the difficulties that the absence of a definition of investment would create in this context.

[2] The Definitions in Other Multilateral Treaties

[a] NAFTA

The NAFTA definition under its Article 1139 is enterprise-based. It refers to an 'enterprise' owned or controlled by an investor as a type of investment as well as to assets linked to the activities of an enterprise: equity and debt securities of an enterprise, a loan to an enterprise, any interest in an enterprise entitling the owner to a share of the income and/or profits of the enterprise, any interest in an enterprise entitling the owner to a share of the assets of the enterprise upon its dissolution, business real estate, and interests arising from the commitment of capital or other resources. Certain monetary claims are expressly excluded from the definition.

[b] The Energy Charter Treaty

Article 1(6) of the ECT defines 'investment' as follows:

> 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
> (d) Intellectual Property;
> (e) Returns;
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> 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 existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
>
> 'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat.

Two points must be noted: (1) the given list of assets is not exhaustive but contains just examples and (2) the protection of the ECT is reserved to investments in the energy sector under precise conditions.

[3] The Various Definitions in Bilateral Treaties

Traditionally, BITs have defined 'investment' as an asset or an interest, providing as the ECT a non-exhaustive list such as movable and immovable property, shares, stocks and debentures of companies or interests in the property of such companies, loans and portfolio transactions, mortgages, liens and pledges, contractual rights, claims to money, intellectual property rights and goodwill, concessions conferred by law or by contract.

The China-Pakistan Free Trade Agreement[5] of 2006 is a good example. Its Article 46 provides the following definition:

> For the purpose of this Chapter,
>
> 1. The term 'investment' means every kind of asset invested by investors of one Party in accordance with the laws and regulations of the other Party in the territory of the latter, and particularly, though not exclusively, includes:
>
> (a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;
> (b) shares, debentures, stock and any other kind of participation in companies;
> (c) claims to money or to any other performance having an economic value associated with an investment;
> (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical process, know-how and goodwill;
> (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Further to the non-exhaustiveness of the list, which is stressed in the text, the circularity of the definition is noteworthy: 'The term "investment" means every kind of asset invested by investors.' It is not specific to this treaty. Article 1(1) of the 1997 Italy-Pakistan BIT[6] reads that investment 'mean[s] any kind of property invested ... by a natural or legal person ...' and the 1994 Bolivia-Chile BIT does not hesitate to state in Article I(2) that 'investment refers to every kind of assets and rights in relation to an investment'.[7]

The difficulties of interpretation resulting from such broad and sweeping definitions of the concept of investment are described below. They have prompted a new generation of treaties including definitions that are more restrictive. The 2012 US Model

5. Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China (24 Nov. 2006).
6. Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments (19 Jul. 1997).
7. Agreement between the Republic of Bolivia and the Republic of Chile on the Reciprocal Promotion and Protection of Investments (22 Sep. 1994) (original in Spanish, free translation).

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BIT provides a good example: it states that investment means every asset that has the characteristics of an investment; this is obviously a tautology, but such definition has the advantage to point out that the list it provides are just examples of the forms that an investment may take:

> 'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
> (b) shares, stock, and other forms of equity participation in an enterprise;
> (c) bonds, debentures, other debt instruments, and loans;[8]
> (d) futures, options, and other derivatives;
> (e) turnkey, construction, management, production, concession, revenue- sharing, and other similar contracts;
> (f) intellectual property rights;
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[9,10] and
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledge.

The 2016 Free Trade Agreement between the EU and Vietnam refers to 'every kind of asset ... that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and for a certain duration'.[11] The CETA between the EU and Canada adopt the same definition in its Article 8(1). However, these new treaties do not provide for resolution of investment disputes by traditional arbitration but by a permanent Tribunal with an appellate procedure.[12]

8. Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
9. Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.
10. The term 'investment' does not include an order or judgment entered in a judicial or administrative action.
11. EU-Vietnam Free Trade Agreement (2016), Trade in Services, Investment and E-Commerce, Chapter I on 'General Provisions', Art. 4(p).
12. *See*, for example, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one Part, and the European Union and its Member States, of the Other Part (2016), Art. 8.27 and Art. 8.28.

[B] The Investment in Arbitration Jurisprudence

Article 25 of the ICSID Convention limits the jurisdiction of ICSID arbitrators to disputes arising from an investment. This has led ICSID arbitrators to develop what is known as the 'double barrel' or 'double keyhole' approach: to retain jurisdiction, ICSID arbitrators should check first whether the dispute relates to an investment pursuant to the requirements of applicable treaty and, then, that it is 'arising of an investment' according to Article 25 of the ICSID Convention. However, this approach has not generated a uniform definition of the concept of investment and the proposed definitions have found little support outside of ICSID arbitration.

[1] The ICSID Jurisprudence

ICSID arbitrators appear to be divided into two main groups: those who believe in the existence of an objective concept of investment and apply with more or less flexibility the so-called *Salini test* (a); and those who prefer a subjective case-by-case approach and rely mainly on the parties' agreement in the applicable BIT (b).

[a] The Objective Approach

The basic characteristics of an investment were enumerated in 2001 by the *Salini v. Morocco*[13] tribunal: (a) a contribution, (b) an assumption of risk, (c) a duration and (d) a contribution to the economic development of the host State of the investment. The idea was that these characteristics were requisites that should be objectively met as a condition for the jurisdiction of ICSID arbitrators. This became known as the *Salini test*.[14]

However, subsequent ICSID tribunals did not uniformly apply the *Salini test*. Some considered that it had to be strictly applied.[15] Others reduced the number of

13. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 Jul. 2001), 42 ILM 609, 622 (2003), para. 52: 'The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction ... In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.'
14. In fact, the *Salini* case was not the first to introduce a definition of investment in addition to that of the treaty. In *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 Jul. 1997), 37 ILM 1378, 1387 (1998), the tribunal indicated that an investment is characterized by 'a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development'.
15. *See*, among other decisions, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), paras 130 et seq.; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006), para. 91.

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criteria to three, as the *LESI* tribunal in 2006,[16] which considered that the contribution to the economic development of the host State of the investment was difficult to prove and was implicitly covered by the three first criteria of *Salini*. However, these criteria were increased to six when in 2009, the *Phoenix* Tribunal[17] added as conditions, observance of the law of the host State and good faith in making the investment. This position, however, was not followed a year later by the *Saba Fakes*[18] tribunal, which retained only the first three criteria of the *Salini* test; it did not retain the contribution to the host State development because an investment, which is expected to be fruitful, might turn out to be an economic disaster while nevertheless remaining an investment. It also rejected the condition of good faith because it was not contemplated by the text of the ICSID Convention and that of legality of the investment because such condition should be included in a BIT. This approach was confirmed by the *Quiborax* tribunal in 2010:

> The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment.[19]

Consequently, it seems that for the majority of those arbitrators which believe that a general concept of investment should be referred to in order to establish their jurisdiction pursuant to Article 25 of the ICSID Convention, only the three first criteria of the *Salini test* should be met:

(1) a contribution;
(2) an element of risk;
(3) a certain duration.

