Chapter 8. Arbitration under Investment Treaties

A Introduction

8.01 Historically, an individual or a corporation who wished to assert a claim against a foreign state for breach of customary international law could not do so directly. Instead, the individual or corporation had to petition its government to take up, or 'espouse', the claim on its behalf. In the course of the nineteenth century, influential individuals or corporations would convince their government to send a small contingent of warships to moor off the coast of the offending state until reparation was forthcoming. This form of 'gunboat diplomacy' was exercised frequently by European powers on behalf of their subjects in the not-so-distant past. For example, when faced with Venezuela's default on its sovereign debt in 1902, the governments of Great Britain, Germany, and Italy sent warships to the Venezuelan coast to demand reparation for the losses incurred by their nationals.

8.02 Argentine jurist and diplomat Carlos Calvo fought for the right of newly independent states to be free of such intervention by foreign powers, promoting the so-called Calvo doctrine, whereby foreign investors should be in no better position than local investors, This right is necessarily limited to the intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and its nationals.

8.03 The doctrine was incorporated into the forerunner of the modern investment treaty, the 'treaty of friendship, commerce and navigation' (FCN treaty). For example, Article 21 of the FCN treaty between Italy and Colombia of 1894 stated as follows:

The Contracting Parties express their desire to avoid all types of dispute which might affect their cordial relations and agree that, in connection with disputes which involve individuals arising out of criminal, civil or administrative matters, their diplomatic agents will abstain from intervening except in cases of denial of justice or extraordinary or unlawful delay in the administration of justice.

8.04 Gunboat diplomacy as a means of asserting rights of nationals was finally laid to rest at the Second International Peace Conference of The Hague in 1907, when the Convention on the Peaceful Resolution of International Disputes was signed. The Convention provided the framework for the conclusion of bilateral arbitration treaties. In accordance with these treaties, in the event of a dispute between two states arising out of the particular interests of a national of the other state, an independent arbitral tribunal would be formed. In effect, a state could espouse the claim of its national (the so-called right of diplomatic protection) by means of a horizontal inter-state procedure. There was no direct cause of action by the foreign national whose interests had been harmed.

8.05 The legal basis of the right of 'diplomatic protection', in the words of the Permanent Court of International Justice (PCIJ) in the Panevezys-Saldutiskis Railway case, was that:

In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to the intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.

8.06 As one learned commentator stated, the procedure was unsatisfactory from the individual claimant's point of view:

He has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits; and even if it is willing to do so, there may be interminable delays before, if ever, the defendant state can be induced to let the matter go to arbitration... It has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal for the purpose, and if proper safeguards against merely frivolous or vexatious claims could be devised, that is a possible reform which deserves to be considered.
the time being, however, the prospect of states accepting such a change is not very great. (5)

8.07 Since that text was written in 1963, the situation has changed dramatically and what Professor Brierley thought unlikely has become a commonplace reality. The validity of his concerns, and the inevitable ‘politicisation’ of disputes ‘leaving investors, particularly small and medium-sized enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claim’, (6) led to a radical reform in the dispute-settlement provisions of many BITs.

8.08 This reform was made possible by the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the ICSID Convention). (7) The Convention was a arbitration primarily for the resolution of disputes between investors and states by means of the inclusion of arbitration clauses in state contracts. Nevertheless, the travaux préparatoires of the Convention also made clear that the consent of the state to arbitration could be established through the provisions of an investment law. (8) Following the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property, (9) many states had begun a programme of bilateral treaties for the protection and promotion of investments (the so-called BITs) that set out explicit protections in favour of foreign investment. (10) They were a natural successor to the FCN treaties of the early part of the twentieth century, but still suffered from the limitations imposed by diplomatic protection. Once the ICSID Convention was in place, treaty drafters from signatory states quickly seized upon the possibility of using this specialist forum for the resolution of treaty disputes between states and investors, and did so by incorporating a clause establishing the consent of the state to arbitrate with covered investors. Professor Brierley’s vision of a diagonal clause, permitting investors to claim directly under a treaty against the state in which the investment was made (the ‘host state’), thus became a reality. Switzerland, for example, inserted a diagonal clause for the first time in its 1981 BIT with Sri Lanka, (11) and has done so systematically ever since. (12)

