



INVESTMENT ARBITRATION Part II

*Columbia Law School's
Global Law and Business
Seminar*

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Standards of Protection

1

Jurisdictional Issues

2

Standards of Protection

01

Expropriation

Fair and equitable treatment

Full protection and security

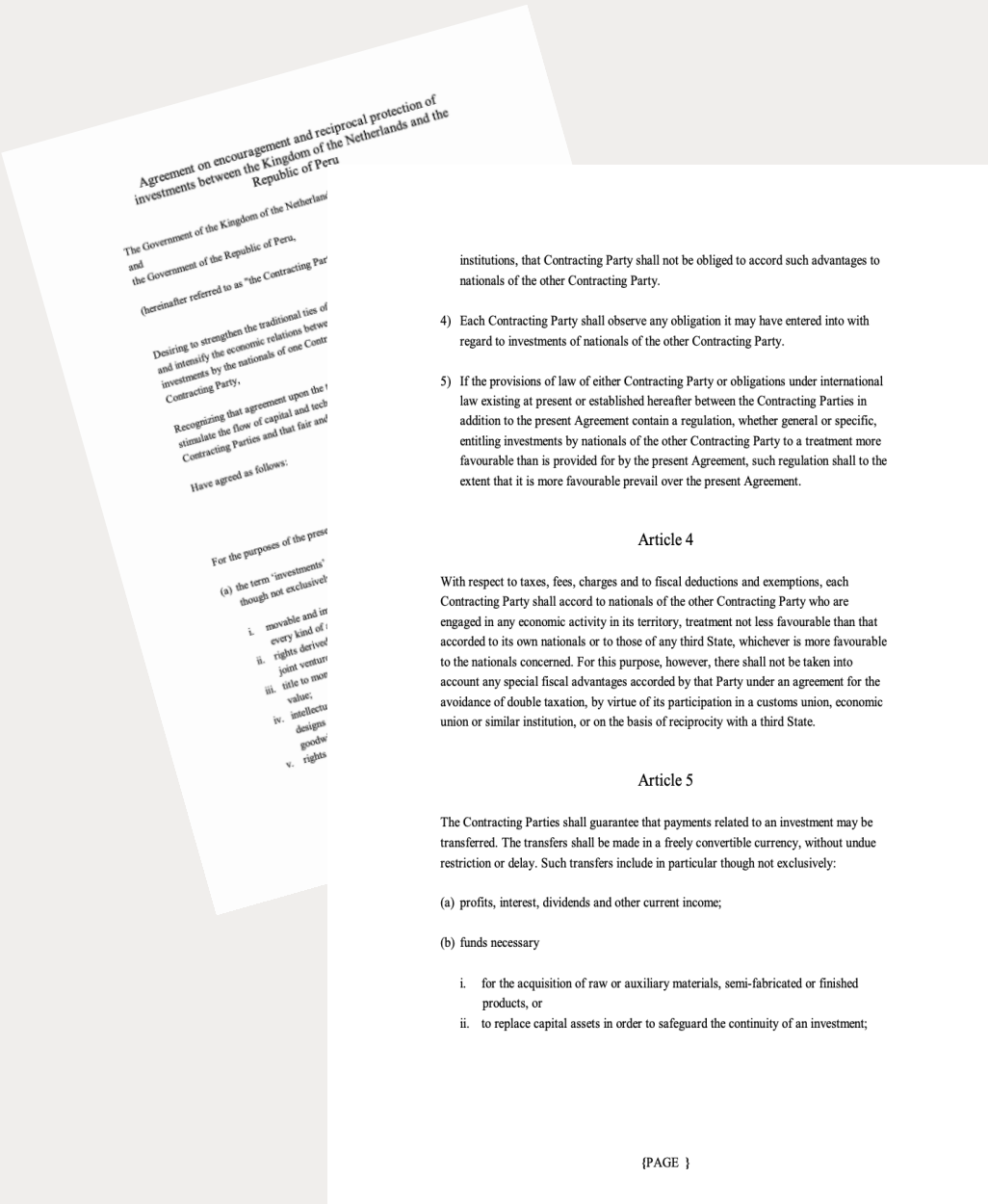
National treatment

Most favored nation

Umbrella clause

Expropriation

The Netherlands-Peru BIT, Article 6



Article 6

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken for reasons of public necessity and utility, and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

- Direct vs. indirect expropriations
- Factors used in defining indirect expropriations:
 - Effect of government measures on an investment
 - Duration of the effect of the governmental act or measure
 - Whether the government has transferred the investment to itself or a third party
 - Intent, purpose, nature or character of the governmental act or measure
 - Degree of reliance on the government's representations

Compensation standards

Hull Formula (1938 letter from
US State Secretary)