[b] *The Subjective Approach*

Other tribunals have rapidly concluded that the *Salini test* had no solid basis under the ICSID Convention. In 2008, the *Biwater* tribunal pointed out that:

16. *LESI, SpA and Astaldi, SpA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 Jul. 2006), para. 72(iv).
17. *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), para. 100.
18. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 Jul. 2010), paras 110–111.
19. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sep. 2012), para. 220.

> In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five[[20]] Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention ...
>
> Further, the *Salini Test* itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.[21]

This position was confirmed by an ICSID annulment committee in 2009 in *Malaysian Historical Salvors v. Malaysia*.[22] The *Alpha Projeckthولding* tribunal adopted a similar reasoning in 2010:

> The ICSID Convention does not define the term 'investment'. Given the absence of a definition, both parties refer to illustrative criteria developed in various arbitration awards, most notably the award in *Salini v. Morocco*. However, the elements of the so-called Salini test, which some tribunals have applied mandatorily and cumulatively (i.e., if one feature is missing, a claimed investment will be ruled out of ICSID jurisdiction), are not found in Article 25(1) of the ICSID Convention. In applying the criteria in this manner, these tribunals have sought to apply a universal definition of 'investment' under the ICSID Convention, despite the fact that the drafters and signatories of the Convention decided that it should not have one. This Tribunal will not follow that approach and will not impose additional requirements beyond those expressed on the face of Article 25(1) of the ICSID Convention and the UABIT.
>
> The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of 'investment', the criteria of resources, duration, and risk would seem fully to serve that objective. The Tribunal recognizes that elements discussed in the *Salini* test might be of some use if a tribunal were concerned that a BIT or contract definition of 'investment' was overreaching and captured transactions that manifestly were not investments under any acceptable definition. Indeed, a number of tribunals and *ad hoc* committees have treated the *Salini* elements as non binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention. However, in most

20. The *Biwater* tribunal saw five and not four criteria as in *Salini*, as follows: (a) duration, (b) regularity of profit, (c) assumption of risk, (d) substantial commitment, and (e) contribution to the development of the host State.
21. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 Jul. 2008), paras 312, 314.
22. *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision of the Application for Annulment (16 Apr. 2009), para. 79.

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attaching any consequences to the seat of the arbitration is yet another appeal of ICSID, since the investors do not have to worry that the State will intervene post factum and annul the award in its national court.

The institution will also offer administrative support, both to the parties and the arbitral tribunal. It will allow the arbitration to run smoothly and the administration will make sure that the rules have been followed. In general, one of the main attractions of institutional arbitrations is an established format with a proven track record, which makes awards rendered under its administration more legitimate.[13]

The ICC, the LCIA and the SCC are among the most prominent institutions. However, the primary institution for investor-State dispute resolution is ICSID.

The UNCTAD statistics demonstrate that the vast majority of cases are institutionally based. Fifty-five out of sixty-five arbitrations commenced in 2017 were institutional. Among these, forty-one are under ICSID, which is 63%. Out of the seventy-five arbitrations commenced in 2016, forty-five or 60% selected ICSID as their forum. It should be noted that the ICSID Additional Facility Rules (discussed in more detail below) were also used by the parties with five arbitrations in 2017 and five in 2016.[14]

Although some BITs and other investment instruments provide for other arbitral institutions, such as the ICC,[15] since the majority of investor-State dispute resolution is under ICSID, the discussion will focus mainly on this particular institution.

[1] International Centre for Settlement of Investment Disputes (ICSID)

[a] The Centre

ICSID (or the Centre) is one of the five international organizations that constitute the World Bank Group. Like the other organizations in the Group, it was established by a multilateral treaty, the ICSID Convention, which as of January 2018 has been ratified by 153 States.[16]

The ICSID Convention establishes a forum for settlement of investment-related disputes between a Contracting State and a national of another Contracting State. In addition to nationality requirements being satisfied for the Centre to have jurisdiction, both the State and the investor must have given their written consent to have their dispute resolved by ICSID.[17] Moreover, the dispute must be a legal dispute directly

13. Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009).
14. UNCTAD Statistics, *available at* http://investmentpolicyhub.unctad.org/ISDS/FilterByYear.
15. *See*, for example, Germany-Jordan BIT (concluded on 13 Nov. 2007, ratified on 28 Aug. 2010), Art. 11; Belarus-Croatia BIT (concluded on 26 Jun. 2001, ratified on 14 Jul. 2005), Art. 10.
16. *See* https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf (accessed 29 May 2018).
17. ICSID Convention, Art. 25.

related to an investment.[18] Given these strict jurisdictional requirements, some disputes cannot be brought before the Centre. It should be noted, under certain circumstances, non-ICSID member parties who, nevertheless, want to have the Secretariat of the Centre administer their proceedings, may do so under the ICSID Additional Facility Rules.

Arbitration under ICSID has several unique attributes consciously designed to reflect a balancing of interests between the host States and foreign investors, and to provide a de-politicized and effective mechanism of dispute resolution. Moreover, its affiliation to the World Bank gives an additional incentive for the States to comply with the arbitration award.[19] Although, it should be noted that, it is precisely, the additional 'incentive' that has brought about criticisms of a conflict of interest or bias in the ICSID system.

Among ICSID arbitration features, the most significant is that it is a 'self-contained' system. ICSID arbitration is conducted solely in accordance with the international law provisions of the ICSID Convention and of the regulations and rules adopted pursuant to it. Arbitral awards rendered pursuant to the ICSID Convention are binding on the parties and not subject to any appeal or to any other remedy except for those provided for in the Convention itself. National courts have no power to review the awards in any way. Rather, they must, on simple presentation of a copy of the award certified by ICSID's Secretary General enforce the pecuniary obligations imposed by the award as if it were a final judgment of the national courts.[20]

ICSID's self-contained nature is such that parties may not seek interim, provisional or conservatory measures from a national court unless they have expressly agreed to that effect in the instrument recording their consent to ICSID arbitration.

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[b] ICSID Additional Facility Rules

As previously mentioned, the Additional Facility Rules were adopted in 1978 and have since been modified twice, in 2003 and 2006. They have opened access to ICSID arbitration for cases, which fail to satisfy one of the three jurisdictional requirements:

- Nationality (*ratione personae*): an arbitration (or conciliation) can be brought before the Centre even if one of the parties is not a Contracting State or not a national of an ICSID Member State.[21]
- Direct link to an investment (*ratione materiae*): an arbitration (or conciliation) may be administered by the Centre even if the dispute 'do[es] not arise *directly*

18. *Ibid.*
19. For criticisms of the close connection between World Bank and ICSID, *see* Julien Fouret, *The World Bank and ICSID: Family or Incestuous Ties?* 4 Intl. Org. L. Rev. 121 (2007).
20. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 Oct. 1966) ('ICSID Convention'), Art. 54.
21. ICSID Additional Facility Rules (April 2006), Sched. C, Ch. II, Art. 2.

out of an investment',[22] provided that the cause is not 'an ordinary commercial transaction'.[23]
- Existence of a legal dispute: Schedule A creates 'fact-finding' proceedings, which may be initiated in the absence of a concrete legal dispute.[24]

It is important to note that the Additional Facility Rules do not extend the jurisdiction of ICSID.[25] They allow the additional types of claims listed above to be administered by the Secretariat of the Centre. It is important to note that the ICSID Convention does not apply to any of the 'recommendations, awards, or reports' rendered under the Additional Facility Rules.[26]