8.09 This right of direct recourse ensures that the investor’s claim is not subject to the political considerations inherent in diplomatic protection. Even if there is no agreement between the investor and the host state, in the absence of a clause establishing the consent of the state to arbitrate with covered investors, the investor may usually commence arbitration directly against the host state. (13) Foreign investors were nevertheless slow to take up their newfound rights: the first case brought by an investor under the investment protections of a BIT was not decided until 1990. (14)

8.10 In light of the dramatic increase in the number of BITs (15) and the emergence of clearer legal principles through case law, the number of investor–state arbitrations has mushroomed. In 2014, ICSID registered thirty-eight new arbitration cases—nearly seven times the number of cases registered during the whole of ICSID’s first ten years of existence. (16) By the end of 2014, the number of known treaty-based investor-state cases had reached 608—approximately ten times the figure as it stood at 2000. (17)

8.11 The dramatic growth of BITs since the mid-1980s has led to the adoption of similar provisions in the ‘investment chapters’, or collateral agreements, to multilateral economic cooperation treaties. These include the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, (18) the North American Free Trade Agreement (NAFTA), (19) the Energy Charter Treaty (ECT), (20) and the Dominican Republic and Central America–United States Free Trade Agreement (DR-CAFTA). (21) Similar provisions have found their way into bilateral free trade agreements (FTAs) such as the United States–Chile FTA (22) and the 2010 Canada–Panama FTA. (23)

8.12 As the number of investment treaty arbitrations has grown, concerns over the investment treaty system have arisen. These concerns include a perceived deficit of legitimacy given that states are being judged on their conduct by private non-elected individuals. Concerns have also arisen in respect of inconsistent arbitral awards, the independence and impartiality of arbitrators, and the delays and costs of arbitral procedures. (24) These complaints have resonated in some scholarly publications (25) and popular media outlets. (26) At the same time, between 2007 and 2012, a small group of Latin American countries defending multiple claims—Bolivia, Ecuador, and Venezuela—denounced the ICSID Convention and certain BITs. (27) These concerns and isolated denunciations are not symptomatic of an exodus from the investment treaty system. According to the United Nations Conference on International Trade and Development (UNCTAD), 330 new investment treaties were concluded between 2010 and 2014, (28) including more than two dozen in Latin America alone. During that same period, ICSID gained seven new member states. (29) Systemic reforms are being considered (30) and implemented, including the introduction of new transparency provisions. (31)

8.13 As a result of the growth in investment treaties, many foreign investments are protected by investment treaties. The question is whether an investor can rely on one or more of these investment treaties to vindicate its legal rights in a particular case. This raises fundamental issues relating to the scope and application of those treaties, which issues are addressed next.

B Jurisdictional Issues
(a) Existence of an applicable treaty

8.14 To determine whether an investor enjoys investment treaty protection, an applicable treaty between the state in which the investment was made and the home state of the investor must be identified. (32) It is easy to identify multilateral investment treaties, because they are sufficiently notorious. It is, however, more difficult to detect applicable BITs, considering their number and the absence of a comprehensive list. (33) Although the UNCTAD list is helpful, the only accurate means of verifying the existence of a BIT, and whether it is in force, (34) is by contacting the treaty section of the relevant government or embassy.

8.15 Most BITs contain provisions with respect to their effective date and duration. An issue may arise as to whether investments made prior to the date on which the BIT came into effect are eligible for protection under it. Tribunals have generally taken the position that prior investments are afforded protection and some treaties are explicit in this regard. The Argentina–United States BIT, for example, provides that it shall apply to investments existing at the time of entry into force, as well as to investments made or acquired thereafter. (35) A distinction should be drawn between application of a BIT to investments made prior to its entry into force and its application to alleged breaches that occurred prior to that date. In Técnicas Medioambientales Tecmed SA v The United Mexican States, (36) the tribunal held that while the concerned investment was eligible for protection under the BIT, the BIT could not have retrospective application to actions by the host state prior to its entry into force.

8.16 Bilateral investment treaties also commonly include provisions regarding the legal status of investments after the termination or expiry of the particular BIT. Generally, such provisions indicate that investments that were otherwise covered by the treaty whilst in force will continue to benefit from the same protection for a specified ‘sunset’ period, usually of between ten and fifteen years after termination or expiry. (37)

(b) Protected investors

8.17 Once a potentially applicable treaty has been identified, the relevant treaty provisions defining the eligible ‘investors’, or ‘nationals’, should be reviewed. Although treaties may vary substantially in this respect, the following provision of the Switzerland–Pakistan BIT is representative:

For the purposes of this Agreement:

1. The term ‘investor’ refers with regard to either Contracting Party to:

   (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

   (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

   (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that same Contracting Party. (38)

Investors covered by protection of investment treaties can thus be divided into natural persons and legal entities.