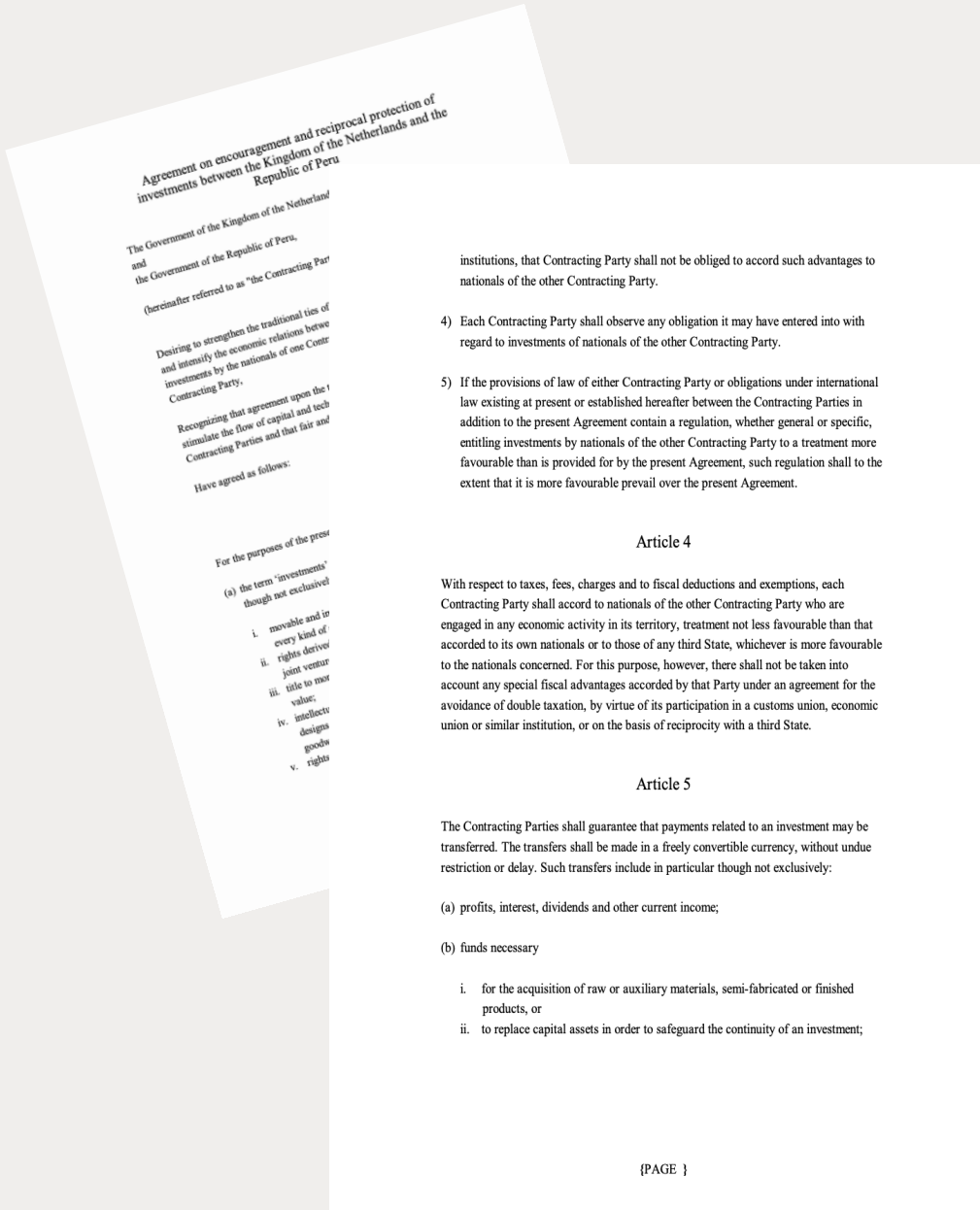
*“Prompt, adequate and effective
compensation”*

Chorzow Factory (PICJ)

*“Reparation must, as far as
possible, wipe out all of the legal
consequences of the illegal act and
re-establish the situation which
would, in all probability, have
existed if that act had not been
committed”*

Fair and equitable treatment

The Netherlands-Peru BIT, Article 3(1)



Article 3

- 1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.

Minimum Standard of Treatment of Aliens

“... a norm of customary international law which governs the treatment of aliens, by providing for a **minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals** and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, **independent of the treatment accorded to their own citizens**. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies.”

OECD, Fair and Equitable Standard in International Investment Law, 8
note 32, Working Papers on International Investment, 2004/3, 2004

Neer Standard (Mexican American Claims Commission, 1926)

“Only if the treatment amounted to an **outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency**”

Autonomous definition of fair and equitable treatment

- Tribunals have incorporated specific legal principles and concepts
 - Arbitrary treatment
 - Legitimate expectations
 - Transparency
 - Coercion of foreign investors
 - Denial of justice
- Bad faith not required
- Factual analysis needed

Legitimate expectations

Did **state** or **state agencies**
make **representations**, make assurances, or take **action**
upon which foreign investors **relied**
in exercise of **reasonable business judgment**
and then the state **changed its position**
in a way that **frustrated** the investor's expectations?

“The principle of denial of justice...”

... has been considered as being part of CIL and is used in three senses. In the **broadest sense**, it “embraces the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State toward aliens”; it includes therefore acts or omissions of the authorities of any of the three branches of government... In the **narrowest sense**, it is limited to “refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment”. There is also an **intermediary sense**, in which it is “employed in connection with the **improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.**”