§4.03 APPLICABLE LAW

Applicable law is of paramount importance in dispute resolution since it defines the rights and obligations of the parties towards one another.[27] It gives a paradigm for the parties' relationship and the basis for their claims. In national courts, the question does not always arise since in most domestic and international disputes the law of the forum will apply.[28] National law may at times be referred to interchangeably as, domestic, internal or municipal law. Another national law may supersede the law of the forum if it is more appropriate to govern the dispute, which will be determined according to the choice-of-law rules.[29] Most choice-of-law rules establish the principle of party autonomy: in a significant number of cases, the parties can agree on the law, which will govern their dispute.[30]

International arbitration is different from State courts. First of all, as it is inherently international, thus, there is no single forum whose laws apply. Moreover, there are other sources of applicable law, such as treaties and arbitration rules that affect international arbitration. Thus, determining the applicable law is crucial, as it

22. *Ibid.*, p. 5.
23. *Ibid.*
24. *Ibid.*, Schedule A.
25. Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law*, 704 (Oxford University Press 2008).
26. ICSID Additional Facility Rules (April 2006), Art. 3.
27. Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide*, 261 (BRILL 2014).
28. *Ibid.*
29. *See, for example*, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the law applicable to non-contractual obligations (Rome II). The choice of law rules will elect the law of a State, as opposed to transnational rules or principles. Even in cases where the parties have the autonomy to choose the applicable law, these regulations provide that they must choose a national law.
30. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 193 (Katia Yannaca-Small Editor, Oxford University Press 2010).

will affect the conduct of the proceedings and the outcome of the case on the merits.[31] Similar to national courts, the arbitral tribunals show a lot of deference to the will of the parties.[32] Most importantly, in investor-State arbitration, any national law selected will most likely be applied in conjunction with international law due to the principle that a State cannot escape liability for breaching an international obligation by invoking its national law.[33] Since most investment disputes are based on bilateral and multilateral protection treaties, it is such treaties that will determine the State's international obligations and breach thereof.

When discussing applicable law, a distinction should be made between the procedural (A) and substantive laws (B). The former regulates the conduct of the proceedings: for example, whether there will be oral hearings or only written submissions, applicable rules of evidence, etc. The latter refers to the legal rules, which the arbitrators will use to decide the case on the merits.

[A] Procedural Law

As mentioned above, procedural law means the body of rules, which will govern the conduct of the arbitration itself. It needs to be determined from the outset, since it will regulate each step of the proceeding, such as appointment of the tribunal, hearing schedules. The underlying principle of the law applicable to procedure is party autonomy (1). However, the law of the seat of arbitration, or lex arbitri (2), should also be examined, since it will affect certain procedural questions, as well as the recognition and enforcement of the award.

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[1] Party Autonomy

Freedom of choice with regard to the rules of procedure is one of the key attractions of arbitration. In most cases, it will not be problematic, as it will be made automatically by virtue of selecting the institution that will administer the proceedings. For example, by selecting ICSID as the forum, the parties subject themselves to the ICSID Convention Arbitration Rules.[34]

Failing the parties' agreement, the main part of the procedure is determined by the arbitrators. Institutional arbitration rules cover a part of the procedure, and no further participation of the parties is generally required, unless there is a gap. Institutional rules generally have provisions for this type of situations. For example,

31. Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide*, 262 (BRILL 2014).
32. Nigel Blackaby, Constantine Pastasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009).
33. Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331, Art. 27; International Law Commission, Articles on the Responsibility of States for International Wrongful Acts, Art. 3, Official Records of the General Assembly, Fifth-Sixth Session, Supplement No. 10 (A/56/10).
34. ICSID Convention, Art. 44: 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration.'

Article 44 of the ICSID Convention allows the parties to agree on the rules to fill the *lacuna(e)*, or allows the arbitrators decide in the absence of agreement.[35] A similar provision is contained in Article 19 of the ICC Rules.[36] Domestic laws may contain a full code of procedure, whereas arbitration rules fit in a small booklet. The latter does not purport to cover any potential procedural questions that may arise. The institutional rules are provisions aimed to prevent the proceedings from being hindered or interrupted due to a procedural obstacle, when the parties are not willing to cooperate. Thus, such institutional rules give the tribunal the authority to settle the issue of procedure.[37]

As noted above, in ad hoc proceedings, the parties will often select the UNCITRAL Arbitration Rules. However, they also have the possibility to define each element of the procedure themselves, which may be useful in a smaller dispute.

In case of gaps, the law of the seat of arbitration may sometimes intervene to provide rules of procedure.[38]

[2] Lex Arbitri

The seat of the arbitration is one of the considerations to take into account when selecting the forum, given that the national law of the seat can affect the proceedings and the award. The rules governing arbitration in the seat of the proceedings is also referred to as 'lex arbitri', which some commentators distinguish from the procedural law because it arguably goes beyond mere procedure.[39]

Indeed, some State laws have 'arbitration codes' or 'laws', providing for applicable procedure rules in the absence of party consensus in an arbitration taking place in that State. For example, Book IV of the French Code of Civil Procedure is dedicated to arbitration: domestic under Title I and international under Title II. Article 1509 states explicitly that the parties may choose the applicable rules of procedure.[40] The rest of the articles provide rules that may apply in the absence of choice: for example, Article 1513 mentions that, absent determination by the parties, the tribunal will decide by a majority of votes.[41] Ostensibly, a rather obvious proposition, but it may be helpful if this aspect is not clear.

35. *Ibid.*
36. ICC Arbitration Rules, Art. 19: 'The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.'
37. *See* LCIA Arbitration Rules (2014), Art. 14; SCC Arbitration Rules (2010), Art. 19: 'Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate'; SIAC Arbitration Rules (2016), Rule 19: 'The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.'
38. Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 184 (Oxford University Press 2009).
39. *Ibid.*
40. French Code of Civil Procedure (*Code de procédure civile*), Art. 1509.
41. *Ibid.*, Art. 1513.

Lex arbitri, however, goes beyond procedural matters.[42] It may stipulate that certain types of disputes are not subject to arbitration under the municipal law.[43] For example, divorce claims cannot be settled by arbitration under French law.[44] This issue goes to the heart of arbitration by assessing whether a specific type of dispute may be resolved in this forum, as opposed to simply giving procedural directives. The most obvious reason why it is difficult to classify lex arbitri as procedural is that different countries have different definitions of what is substantive and what is procedural law.[45]

The impact of lex arbitri is limited in the context of investor-State disputes brought under ICSID, which detaches itself from the concept of the seat of arbitration. This, however, is not the case for arbitrations brought under UNCITRAL, SSC or ICC, for example.

[B] Substantive Law

Substantive law (or *lex causae*) is the set of rules to be applied by the arbitral tribunal to settle the dispute on its merits. The parties have an interest in determining the applicable governing law, which is normally set out in their contract, since it will affect the outcome of their case.[46] The arbitrators, as well focus on the substantive law since it affects the recognition and enforcement of the award.