(i) Natural persons

8.18 Most BIT provisions establish the nationality of a natural person by reference to the domestic laws of the respective contracting states. This is consistent with the concept of state sovereignty in deciding the criteria for identifying its nationals. Certain BITs may contain an additional requirement of residence, (39) or domicile. (40)

8.19 Difficulties may arise where the purported investor is a national of both state parties to the BIT. The ICSID Convention precludes individuals from suing any state of which they are nationals. (41) Tribunals have favoured formal nationality, rather than the test of effective (or dominant) nationality, in determining whether an individual qualifies as a ‘national of another [ICSID] Contracting State’ under the Convention. (42) This preclusion of an investor who also holds the nationality of the host state does not apply where other arbitration mechanisms, such as the UNCITRAL arbitration rules, are used, provided that there is no separate express prohibition on dual nationals in the BIT itself. (43)

(ii) Legal entities

8.20 All investment treaties extend the benefit of their protection to legal entities such as companies. Many BITs simply require that the entity be incorporated or constituted under...
the laws of one of the contracting parties. Some treaties add other requirements, such as the need actually to carry out business in the home state. (44)

8.21 Where no such additional requirements have been stipulated, tribunals generally conduct a review limited to determining whether the legal entity satisfies the formal definition of investor under the treaty and refuse to incorporate additional requirements that the treaty drafters did not include. For instance, in Yukos Universal Ltd (Isle of Man) v Russian Federation, (45) Russia argued that the claimant should not qualify as an investor under the ECT (which defines ‘investors’ based on the law under which an entity is organised), because it was a shell company that was owned and controlled by Russian nationals. In rejecting this argument, the tribunal held that it knew of ‘no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party’ and refused to ‘write new, additional requirements—which the drafters did not include—into a treaty, no matter how auspicious or appropriate they may appear’. (46)

8.22 Similarly, in Tokios Tokeles v Ukraine, (47) a majority of the arbitrators held that an investor incorporated in Lithuania qualified as an investor under the Lithuania–Ukraine BIT, (48) even though 99 per cent of its shares were owned by Ukrainian nationals. By contrast, in TSA Spectrum de Argentino SA v Argentine Republic, (49) a majority denied jurisdiction under the Netherlands–Argentina BIT (50) over a claim against Argentina brought by an Argentine company claiming to be ‘controlled’ by its Dutch parent (which owned 100 per cent of its shares). The tribunal looked beyond the claimant’s immediate (Dutch) parent company and found that its ‘ultimate owner’ was an Argentine national. The tribunal then held that Article 25(2)(b) of the ICSID Convention’s ‘foreign control’ requirement for juridical entities having the nationality of the state party to the arbitration had not been met.

8.23 The natural consequence of the formalistic language of most treaties is that adopting a particular corporate structure for the purposes of attracting the protection of an investment treaty is wholly legitimate (as it is in the case of tax structuring). In Aguas del Tonari SA v Republic of Bolivia, (51) the tribunal rejected Bolivia’s objection that the ‘availability of the BIT was the result of strategic changes in the corporate structure’, noting that:

[I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT. (52)

8.24 Some tribunals have nevertheless drawn the line where the restructuring of an investment has been undertaken solely to gain BIT protections in relation to an earlier dispute, holding that this would amount to a lack of ‘good faith’ and an ‘abusive manipulation of the system’. (53) Thus, in Mobil Corporation Venezuela Holdings v Bolivarian Republic of Venezuela, (54) the tribunal held that it had jurisdiction over claims relating to nationalisation measures taken by Venezuela after the corporate restructuring in question had taken place, but not claims relating to disputes over royalty and tax rates that had arisen prior to the restructuring.