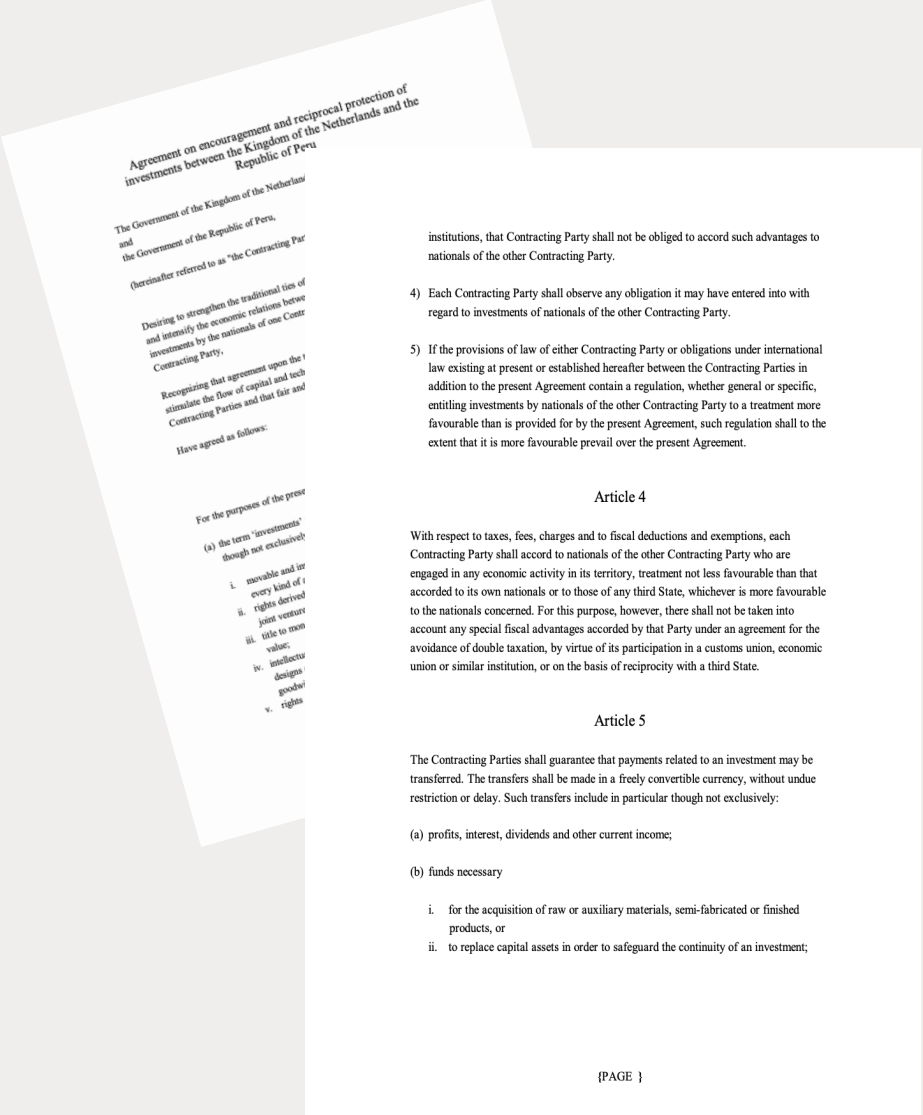
OECD (2004), “Fair and Equitable Treatment Standard in International Investment Law”, OECD Working Papers on International Investment, 2004/03, OECD Publishing. <http://dx.doi.org/10.1787/675702255435>. Page 28.

Examples

- Denial of access to justice
- Targeted legislation
- Repudiation by a state of an agreement to arbitrate
- Governmental interference
- Manipulation of the composition of the courts
- Executive public pressure
- Failure to execute judgments
- Inadequate measures against perpetrators of crimes against foreigners

Full protection and security

The Netherlands-Peru BIT, Article 3(2)



Article 3

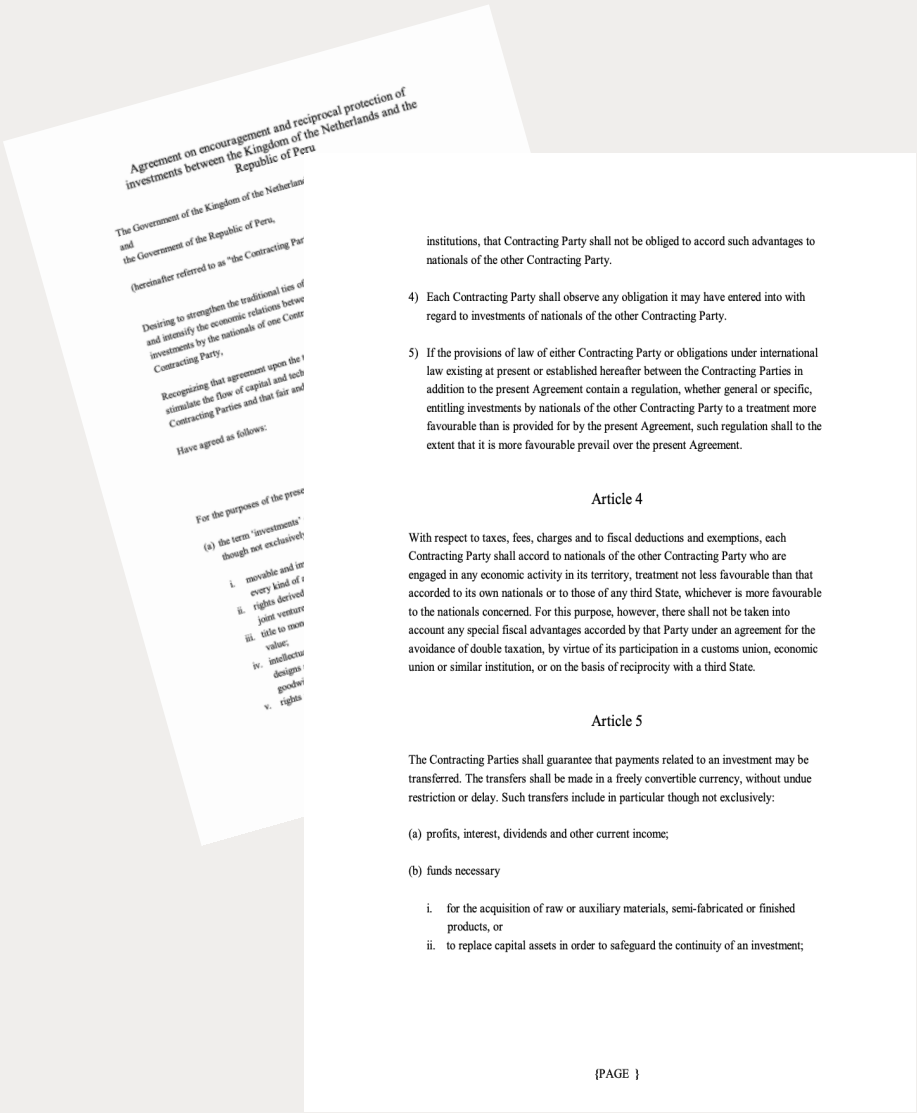
2) More particularly, each Contracting Party shall accord to such investments **full security and protection** which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

Full protection and security

- Impose certain positive obligation on the host state to protect investments
- Non-compliance usually occurs when the host State has failed to prevent physical damage to qualifying investments by not taking **measures that fell within the normal exercise of governmental functions of policing and maintenance of law and order** (AAPL vs. Sri Lanka)
- Standard of due diligence, requiring the host state to exercise reasonable care, within its means
- Physical to intangible damage