The role of the arbitrator in determining the applicable law cannot be overstated. Ultimately, the tribunal is the adjudicator, and part of its role is to select and apply a law or laws to settle the dispute. When national courts face the problem of choice of law, they have a specific body of law, part of private international law, including choice-of-law rules, which is applied. In the case of arbitration, there is no national forum. No particular choice of law rules is imperative for the arbitrators, thus granting the arbitrators with broad discretion in their exercise of judgment. On the other hand, the award may be annulled or refused recognition if the arbitrators do not respect the limits of their mission by not applying the law chosen by the parties.[47]

The determination of substantive law is particularly complex in the context of investor-State disputes, because of the particular nature of their relationship and the proliferation of treaties in this area. With regard to the former, the point of contention concerns the investor being a private party, whose rights are generally based on national or municipal law, and whether he or she could have rights in the international

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42. Nigel Blackaby, Constantine Pastasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 184 (Oxford University Press 2009).
43. *Ibid.*
44. French Civil Code (*Code civil*) (as revised in 2016), Art. 2060.
45. Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 184 (Oxford University Press 2009), note 73.
46. Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide*, 262 (BRILL 2014).
47. New York Convention, Art. V(1)(c).

order.[48] It has been generally accepted that the investor may engage the State's international responsibility based on the applicable treaty protection, which makes the investor a holder of rights on the international law level.[49] When relying on a BIT, the investor is subject to the treaty's dispute resolution mechanism as well as the selection of law clause. Such clauses often mention the applicability of both domestic and international laws to the resolution of the dispute without specifying the precise scope of application of each one.[50]

The elements to be discussed in relation to the determination of applicable law include the role of the parties (1), as well as the function of the arbitral tribunal (2) and the 'interplay between national and international law' (3).[51]

[1] Determination by the Parties

'The principle of party autonomy is the primary rule governing the arbitration, including in regard to the law applicable to the substance of the dispute.'[52] Just as domestic choice-of-law rules, the rules of most arbitral institutions state that '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.'[53] There is a variety of ways, in which the parties' choice may be manifested.

If the parties are bringing a claim on the basis of a contract, which contains the dispute resolution clause, the situation is rather straightforward. They may include a choice of law clause in the contract, which will be followed by the tribunal. Treaty-based arbitration is more contentious, because the States make the choice of the applicable law on behalf of the investor prior to the dispute even arising. In *AAPL v. Sri Lanka*, the tribunal expressed its reservations on this matter:

48. Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, 5 (Oxford University Press 2013).
49. *Ibid.*
50. *See*, for example, Australia-Pakistan BIT (7 Feb. 1998): 'The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, any agreement between the parties to the dispute and the relevant domestic law of the Party that admitted the investment.' *See also* Argentina-France BIT (3 Jul. 1991): 'The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.'
51. *See*, Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013).
52. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 192 (Katia Yannaca-Small Editor, Oxford University Press 2010).
53. ICSID Convention, Art. 42(1). *See also* ICC Arbitration Rules, Art. 21: 'The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute'; UNCITRAL Arbitration Rules (as revised in 2010), Art. 35(1): '[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute'; etc. *See*, more generally, Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 193 (Katia Yannaca-Small, Oxford University Press 2010).

> the Parties in dispute have had no opportunity to exercise their right to choose in advance the applicable law determining the rules governing the various aspects of their eventual disputes.
>
> In more concrete terms, the prior choice-of-law referred to in the first part of Article 42 of the ICSID Convention could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals investing within the territory of the other Contracting State.[54]

In that case, the tribunal based itself on the conduct of the parties to determine what law the parties had mutually agreed to.[55] *AAPL* was the first case where the tribunal accepted that an investor may bring an ICSID claim based on a dispute resolution provision contained in a BIT. Since then, it has been generally accepted that when an investor brings a claim under a BIT he accepts the offer to arbitrate contained in the protection treaty. As such, he also accepts that choice of law made by the States that signed and ratified the treaty.[56]

Whether contained in a treaty or in a contract, the choice of law clause still has to be interpreted and applied by the tribunal.

[2] The Arbitrator's Role

There are two ways, in which the arbitrators intervene in the determination of the applicable law. First, they interpret the will of the parties under the autonomy principle. Second, in the absence of choice, the arbitrators have to determine the applicable law based on the applicable arbitration rules.

Arbitrator and the Choice-*of-Law Clause*

Even when there is a choice-of-law clause in the contract or the treaty, the arbitrator still has to interpret the clause. For example, the clause may opt for both domestic law of the host State and international law, in which case the tribunal will have to determine which legal questions should be determined according to municipal law and which according to international law.

A specific problem arises when there is a clause in the contract subjecting the dispute to domestic law, but the investor alleges violation of international law by the

54. *Asian Agricultural Products Ltd. v. Sri Lanka*, Award (27 Jun. 1990), ICSID Reports 256 (1997), paras 19–20.
55. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 194 (Katia Yannaca-Small Editor, Oxford University Press 2010).
56. *Antoine Goetz et al. v. Republic of Burundi*, Award (10 Feb. 1999), para. 94: 'Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty.' (English translation from XXVI Yearbook of Commercial Arbitration 24, 36 (2001).

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State. Tribunals have refused to apply solely municipal law based on customary international law:

> [I]t is a well settled principle of international law that a state cannot rely on a provision of its domestic law to defeat its consent to arbitration ... It is further a well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement.[57]

Absence of Choice

The second part of ICSID Article 42(1) provides that in the absence of a party agreement, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[58] The ICC Rules, on the other hand, provide that 'the arbitral tribunal shall apply the rules of law which it determines to be appropriate'.[59] Under UNCITRAL Model Law, the tribunal shall use the appropriate conflict of law rules to determine the applicable law.[60] Whatever the specific formula, the common thread is that the arbitrators have the possibility to determine the applicable law using a certain degree of discretion.

Most bilateral treaties do not contain a choice of law clause,[61] so the tribunals often have to interpret the second part of ICSID Article 42(1) and similar provisions in other arbitral rules. Contrary to the first phrase of the same article, which commands the interpretation of the parties' will, the second phrase requires the interpretation of the Convention. Under ICSID, it is considered that both domestic law of the host State

57. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 Sep. 2003), para. 207.
58. ICSID Convention, Art. 42(1).
59. ICC Arbitration Rules, Art. 21(1).
60. UNCITRAL Arbitration Rules (as revised in 2010), Art. 35(1): 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.'
61. Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375, 379 (2003). Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 200 (Katia Yannaca-Small Editor, Oxford University Press 2010): 'The vast majority of BITs entered into by countries such as the United States, the United Kingdom, France, or Germany do not contain a clause on the applicable law regarding investment disputes between one of the contracting States and the investors of the other contracting State: as at December 15, 2008 and to the best of the author's knowledge based on the BITs available, none of the 40 BITs entered into by the United States and which are in force contain a clause on the applicable law; a clause on the applicable law can be found in only 12 out of 91 BITs concluded by France and in force, in only 6 out of 91 BITs concluded by the United Kingdom and in force, and in only 8 out of the 114 available BITs concluded by Germany and in force.'

and international law have to be applied,[62] but the question then becomes how to determine their respective application.