8.25 Some treaties seek to limit the scope of protection to protected investors by means of treaty clauses allowing the state parties to deny treaty benefits to investors that do not have substantial business activities in their home state and which are controlled by entities or persons of a third state (known as ‘denial of benefits’ clauses). (55) While it remains a matter of debate whether these clauses can be applied retroactively (that is, after an investment is made), (56) tribunals have held that respondent states bear the burden of proving that the requisite elements have been satisfied. (57)

8.26 Legal entities established in the host state (and therefore having the nationality of the respondent state) may receive treaty protection if (a) they are controlled by entities incorporated in the other contracting state, and (b) both states have agreed in the applicable treaty to extend the protection of the treaty to such controlled entities. This extension is expressly permitted by Article 25(2)(b) of the ICSID Convention. (58) For example, Article 1(2)(c) of the Argentina–France BIT extends protection to:

--- legal persons effectively controlled directly or indirectly by nationals of one of the Contracting Parties or by legal persons having their registered office in the territory of one of the Contracting Parties and constituted in accordance with legislation of the latter. (59)

8.27 Thus a locally incorporated entity may claim against its state of incorporation if controlled by a national or company of the other contracting state. This is significant because it is often expedient, or even necessary, to incorporate a local entity to hold an investment, and this extension of protection allows the local entity to bring a claim for its direct losses. It also enables minority shareholders in the local entity (many of whom may be local investors) to obtain indirect relief through treaty arbitration.

(c) Protected investments

8.28 In order to rely on an investment treaty, a qualifying ‘investor’ must establish that it
has made a protected ‘investment’. Most investment treaties contain a definition of what constitutes an ‘investment’. They tend to provide a definition that commences with a broad statement, often referring to ‘every kind of asset’, and then add a non-exhaustive list of examples. The United Kingdom–Chile treaty is typical in this respect and provides, at Article 1(a), that:

... ‘investment’ means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens and pledges;

(ii) shares in, and stock and debentures of a company, and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate or extract or exploitation of natural resources.

8.29 The open-ended definition acknowledges that the concept of ‘investment’ is dynamic and may evolve over time. A tribunal entertaining an investment treaty claim must therefore analyse whether the claimant’s investment satisfies the definition in the treaty that has been invoked.

8.30 Most treaties provide that a shareholding in a company established in the host country constitutes an investment. In AMT v Zaire, the ICSID tribunal rejected Zaire’s argument that AMT, an American company, had not made any direct investment in Zaire, because it had merely participated in the share capital of a Zairian company. The arbitral tribunal held that investments via the share capital of a local entity were eligible for protection under the United States–Zaire BIT. And, in CMS v Argentina, the tribunal held that the American claimant’s minority shareholding in an Argentine company qualified as a protected investment. Such decisions are important because host states often impose an obligation that the ultimate investment vehicle be a locally incorporated entity.

8.31 The definition of ‘investment’ has been interpreted to cover direct and indirect investments, and modern contractual and other transactions having economic value.

8.32 An indirect shareholding in a local company via one or several intermediary companies has been held to constitute a protected investment, even where the treaty’s definition of ‘investment’ does not expressly include ‘indirect’ investments. In Tza Yap Shum v Peru, the tribunal held that a Chinese national’s indirect shareholding in a local Peruvian company, which was held via an intermediary company established in the British Virgin Islands, could be considered a protected investment for the purposes of the Peru–China BIT.

8.33 Indirect investments in assets, rather than shareholdings, have also been held to be protected. In Mobil Corporation v Bolivarian Republic of Venezuela the tribunal held that a Dutch company had a qualifying investment in a Venezuelan joint venture, even though the party to that agreement was its Bahamian subsidiary, and the Netherlands–Argentina BIT did not expressly specify that both direct and indirect investments were covered.

8.34 Tribunals have also recognised that financial investments qualify for protection under BITs, even though they do not correspond to the conventional notion of ‘foreign investment’ in that they do not necessarily involve an inflow of funds into the host state or the active management of an investment. For example, in Fedax NV v Republic of Venezuela, the arbitral tribunal held that promissory notes issued by Venezuela, acquired by the claimant from the original holder in the secondary market by way of endorsement, constituted an investment under the Netherlands-Venezuela BIT. The relevant BIT included ‘titles to money’ as a category of investment, and the tribunal rejected the contention of the Republic of Venezuela that this item was restricted to classic forms of direct foreign investment—that is, ‘the laying out of money or property in business ventures, so that it may produce a revenue or income’. The tribunal also held that ‘it is a standard feature of many international finance transactions that the funds involved are not physically transferred to the territory of the host country but are put at its disposal elsewhere’.