National treatment

The Netherlands-Peru BIT, Article 3(2)



Article 3

2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

Typically exceptions are included:

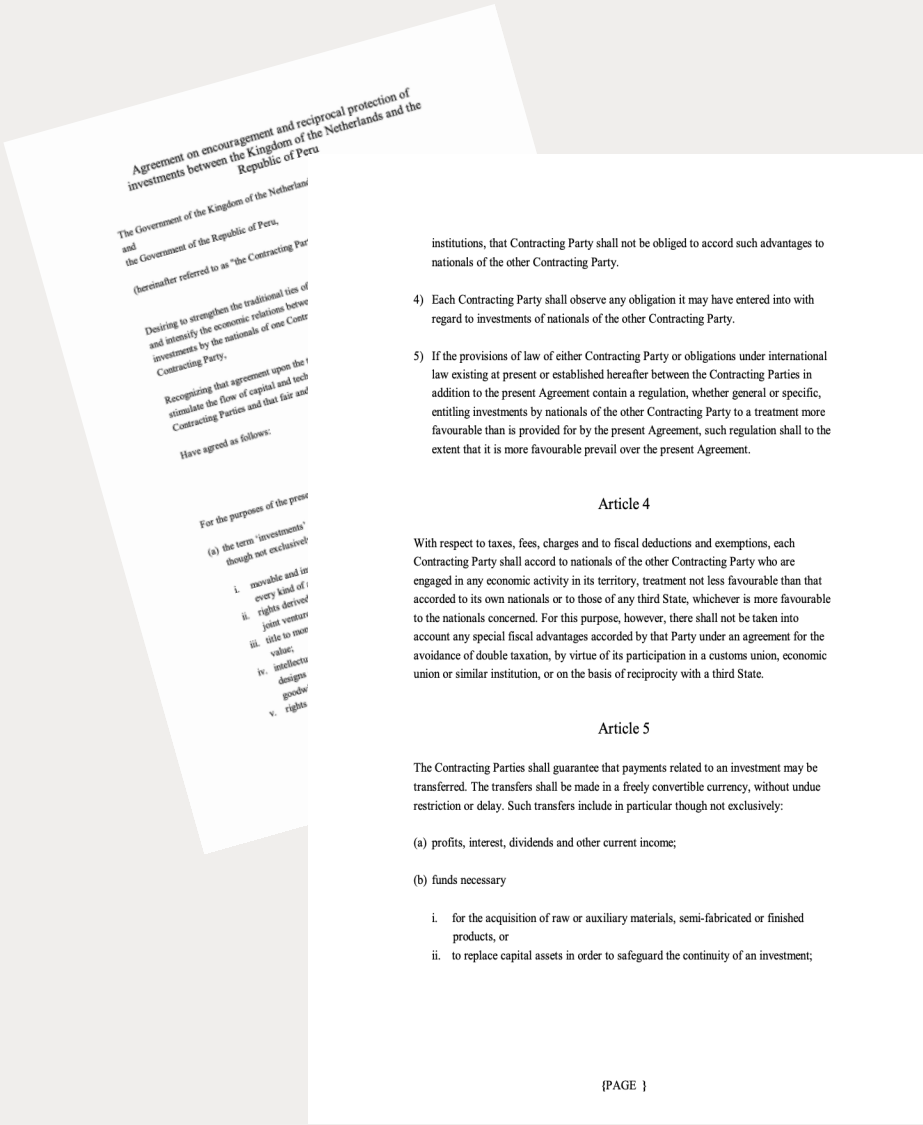
- By **sector**: air transportation, telecommunications, banking, insurance, etc.
- **Certain subject matters**: taxation, intellectual property rights, financial incentives, public procurement, etc.
- **General matters**: public security and order, public health or morality

How is the “national treatment” standard applied?

- Relevant class of comparators: “*like circumstances*”
- What treatment did comparators receive?
- What was the host state’s intent?

Most favored nation clause

The Netherlands-Peru BIT, Article 3(2)