[3] Complementary Function of Municipal and International Laws

As mentioned before, even if there is a choice of law in favor of domestic law, international customary law dictates that a State cannot hide behind its national law to avoid its international responsibility.[63] In the absence of choice, the second phrase of ICSID Article 42(1) commands both municipal law and international law to be applied.[64] In general, it would be virtually impossible to conduct investment-related arbitration only relying on one set of laws. The reason for that lies in the particularity of investment law, which has seen a proliferation of legal instruments implemented on national and transnational levels. Since investors most often bring claims based on treaties, international law has to be used to interpret the treaty provisions. However, the scope of international law is limited, and it simply does not regulate a number of private law questions. For example, there is no international property law; therefore, real estate and trademarks are by default subject to domestic law of the host State.[65]

The issue then becomes determining the precise bounds between the two legal orders governing the same dispute. Under most arbitration rules, the tribunal has the liberty to apply the law it considers appropriate.[66] However, ICSID Article 42(1) has been a source of much debate. Historically, the prevailing consensus between academics and tribunals seemed to be that the law of the host State shall have the primary role, and that it is to be supplemented by international law in case of *lacunae*, or corrected if there is an inconsistency.[67] The decision in *Wena Hotels* is widely cited as departing from the aforementioned doctrine in favor of giving both legal orders a role to play:[68]

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62. Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375, 380 (2003).
63. *See* above§4.03.
64. *See* above §4.03[B][2].
65. Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* 5 (Oxford University Press 2013).
66. *See* above §4.03[B][2].
67. *See*, generally, Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375 (2003). *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, Decision on Annulment (3 May 1985), 2 ICSID Reports 95, 122 (1994), para. 69: 'Article 42 of the Washington Convention certainly provides that "in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute ... and such principles of international law as may be applicable." This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is complementary (in the case of a "lacuna" in the law of the State), or corrective, should the State's law not conform on all points to the principles of international law.'
68. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 202 (Katia Yannaca-Small Editor, Oxford University Press 2010).

Transparency is clearly interconnected to investors' legitimate expectations, especially in the way it has been defined by arbitral tribunal. In *Metalclad Corporation v. United Mexican States*,[42] the tribunal defined the obligation of transparency as the idea that 'all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors'. In addition, in the event a Party would become aware of 'confusion or misunderstanding' concerning the legal requirements to be fulfilled by investors, the Party would have 'the duty to ensure that the correct position [would be] promptly determined and clearly Stated so that the investors can proceed with all appropriate expedition in the confident belief they are action in accordance with all relevant laws'.[43]

[5] Balance Between Investors' Legitimate Expectations and Reasonable Regulatory Actions of the Host State

The FET obligation does not have as its aim to prevent host States from acting in the public interest or to develop its legal, administrative and business frameworks. Therefore, some actions, even if they adversely affect investments, will not be considered a breach of the FET standard.[44] Indeed, arbitral tribunals recognized the need for host States to make legitimate changes to their legislation and to take actions for public interest purposes. In *Saluka Investments BV (The Netherlands) v. Czech Republic*, the tribunal held that:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well...[45]

A similar approach has been adopted in many other cases and is now considered a requirement to the characterization of a breach of legitimate expectations.[46]

42. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000).
43. *Ibid.*, para. 76.
44. *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 Jan. 2010).
45. *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), para. 305.
46. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sep. 2007), para. 332. *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award (5 Sep. 2008), para. 258; *Vivendi v. Argentina II*, ICSID Case No. ARB/97/3, Award (20 Aug. 2007), para. 7.4.31; *EDF v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009).

Several forces are therefore to be balanced by tribunals when identifying a breach of the FET standard based on legitimate expectations of the investors. Some cases are essential in this regard: *Saluka v. Czech Republic*,[47] *Tecmed v. United Mexican States*,[48] *Rompetrol v. Romania*,[49] and *Bayindir v. Pakistan*.[50]

§6.03 FULL PROTECTION AND SECURITY

States are not mandated nor obliged to allow foreign capital in their countries. However, if they provide the platform for foreign investments, they must also provide foreigners with at least the same protections they give to their nationals, not only in terms of the treatment of their investments, but more so with regards to their own physical protection.

The principles of international law seek to provide foreigners with certain standards of protection when dealing with sovereign States. The origin of this protection stems from older bilateral treaties of friendship, commerce and navigation, and is part of the developing history of international business, trade and investment.

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47. *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), paras 306–308: 'The determination of a breach of [the FET obligation] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other ... A foreign investor ... may in any case properly expect that the [host State] implements its policies bona fide by conduct that is, as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination....The host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.'
48. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) 43 ILM 133, 137 (2004), para. 154: Legitimate expectations was defined as the entitlement of investors that a host State will 'act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investments without the required compensation...'
49. *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013), para. 278 (The tribunal noted that the legitimate expectations of a protected investor include the expectation that the State authorities will seek means to avoid unnecessary damage or at least to minimize or mitigate the adverse effects on the investment.).
50. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 Aug. 2009). (The tribunal found that the claimant's reasonable expectations as to the treatment it would be afforded had not been frustrated since 'it could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan' at the time that it entered into the contract (there having been a preceding period of four years during which the contract had been negotiated, terminated and then revived by reason of changes in government.).

Prior to establishing the provision of FPS, at the core of diplomatic protection was States' liability for the injuries to foreigners and their assets.[51] This meant that the acts of one host State which caused harm to a national of another State were dealt with by diplomatic intervention, whereby the home State of the foreign national would espouse the claim of the person. In many instances, actions of this kind also led to hostile relations between the intervening States, which was at times referred to as 'gunboat diplomacy'.

Article 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts[52] (ILC Articles on State Responsibility or ILC Articles) prescribes that in order for an internationally wrongful act to be attributable to a State, it must pass a two-prong test: (a) the actions must be attributable to a State under international law and (b) the act must constitute a breach of an international obligation of that State.

Although it is understood that public riots, insurrects, civil unrest, strikes and other types of public disorders can and do happen without government incitement, the host State has the obligation of providing investors with the minimum standard of FPS. However, despite violence being the most common pattern, this standard of protection is also triggered with non-violent situations. FPS seeks to ensure that host States take 'active and reasonable measures to protect a foreign investment from adverse effects or actions (of a physical or legal nature) of the host State, its organs, or third parties'.[53]

In the *Biwater v. Tanzania* case, the arbitral tribunal alluded to a definition of the duty of due diligence, where it said that 'a substantive failure to take reasonable, precautionary and preventive action is sufficient to engage the international responsibility of a State for damage to public and private property in that area'.[54]

FPS guarantees that the host State must provide investors with adequate protection to preserve its investments as well as the physical integrity of investors. Liability for the host State is triggered when the investors face losses or damages that could have been prevented if the government had provided adequate and timely protection for the investment or persons. This protection may be provided by the government, its legal authorities, or by means of law enforcement officials. Accordingly, the government's failure to act promptly to prevent losses or damages to the investment would trigger the application of the standard.

[A] The Extent of the FPS Provision

Article 10 on Promotion, Protection, and Treatment of Investments of the ECT establishes that:

51. James Crawford, *The International Law Commission's Article on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002), cited R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes. Cases, Materials and Commentary*, 787 (Kluwer Law International 2005).
52. ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 2.
53. Girsberger, Daniel & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, 475 (3rd ed., Schulthess Juristiche Medien AG 2016).
54. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*. ICSID Case No. ARB/05/22, Award (24 Jul. 2008), para. 725, reference to Professor Ian Brownlie.