8.35 Subsequent tribunals have opined that loans, government bonds, and related security entitlements can constitute protected ‘investments’ under the broad headings of the relevant BIT’s definition of investment, such as ‘assets’, ‘claims to money’,...
or ‘obligations’. Some tribunals have held that whilst certain financial transactions taken in isolation might not qualify as investments, they may nevertheless be so considered if the overall operation of which they are part, or to which they are connected, constitutes an investment.\(^{(78)}\)

8.36 In order to determine whether a purported ‘investment’ qualifies for protection under the treaty, it may be necessary to consider the conditions under which the investment was admitted into the host state.\(^{(79)}\) Investments procured by fraud or corruption, or made in violation of the host state’s public policy laws or international principles of good faith, will generally not be protected. For instance, the tribunal in Inceysa Vallisoletana Sl v Republic of El Salvador\(^{(80)}\) declined jurisdiction on the basis that the investment, a concession contract, was obtained through fraud. And in Phoenix Action Ltd v Czech Republic,\(^{(81)}\) the tribunal declined jurisdiction on the basis that the claimant’s acquisition of an interest in two Czech companies for the sole purpose of bringing a claim against the Czech Republic was not an ‘investment’ under the BIT, because it was not made in good faith.

8.37 Moreover, some treaties contain conditions requiring that the investment be specifically approved, or ‘classified’, by the host state. In Philippe Gruslin v Malaysia,\(^{(82)}\) the tribunal declined jurisdiction on the ground that the concerned investment was not made in a project approved by Malaysia, which was a precondition to accessing the protection of the agreement. However, some tribunals have prevented states from relying on formal requirements where the investment has otherwise been clearly approved by the state. In Desert Line Projects LLC v The Republic of Yemen,\(^{(83)}\) the tribunal upheld its jurisdiction despite the claimant’s failure to produce an ‘investment certificate’—a requirement under the BIT. The tribunal did not consider that the granting of a specific certificate was an indispensable formality for jurisdictional purposes and it emphasised that the investment had been endorsed at the highest level of the state.

8.38 In addition to satisfying the definition of ‘investment’ in the BIT, several tribunals have required that an investment also possess certain objective characteristics in order to qualify for protection. This case law was developed in the context of Article 25 of the ICSID Convention, which requires that legal disputes arise directly out of an ‘investment’.\(^{(84)}\) The Convention, however, does not define the term ‘investment’,\(^{(85)}\) leaving it to contracting states to do so, such as by means of BIT clauses. However, certain tribunals and commentators have opined that the term ‘investment’ in the ICSID Convention must be understood as setting ‘outer limits’ to, or mandatory requirements for, ICSID’s jurisdiction that cannot be left to the discretion of the parties.\(^{(86)}\) In this regard, it is often noted that a simple contract for the sale of goods, without more, could not qualify as an investment under Article 25 of the Convention, even if this were the subject of an agreement by the parties.\(^{(87)}\)

8.39 The tribunals that adhere to this view typically apply some version of the so-called Salini test, which was laid out in Salini v Morocco—although it originally derives from Fedax v Venezuela.\(^{(88)}\) The tribunal in that latter case opined that ‘[t]he basic features of an investment have been described as involving 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’.\(^{(89)}\)

8.40 Among the tribunals that have applied the Salini test, there is disagreement as to how it should be applied and which factors should be considered. Perhaps the most controversial aspect is whether (and to what extent) investments must contribute to the economic development of a state (a factor drawn from the Preamble of the ICSID Convention\(^{(90)}\)). The tribunal in LEB SpA and ASTALDI SpA v People’s Democratic Republic of Algeria\(^{(91)}\) considered this requirement to be irrelevant. By contrast, the ad hoc committee in Patrick Mitchell v Democratic Republic of the Congo\(^{(92)}\) held that ‘the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful’.\(^{(93)}\)

8.41 Other tribunals, however, reject the Salini test as inappropriately narrowing the definition of ‘investment’ in the investment treaty. The annulment committee in Malaysian Historical Salvors, SDN, BHD v Malaysia\(^{(94)}\) decided, by majority, to annul the original sole arbitrator’s decision that a salvage contract was not an ‘investment’ under Article 25 of the ICSID Convention because it did not sufficiently contribute to Malaysia’s economic development. The decision rejected the elevation of the Salini criteria to jurisdictional conditions and criticised the arbitrator’s failure to apply the broad definition of investment in the applicable BIT.