Article 3

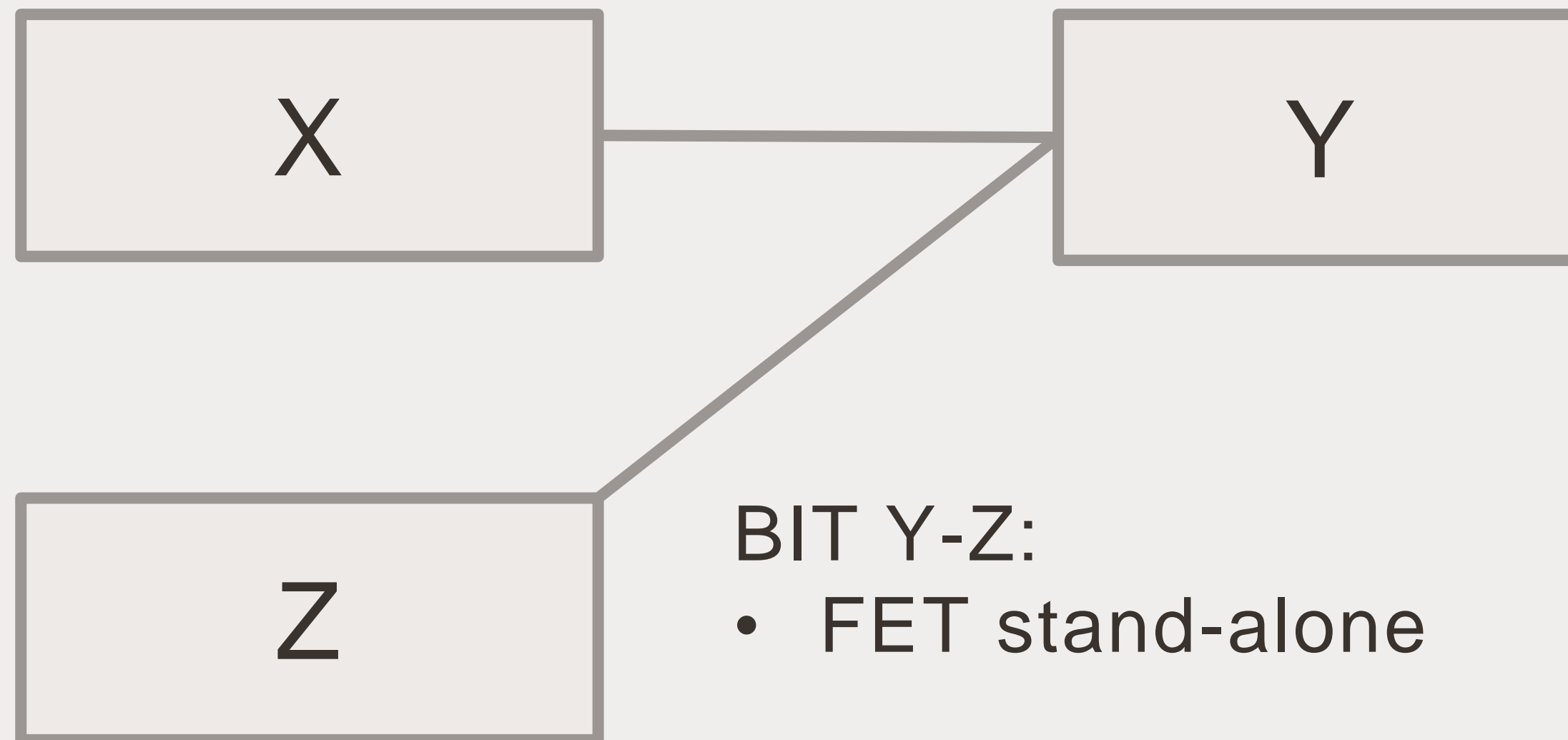
2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

Typical exceptions to the most favored nation clause

- Beneficial opportunities provided through taxation or customs treaties

BIT X-Y:

- FET linked to customary international law
- MFN

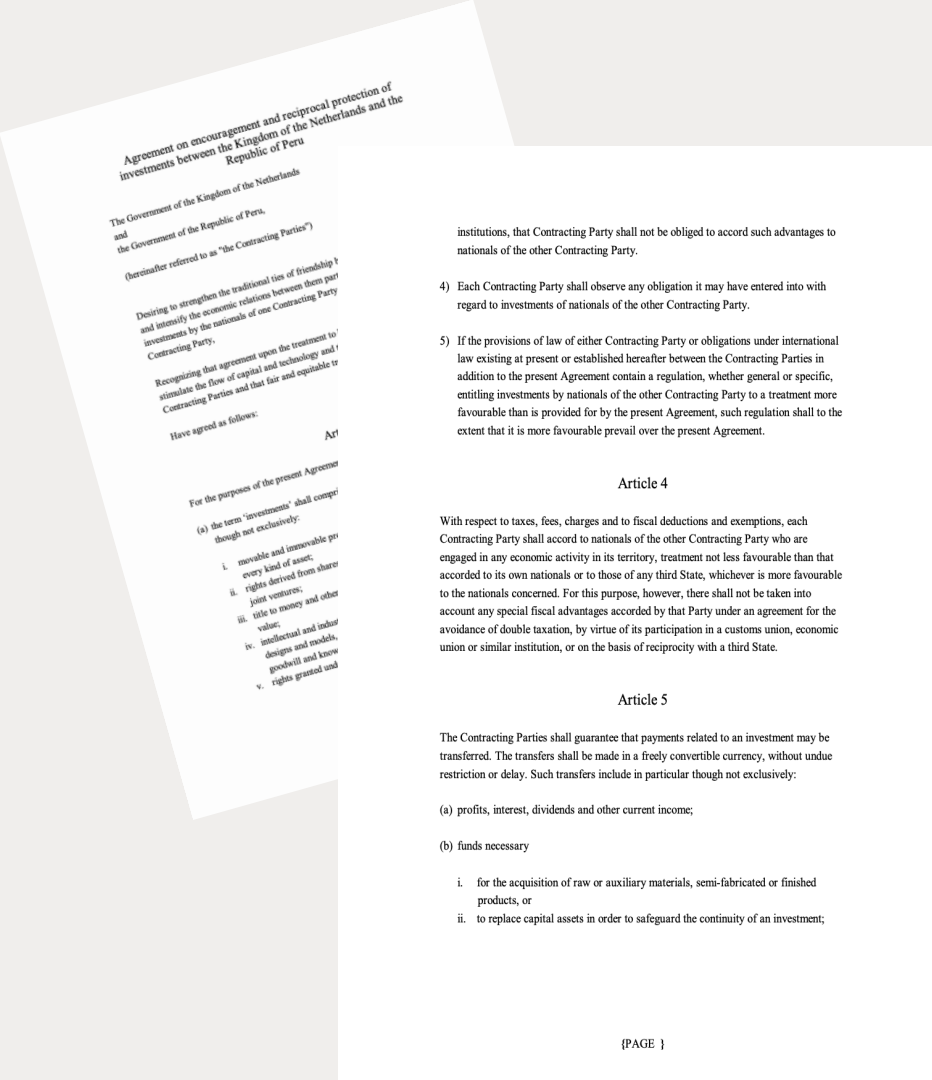


BIT Y-Z:

- FET stand-alone

Umbrella clause

The Netherlands-Peru BIT, Article 3(4)



Article 3

4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.