> [e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable, and transparent conditions for investors of other Contracting Parties to make Investments in its Area ...Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations...[55]

FPS imposes a two-tier obligation on host States. On the one hand, they are required to provide actively protection on foreign investments, and on the other one, they are also obliged to refrain from adopting any measure, whether direct or indirect, with consent or by assent, detrimental to foreign investments. The limits of this protection, however, have to be reasonable. Thus, a State is not obliged to provide protection against harm or threats of which it is not aware. Yet, when a host State becomes aware of potential threats directed exactly at foreign nationals or their investments, the duty to act is triggered and effective police protection within reasonable means must be provided.

Thus, in light of the ILC Articles on State Responsibility, '[t]here is a breach of an international obligation ... when an act of that State is not in conformity with what I required of it by that obligation, regardless of its origin or character.'[56] Generally speaking, this principle has always tied State responsibility to the preservation and care of investors' property, whether tangible or intangible.

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The 2012 US Model BIT establishes that covered investments shall be given a treatment including FPS in accordance with the treatment as per customary international law, without creating 'additional substantive rights'.[57] In expanding the definition, FPS, under the 2012 US Model BIT requires 'each [host State] to provide the level of police protection required under customary international law'.[58]

There are several risks faced by foreign investments. One of them is the potential of local hostility by civilians in the host country geared towards the investors' physical security and their assets. FPS requires that the host State exercise a proper level of due diligence and care in preventing civil unrests that harm foreign investors' physical integrity and their properties. Host States thus have an obligation to adopt reasonable measures that fairly protect investors' interests. This means that they have the obligation to exercise police power in diligently procuring the safeguard and protection of investors' properties. This protection also extends to those direct or indirect foreign investments, such as in cases of recapitalization of already existing operations. Some of the general aspects that will be evaluated by the tribunal are the actions or inactions of the host State aimed at protecting the foreign investment, as well as the efforts and due diligence conducted by the host State to preserve and prevent actual damages to the

55. ECT, Part III – Investment Promotion and Protection, Art. 10.
56. ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 12.
57. 2012 US Model BIT, Art. 5(2).
58. *Ibid.*, Art. 5(2)(b).

investment property of the foreign investor.[59] FPS requires that host States adopt reasonable measures to prevent the 'physical destruction of an investor's property'.[60]

In the *Saluka* case, the arbitral tribunal emphasized that the standard of FPS is not one of strict liability on the host State.[61] This means that the host State's liability may be shielded by proving that it took reasonable precautionary measures in preserving and protecting the investors' physical and economic interests in the territory against attacks that threaten or may threaten foreigners in its territory.[62]

Additionally, the *AAPL v. Sri Lanka* case dealt in part with an investor's claims that the Sri Lanka government owed it strict liability to guarantee its FPS. The arbitral tribunal found that the duty was not of a strict liability but rather an obligation of means, thus requiring a link between the damages suffered and the causal responsibility of the State or its dependency for acting without due diligence. Thus, the principle is read to establish a reasonable duty of care to act with due diligence in protecting both the investor's physical integrity, as well as its corporeal or intangible investment property.[63]

§6.04 MOST-FAVORED-NATION

The MFN clause affords an investor from Country A investing in Country B the assurance that it will not be treated less favorably than an investor from a third country by Country B. UNCTAD has specified that in the international investment law context, the purpose of the MFN clause is '[to give] investors a guarantee against a certain forms of discrimination by host countries, and [to establish] equality of competitive opportunities between investors from different foreign countries'.[64]

Most investment agreements contain MFN clauses, although the wording, context and scope may differ. Despite its essentialness, the MFN clause brings debate as to its relation to the different provisions in treaties. While the general consensus is that the MFN clause can be applied to substantive rights, it is 'highly controversial as to whether the clause should equally apply to procedural rights'.[65]

59. *See Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits (8 Dec. 2000).
60. Gary Born, *International Arbitration: Law and Practice*, 431 (Kluwer Law International 2012).
61. *See also Asian Agricultural Products Ltd v. Sri Lanka, ICSID Case No. ARB/87/3*, Final Award (27 Jun. 1990).
62. *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, 2006 (This dispute was based on the Netherlands-Czech Republic BIT.).
63. *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 Jun. 1990).
64. UNCTAD, *Most-Favored-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements, UN Doc. UNCTAD/ITE/IIT/10 (Vol. III), 1 (United Nations 1999), http://unctad.org/en/Docs/psiteiitd10v3.en.pdf (accessed 30 May 2018).
65. Nartnirun Junngam, *An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference*, 15 UCLA Journal of International Law & Foreign Affairs 399 (2010).

[A] Historical Background of the Development of the MFN Clause and Its Current Relevance

The MFN clause originated from the practices of international trade law. The clause first began as a unilateral form in which powerful nation states, predominantly European, would make the less powerful States promise to MFN treatment.[66]

Later in history, another form emerged (though no longer in use today): the conditional MFN clause. The clause was conditional because an economic concession was only granted if some compensation was promised and the benefitting State had also to grant the same compensation to the other State.[67] The conditional MFN clause was based on the idea of reciprocity.[68]

MFN treatment is defined in Article 5 of the ILC Draft Articles on MFN Clauses as 'treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State'.[69]

MFN and NT go hand in hand to constitute the non-discrimination principle under international. While analyzing the MFN clause a few things should be borne in mind. First, the obligation to grant MFN treatment is a treaty obligation, and it does not arise from customary international law. Second, the MFN clause is a contingent or relative obligation as it will depend on what is granted to investors of other nationalities and their investments in the host state. Third, the MFN clause may only be pleaded when arising from the same sphere of relationship. In accordance with the *ejusdem generis* principle, the MFN clause can only apply to matters belonging the same subject matter of the clause.

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[B] Examples of MFN Clauses

> 2012 US Model BIT
>
> Article 4: Most-Favored-Nation Treatment
>
> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

66. *Ibid.*
67. *Ibid.*
68. *Ibid.*
69. ILC Draft Articles on Most-Favoured Nation Clauses with Commentaries (1978).

> Bulgaria-Cyprus BIT, Article 3[70]
>
> 1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third States.
>
> 2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.
>
> Argentina-Spain BIT, Article IV(2)[71]
>
> In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.

[C] A Few Cases Dealing with MFN Clauses

Although there are no binding precedents in international arbitrational (commercial or investor-State), it is useful to see how arbitral tribunals have dealt with the application of the MFN clause. There are a number of cases where tribunals have struggled through the MFN legal quagmire, but only a few will be focused.

As stated in the beginning of this chapter, the application of the MFN clause has not given rise to much debate as to importing a more favorable provision in a BIT to 'substantive' protections but has brought about debate and much criticism as to its application with respect to procedural or jurisdictional matter. Thus, the question is whether an investor is allowed to use the MFN provision in the BIT that is applicable to its dispute for purposes of establishing jurisdiction in a more favorable way to the investor. An example of such an instance is where the investor does not want to comply with a requirement in the dispute resolution provisions of its applicable treaty – such as to refer a dispute to domestic procedures before commencing international arbitration – that does not exist under the host State's BIT with a third State. As will be addressed below, the *Maffezini* case grappled with this issue.