8.42 This doctrine of the objective notion of investment has recently been applied outside the ICSID context, in an UNCITRAL case: Romah SA (Switzerland) v Republic of Uzbekistan.\(^{(95)}\) In that case, the tribunal was asked to determine whether a transfer of title to wheat amounted to an investment. Referring to the ‘inherent meaning’ of the term ‘investments’ under the BIT—which the tribunal held included a contribution over a certain period of time involving some risk—the tribunal concluded that this one-off transaction did not constitute an investment. This approach in a non-ICSID context was criticised in Guaracachi America Inc. and Rurelec Plc v Plurinational State of Bolivia,\(^{(96)}\) in which it was held that:
8.43 Whilst the notion of investment has been expanding, it has its limitations. As noted already, ordinary commercial transactions are generally not protected by investment treaties or the ICSID Convention. In other cases, tribunals have found that bank guarantees contingent on a sales contract and expenses incurred in bidding for a public contract were not investments under the applicable BIT.

8.44 Moreover, in some recent BITs, states have narrowed the scope of protection by expressly excluding portfolio investments and commercial contracts, or by requiring that investments have certain inherent characteristics by reference to criteria associated with the Salini test. Other states have limited the scope of their BITs by excluding certain classes of dispute arising out of investments in certain sectors, which are permitted to do under Article 25(4) of the ICSID Convention, although such exclusions are unlikely to affect treaties already in place.

(d) Consent and conditions to access investment treaty arbitration

8.45 In order to access arbitration under a treaty, both parties must consent. Host states set out their consent in the text of the investment treaties. Typically, the consent will include procedural preconditions to be fulfilled, such as the written notification of a dispute and the expiry of a specified period within which the investor seeks to engage the host state in amicable consultations (also known as a 'cooling-off period'). Other treaties require the investor to pursue remedies before the courts of the host state for a minimum period prior to commencing arbitration. The question arises: what happens if an investor fails to comply with such conditions?

8.46 The level of detail required for notifications of dispute sent under investment treaties depends upon the requirements set out in the text of the treaty and their interpretation. Several tribunals have held it to be unnecessary for the investor to ‘spell out its legal case in detail’, or even to allege a breach of the BIT itself, during the initial negotiation process and that it is sufficient for it to inform the state of the allegations that may later be invoked to engage the host state’s international responsibility before an international tribunal. Other tribunals, including the tribunal in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* and *Burlington Resources Inc. v Republic of Ecuador*, have held that a notification must refer to specific breaches of the BIT and have declined jurisdiction over one of several claims on the basis that it had not been specifically notified.

8.47 An important question arises as to whether consultation periods are procedural or jurisdictional in nature. If procedural, then failure to comply with the requirement of the clause is frustrated (for example when the host state has failed to engage in discussions) does not impact on the consent to arbitrate. For example, in *Ronald S Lauder v The Czech Republic*, the tribunal waived the waiting period in the following terms:

However, the Arbitral Tribunal considers that this requirement of a six-month waiting period of Art VI(3)(a) of the Treaty is not a jurisdictional provision, ie a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (Ethyl Corp v Canada, UNCTRAL June 24, 1998, 38 ILM 708 (1999), paras 74-88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.

8.48 Similarly, the tribunal in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* held that the six-month amicable settlement period under the BIT was 'procedural and directory in nature', the purpose of which was 'to facilitate opportunities for amicable settlement ... not to impede or obstruct arbitration proceedings'.

8.49 Similar approaches have been adopted with other preconditions to arbitration, such as the obligation to pursue local court remedies for a set period of time before accessing arbitration irrespective of whether or not the local court had issued a decision. In the case of *BG Group v Republic of Argentina*, a treaty requirement to submit the dispute to the Argentine courts for eighteen months (without any obligation to be bound by the result, or even to reach a decision) before accessing arbitration was not held to be 'an absolute impediment to arbitration' in the particular circumstances. The circumstances were that the host state had severely restricted access to those local courts.

8.50 Other tribunals, however, have held that conditions to access arbitration under a BIT, such as consultation periods, are jurisdictional prerequisites. For instance, in *Guaracachi America Inc. and Rurelec PLC v Plurinational State of Bolivia*, the tribunal concluded that it lacked jurisdiction over certain claims because the claimants failed to observe a six-month ‘cooling-off period’, even though it considered that to have done so would have been likely to prove futile.