Scope

NARROW: *SGS v. Pakistan, El Paso v. Argentina*

Only commitments given by State as a sovereign will be elevated to BIT commitments, but not when state is acting in pure commercial capacity

- Would incorporate by reference an unlimited number of contracts and other municipal law instruments, even most minor ones
- Division between national legal order and international legal order would be blurred
- Nullifies freely negotiated dispute settlement clauses

BROAD: *SGS v. Philippines, Eureko v. Poland*

Provision means what it says and elevates municipal law obligations into obligations directly cognizable under international law (contractual and municipal law breaches)

- Interpretation is consistent with aim of creating a neutral impartial forum for resolution of disputes and de-politization
- Interpretation of terms “shall” & “commitment” is clear
- Interpretive rule of effectiveness

Jurisdictional Issues

02

Jurisdiction *ratione temporis*

Jurisdiction *ratione materiae*

Jurisdiction *ratione personae*

Consent of state

To offer protection

To use ISDS

Under what circumstances: to **WHOM**? to **WHAT**? for **HOW LONG**?

Jurisdiction *ratione temporis*

France-Mexico BIT

Article 13 – Duration and Termination

“The Agreement shall be in force for an **initial period of ten years**. It shall remain in force thereafter, unless one of the Contracting Parties gives **one year's written notice of termination** through diplomatic channels.”

[...]

“In case of termination of the period of validity of this Agreement, investments made while it was in force shall continue to enjoy the protection of its provisions for an **additional period of fifteen years**.”

Article 2 – Scope

“It is understood that investments covered under the present Agreement are **those which have already been made or may be made subsequent to the entering into force** of this Agreement, in accordance with the legislation of the Contracting Party in the territory or in the maritime area of which the investment is made.”

Jurisdiction *ratione materiae*

What is an investment?

What are its defining traits?

“Substantive treaty” example

Ecuador-UK BIT, Article 1

For the purposes of this agreement, “investment” means **every kind of asset** and in particular, though **not exclusively**, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares, stock and debentures of companies or interests in the property of such companies;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights and goodwill;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement

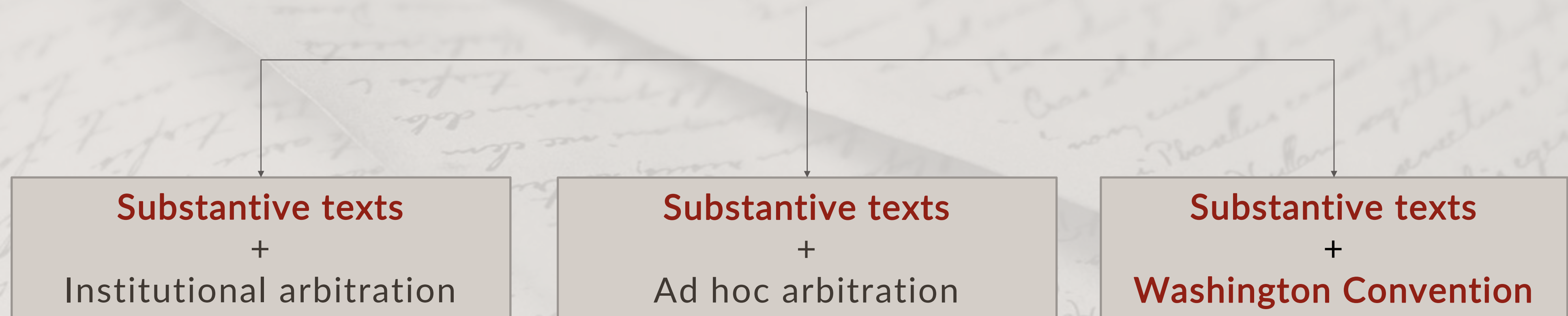
What legal texts are relevant for purposes of defining this notion?

Example of clause submitting to arbitration – US Model Treaty (2012), Article 24

Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) **under the ICSID Convention** and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) **under the ICSID Additional Facility Rules**, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) **under the UNCITRAL Arbitration Rules**; or
- (d) if the claimant and respondent agree, **to any other arbitration institution** or under any other arbitration rules.

What legal texts are relevant for purposes of defining this notion?



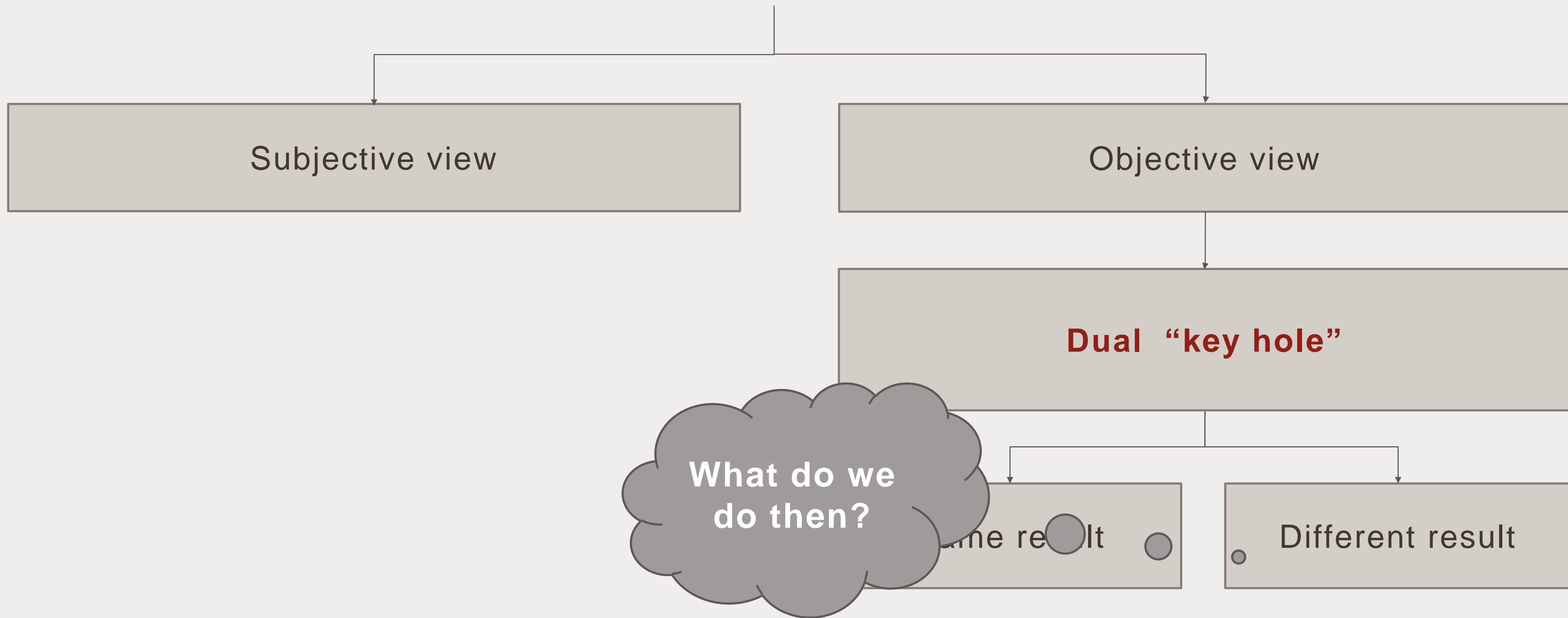
A nighttime photograph of the United States Capitol building in Washington, D.C. The dome is brightly lit and stands out against the dark sky. The Washington Monument is visible on the left side of the frame. The city lights and snow-covered ground are visible in the foreground and background. A semi-transparent white rectangular box is overlaid on the image, containing the text "Washington Convention".