[1] Maffezini v. Spain[72]

This case involved a dispute between an Argentine claimant and the Kingdom of Spain as respondent. The claim was brought under the Argentina-Spain BIT. The BIT included an eighteenth-month condition precedent, which required that the dispute be submitted to domestic litigation in Spain and, only if the matter was not resolved on the

70. Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (12 Nov. 1987).
71. Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre el Reino de España y la República Argentina (3 Oct. 1991) (Free translation from the Spanish original).
72. *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000).

merits by the domestic courts or no decision had been rendered within the eighteen-month period, would the investor be able to bring his claim under ICSID as a forum.[73] Maffezini resorted directly to international arbitration and argued, invoking the MFN clause in the Argentina-Spain BIT, that the Spain-Chile BIT did not have a similar provision requiring to resort to the local courts and allowed Chilean investors in Spain to go straight to arbitration. As such, Maffezini argued that he was receiving less favorable treatment than the Chilean investors were.[74]

Despite the fact that the Argentine-Spain BIT did not expressly state that the MFN clause covered dispute settlement, the tribunal ruled that dispute settlement mechanisms are 'inextricably related to the protection of the rights of the investors since they are related to the fair and equitable treatment promised by the MFN clause'.[75] The tribunal followed the *Ambatielos*[76] case regarding the relation of dispute settlement provisions to the category of matters encompassed by the MFN clause. It stated, 'if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause as they are fully compatible with the *ejusdem generis* principle'.[77] Agreeing with the investor, the tribunal stated that if the situation had been such that the host State made the exhaustion of domestic remedies a condition for its consent to arbitration, the investor would not have been able to invoke a third party treaty that eliminated the waiting period.[78] Thus, if there were a specific provision laying out the contours of consent, the parties would not be able to refer to another treaty to bypass it.

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The *Maffezini* tribunal basically agreed with the practice of importing dispute settlement provisions from a third-party treaty, but also highlighted four public policy considerations that would be exceptions to this practice.[79] First, if one country made its consent to arbitration only upon the exhaustion of local remedies, this condition cannot be bypassed by the MFN clause.[80] Second, if the treaty contained a 'fork-in-the-road' provision requiring an absolute choice between settling of disputes through the domestic court system or international arbitration, the MFN clause cannot help bypass this provision.[81] Third, if the treaty set forth a specific forum of arbitration, such as ICSID, the MFN clause would not be allowed to be invoked to argue for an entirely different system of arbitration.[82] The last scenario in which the tribunal would not allow the invocation of the MFN clause is when the parties have agreed to a 'highly institutionalized system of arbitration that incorporates precise rules of procedure'.[83] It

73. *Ibid.*, para. 24.
74. *Ibid.*, paras 29–31.
75. *Ibid.*, paras 38, 54.
76. *Ambiatelos Case* (*Greece v. United Kingdom*), Judgment (1 Jul. 1952), ICJ Reports 28 (1952).
77. *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000), para. 56.
78. *Ibid.*, para. 63.
79. *Ibid.*, para. 56.
80. *Ibid.*, para. 63.
81. *Ibid.*
82. *Ibid.*
83. *Ibid.*

seems that the tribunal pointed out to these public policy considerations out of the concern of potential treaty shopping. It is important to note that the tribunal found that none of these four situations applied to Maffezini and thus, resulted in a liberal ruling allowing the claimant to invoke a different dispute mechanism.

[2] Siemens v. Argentina[84]

Like in *Maffezini*, this case involved the provision of a requirement to resort to domestic litigation in Argentina under the Argentina-Germany BIT. The tribunal reached the same conclusion as the one in Maffezini and concluded that the MFN clause encompassed dispute settlement provisions. The *Siemens* tribunal had a more thorough explanation of its reasoning than in Maffezini and relied on the purpose of the Treaty – 'to protect' and 'to promote' investments.[85] Thus, the Tribunal interpreted the Treaty as to 'create favorable conditions for investments and to stimulate private initiative'.[86]

The *Siemens* tribunal also considered the issue of whether a claimant invoking the MFN clause had to import the allegedly more favorable third party treaty's provisions as a whole or only the provisions deemed beneficial to the claimant's situation. The tribunal concluded that parties can indeed select provisions that are favorable to them; if this practice was not allowed, according to the tribunal, the 'MFN clause would be of limited use'.[87] The arbitrators in this case did not think the holding would be that problematic since the BIT works in both ways: just as an Argentinean investor can receive benefits through an Argentinean BIT, a Chilean investor will be able to do the same through his own country's BIT.[88] The tribunal further asserted that 'claiming a benefit by the operation of an MFN clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty' and that it would be a case-by-case scenario based on the terms of the disputed MFN clause.[89]

[3] Salini v. Jordan[90]

Salini rejected the liberal interpretation and application of MFN clauses to dispute settlements set forth by *Siemens* and *Maffezini*. In this case, the Jordan-Italy BIT

84. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004).
85. *Ibid.*
86. *Ibid.*, para. 81.
87. *Ibid.*, para. 108.
88. *Ibid.*
89. *Ibid.*, para. 109.
90. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 Nov. 2004), 44 ILM 573 (2004). This case must not be confused with the famous *Salini* case discussed in Ch. 2 (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4).

contained a provision laying out a specific dispute settlement procedure: ICSID arbitration for disputes arising from treaty violations and contractual dispute settlement procedures for investment contract disputes.[91] The case concerned a conflict over the final payment of the construction of a dam. Thus, the parties had to settle their dispute domestically in Jordanian courts, unless the parties had agreed to arbitrate instead.[92] Notwithstanding, the Italian investors attempted to bring their claim to ICSID on the theory that Jordan's BITs with other countries allowed contractual claims to be arbitrated and that the claimants were entitled to the same treatment.[93]

The *Salini* tribunal reached its decision on jurisdiction only around three months after the decision in *Siemens*. The tribunal first distinguished this case from *Maffezini* and the *Ambatielos* cases; it observed that Article 3 of the Jordan-Italy BIT did not provide for its application over dispute settlement and did not 'envisage all rights or all matters covered by the agreement'.[94] The tribunal further reasoned that Article 9(2) of the BIT was clear in that it wanted contractual disputes to be settled according to the terms of the particular investment agreement and thus, ICSID arbitration was not an available procedure.[95] Thus, unlike the *Maffezini* tribunal, the *Salini* arbitrators narrowed the scope of the application of the MFN clause to dispute settlements and deferred to the express condition set forth in the BIT.