Washington Convention

ICSID Convention, Article 25(1)

“(1) The jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

2 main views

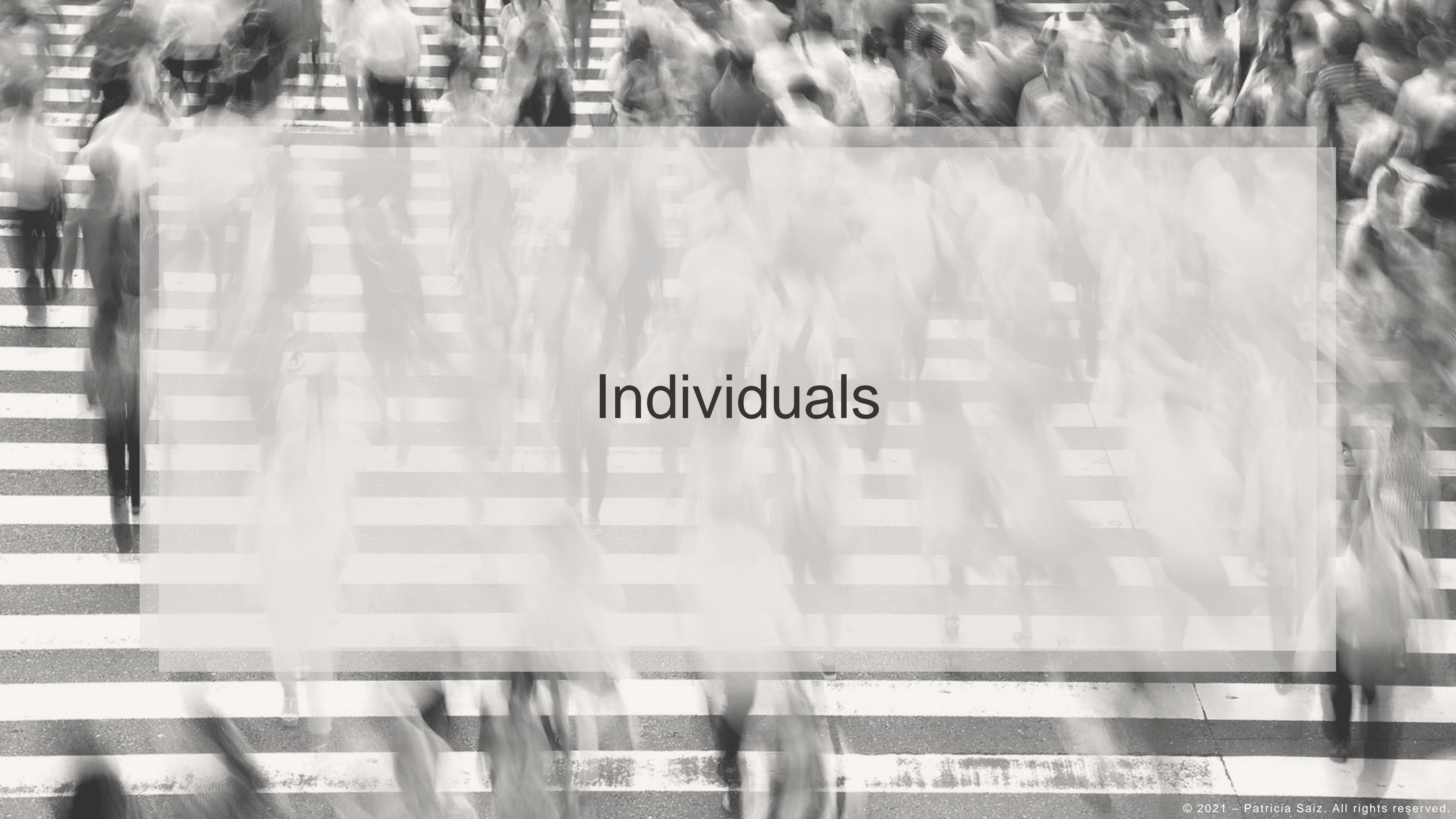


Schreuer Criteria – A response to lack of definition

- A substantial commitment in **capital** (rejection of minimum amount from draft)
 - *Bayindir v. Pakistan* (contributions in know-how, equipment, personnel, finances)
 - *Joy Mining v. Egypt* (magnitude compared to entire project)
- A certain **duration** (2 to 5 years?, short term not excluded)
 - *Salini v. Morocco*: 36 months
 - *Consortium RFCC v. Morocco*: 20 months, extended 6 more months
 - *Bayindir v. Pakistan*: 3 years extended one more year
- Participation of both parties in **risk** (vs. example of pre-paid sale of goods)
- A contribution to the **economic development** of the State
 - *Patrick Mitchell v. Republic of Congo* (no contribution)
 - *MHS v. Malaysia* (no contribution)
- Generation of **regular** profits and returns (generation vs. expectation? How regular?)
 - *Joy Mining v. Egypt* (one off)
 - *MHS v. Malaysia* (criterion not always determinative)

Jurisdiction *ratione personae*

Who qualifies as an investor?



Individuals

Ecuador-UK BIT, Article 1(c)

“Nationals” means:

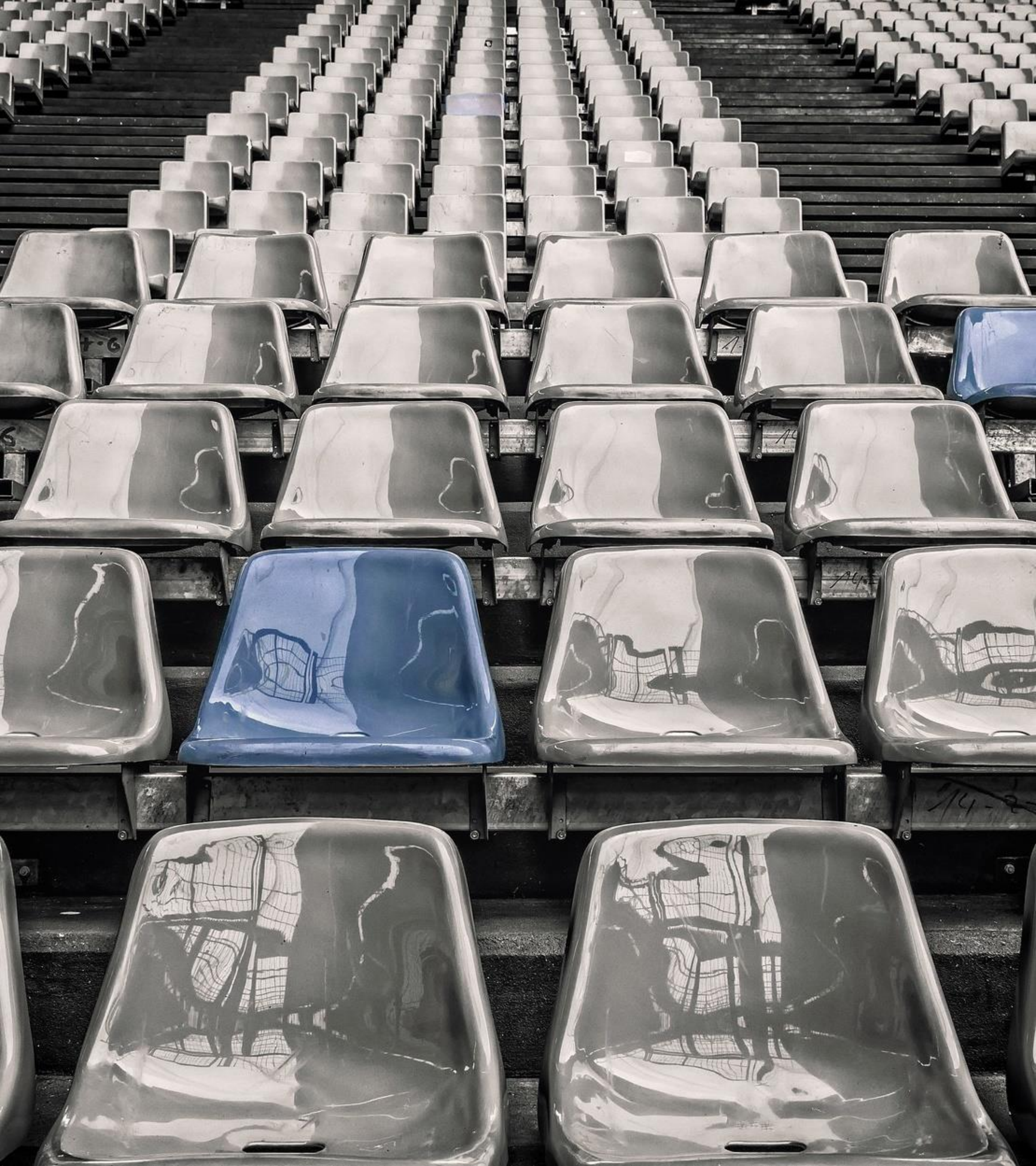
- (i) in respect of the United Kingdom: physical persons **deriving their status as United Kingdom nationals from the law in force** in the United Kingdom;
- (ii) in respect of Ecuador: the Ecuadoreans, **in accordance with the Political Constitution of the Republic of Ecuador**

“Companies” means:

- (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.
- (ii) in respect of Ecuador: legal persons constituted in accordance with the law in force in the Republic of Ecuador or domiciled in the territory of the Republic of Ecuador.

An aerial night photograph of a city, likely New York City, showing a dense grid of buildings. A semi-transparent white grid is overlaid on the image, creating a pattern of squares. The word "Corporations" is centered within this grid.

Corporations



Criteria:

- Incorporation / legal establishment
- Seat / head office
- Control

Argentina-US BIT, Article 1(1)(b) and (c)

b) “company” of a Party means any kind of corporation, company, association, state enterprise, or other organization, **legally constituted under the laws and regulations of a Party or a political subdivision** thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned;

c) “national” of a Party means a natural person who is a national of a Party under its applicable law

France-Mexico BIT, Article 1(2)

The term "investor" means:

(...) b) any legal person **(i) constituted in the territory of one Contracting Party** in accordance with the legislation of that Party **and having its head office** in the territory of that Party, **or (ii) controlled directly or indirectly by the nationals of one Contracting Party**, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Contracting Party.



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THANK YOU!