[4] Plama v. Bulgaria[96]

Plama is a case that favors a narrower interpretation of MFN clauses. There, the claimant, a Cyprus corporation, brought the claim due to the Bulgarian government's treatment of its oil refinery.[97] *Plama* wanted to resolve the dispute through international arbitration rather than through Bulgarian courts through the operation of the MFN clause and resorted to the more generous Bulgaria-Finland BIT, as the Bulgaria-Cyprus BIT, provides for 'the possibility of ICSID arbitration'.[98]

The tribunal ruled, however, that the MFN clause cannot be applied to replace the dispute settlement system that had already been agreed to.[99] It endorsed the doctrine that, as a matter of domestic and international law, an agreement to arbitrate must be clear and unambiguous.[100] The Tribunal explained, '[i]n the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.'[101] According to the Tribunal, without the

91. *Ibid.*, para. 66.
92. *Ibid.*, para. 71.
93. *Ibid.*, para. 21.
94. *Ibid.*, paras 117–118.
95. *Ibid.*, para. 118.
96. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), 44 ILM 721 (2005).
97. *Ibid.*, para. 21.
98. *Ibid.*, para. 79.
99. *Ibid.*, para. 240(C).
100. *Ibid.*, para. 198.
101. *Ibid.*

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specific language granting such forum, it cannot be understood that the MFN clause is to be read broadly as to import broad languages from other BITs.[102] The *Plama* Tribunal expressly rejected the interpretation held by the Siemens Tribunal that the phrase 'with respect to all matters' allows the MFN clause to be interpreted and applied broadly.[103]

§6.05 NATIONAL TREATMENT

According to UNCTAD, the NT standard can be defined as a principle whereby a host country extends to foreigners' treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances. [104] NT is said to be a 'relative' standard of protection, which is comparable or dependent on the treatment accorded to domestic investors. As such, if the foreign and the domestic investor are both in like circumstances, both must be treated equally and no national or domestic investor shall be afforded privileges and protections denied to the foreign investor just on the basis of nationality.

In international law, the NT standard has been invoked in two different settings. First, under the Calvo Doctrine,[105] supported in the past by most Latin American countries, where the treatment of aliens and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws. And, second, in opposition to the Calvo Doctrine, the doctrine of State responsibility for injuries to aliens and their property, which has been supported by developed countries, asserts that customary international law establishes a minimum international standard of treatment to which aliens are entitled, allowing for treatment more favorable than that accorded to nationals where this falls below the international minimum standard.

[A] Examples of NT Clauses

France Model BIT

Article 4: National treatment and most favored Nation treatment

Each Contracting Party shall apply on its territory and in its maritime area to the nationals and companies of the other Party, with respect to their investments and activities related to the investments, a treatment not less favorable than that granted to its nationals or companies, or the treatment granted to the nationals or companies of the most favored nation, if the latter is more favorable. In this respect, nationals authorized to work on the territory and in the maritime area of

102. *Ibid.*, para. 206.
103. *Ibid.*, para. 205.
104. *See* UNCTAD, *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, UN Doc. No. UNCTAD/ITE/IIT/11 (Vol. IV), (United Nations 1999), http://unctad.org/en/Docs/psiteiitd11v4.en.pdf (accessed 30 May 2018).
105. The Calvo Doctrine was first proposed by Carlos Calvo, an Argentine diplomat and legal scholar. Among other things, the doctrine stated that foreigners who held property in Latin American States and had claims against such States should seek redress in the courts of such States and not through diplomatic means. Thus, a Calvo clause in a contract between a Latin American State and a foreign investor stipulates that the investor agrees to have any disputes between it and the State adjudicated in the courts of the host State.

one Contracting Party shall enjoy the material facilities relevant to the exercise of their professional activities.

This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.

The provisions of this article do not apply to tax matters.

2012 US Model BIT:

Article 3: National Treatment

Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments."

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2007 Colombia Model BIT[106]

Article IV, Treatment of Investments

1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a not less favourable treatment than that accorded, in like circumstances, to investments of its own investors or to investors of any other third State, whichever is more favorable to the investor.

2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.

3. The provisions of this Agreement concerning the granting of a no less favourable treatment than that accorded to investments of investors of any of the Contracting Parties or of any third state shall not be construed so as to bind a Contracting Party to extend to investments of investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: Any existing or future free trade area, customs union, common market, economic union or any other kind of economic or regional organization or any international agreement intended at facilitating border trade, which a Contracting Party is or becomes a Party to.

In deciding whether a host State has discriminated against an investor for the purposes of the NT standard, the tribunal must compare the State's treatment of the

106. 2007 Colombia Model BIT, https://www.italaw.com/documents/inv_model_bit_colombia.pdf (accessed 30 May 2018).

investor with its treatment of others in like circumstances. The tribunal's interpretation of 'like circumstances' is thus critical.

Rudolf Dolzer indicates that in order to find breach of NT, a tribunal must determine whether the investors are in like circumstances (A), then determine whether the treatment accorded to a foreign investor is less favorable than the one enjoyed by domestic investors (B). And, lastly, it must determine the host State's intent and whether there was a justification for this differentiation (C).[107]

[B] 'Like Circumstances'

Different tribunals have taken different approaches. The tribunal in *S.D. Myers v. Canada Myers v. Canada*, a case brought under NAFTA where the issue was whether Canada breached the NT protection accorded to Myers when it established that the disposal of the PCBs shall be done in Canada and by Canadians. The Tribunal said that:

> [t]he Tribunal considers that the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector'.[108]

[C] 'Comparable'

The *Methanex v. United States* tribunal focused on whether the economic activities of the foreign investor were 'comparable' to those in the domestic sphere.[109]

[D] 'Like Situation'

In *Occidental v. Ecuador*, Occidental brought an action for breach of NT under the US-Ecuador BIT. The tribunal decided in favor of the petitioner holding thereby, in fact, 'in like situations' cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of NT is to protect investors as compared to local producers, and this

107. Rudolf Dolzer, *National Treatment: New Developments*, in OECD Symposium, *Making the Most of International Investment Agreements: A Common Agenda* (12 Dec. 2005), https://www.oecd.org/investment/internationalinvestmentagreements/35805957.pdf (accessed 30 May 2018).
108. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 Nov. 2000), para. 250.
109. *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 Aug. 2005).

cannot be done by addressing exclusively the sector in which the particular activity is undertaken.

In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*,[110] Bayindir was contracted to build a six-lane motorway between Islamabad and Peshawar by the National Highway Authority (NHA), an agency of the Pakistani government. The project was damaged by disagreements over delays in the construction schedule for a period of eight years. Bayindir, among other things, blamed the delays on factors outside of its control, including arguing the breach of NT. As such, Bayindir argued that it was expelled so that the highway project could be handed to local contractors on more favorable terms.

The tribunal decided whether Bayindir's investment was in a 'similar situation'. If so, Bayindir's investment was accorded less favorable treatment than the local contractor, PMC-JV, and the tribunal had to decide whether the difference in treatment was justified. In its Decision, the Tribunal did not rule out that the contracts with PMC-JV and Bayindir may be similar, as they both related to the same project, but the tribunal found that the terms and circumstances of the contractual relationships between, on the one hand, NHA and Bayindir, and, on the other hand, NHA and PMC-JV were different. Such differences were in the financial terms, the constitution of the two entities, their level of experience and expertise, the scope of work. As a result, the tribunal concluded that 'the two contractual relationships are too different for Bayindir and the local contractors to be deemed in 'similar situations'. Therefore, it found no breach of the NT clause.

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[E] Discriminatory

Another important aspect that tribunals consider is whether the measure is discriminatory on its face and whether the interest of the State in protecting the public interest is actually at issue. This point was raised by the tribunal in both, *S.D. Myers Inc. v. Canada* and in *Total S.A. v. Argentine Republic*. In *Total S.A. v. Argentine Republic*, the tribunal said that:

> [t]o determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of 'like situation' or 'similarly-situated' is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner. This is inherent in the very definition of the term 'discrimination' under general international law that:
>
> Mere differences of treatment do not necessarily constitute discrimination... discrimination may in general be said to arise where those who are in all material

110. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 Aug. 2009).