8.51 A separate issue is whether preconditions to arbitration can be avoided (or replaced) by relying on the ‘most favoured nation’ (MFN) clause of the applicable treaty in order to access more favourable preconditions in other treaties concluded by the host state of the
investment. There is much debate as to whether MFN clauses can be applied to dispute settlement clauses in investment treaties.

8.52 This possibility was upheld by an ICSID tribunal in the Maffezini case. (115) Mr Maffezini was an Argentine investor, who had a dispute with the Government of Spain arising out of an investment that he had made in Spain. He submitted his dispute to ICSID arbitration under the Spain–Argentina BIT, (116) despite the fact that the treaty had a dispute settlement clause requiring prior recourse to local courts for a period of eighteen months. Mr Maffezini pointed out that the MFN clause of the Spanish treaty obliged Spain to treat investors of Argentina no less favourably than third-party investors. Consequently, rather than taking his dispute to local courts, he invoked the MFN clause of the Spanish treaty in order to rely on the more favourable dispute settlement clause of another BIT concluded between Spain and Chile. (117) This treaty provided for access to international arbitration after only a six-month negotiation period.

8.53 The ICSID tribunal held that the text of the MFN clause of the Spanish treaty embraced the dispute settlement provisions of that treaty. Therefore, relying on the more favourable arrangements contained in the Chile–Spain BIT and, inter alia, the legal policy adopted by Spain with regard to the treatment of its own investors abroad (whereby it generally tried to secure for them the right to access international remedies without prior recourse to local remedies), Mr Maffezini had the right to submit the dispute to international arbitration without first accessing the Spanish courts. This position was upheld by a number of later tribunals, (118) but has not been unanimously adopted. In Wintershall Aktiengesellschaft v Argentine Republic, (119) the tribunal declined jurisdiction on the basis that the MFN clause did not embrace the dispute resolution provision.

(e) Bilateral investment treaties and contractual dispute resolution clauses

8.54 Another issue is whether a state's consent to arbitration in a BIT is overridden by an exclusive choice-of-forum clause in a related investment contract. Tribunals have generally held that, as long as the arbitration claims allege a cause of action under the BIT, they are not subject to the contractually elected jurisdiction. In Lanco v Argentina, (120) for example, the contract contained an exclusive jurisdiction clause in favour of the Argentine courts. Argentina argued that this clause applied and that the dispute was not within the jurisdiction of the ICSID tribunal. The tribunal rejected this argument, holding that the exclusive jurisdiction clause in the contract could not exclude the jurisdiction of the ICSID tribunal in relation to the BIT claim. Each claim had a separate source (one was based in contract and the other on the BIT) and each source had a separate dispute resolution provision.

8.55 In the Vivendi case, (121) the relevant investment was a concession contract concluded by the claimant with Tucumán, a province of Argentina. The claims concerned acts by Tucumán authorities interfering with the claimant’s rights under the concession contract. Argentina argued that the dispute resolution clause of the contract, establishing the jurisdiction of the local courts for the purpose of interpretation and application of the contract, precluded jurisdiction under the French treaty. Rejecting this argument, an ICSID annulment committee held that:

Where ‘the fundamental basis of a claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in the contract between the Claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. (122)

The committee went on to state that BIT claims often involve taking into account the terms of a contract in determining whether there has been a breach of the BIT. This does not prevent the claims being BIT claims for which treaty arbitration is available.

8.56 The case law also suggests, however, that there may be cases in which the claims are, in reality, linked to the underlying contract only, so that the contract is the ‘fundamental basis’ of the claims, rather than the BIT. In this case, the contract clause may apply even if the claims are formally ‘dressed up’ as BIT claims. (123) This issue is further complicated by the issue of observance of undertakings, or ‘umbrella’, clauses in which the treaty apparently elevates contractual rights to the level of treaty rights. In such cases, purely contractual claims may also be categorised as treaty claims and jurisdiction should be granted. In such cases, there may be issues of admissibility where the relevant contract also includes an exclusive jurisdiction clause. (124)

(f) Parallel claims before local courts

8.57 Another question that arises is whether consent to arbitration is affected by the pursuit of remedies before a local court through the operation of a so-called fork in the road provision. Many dispute settlement clauses of BITs provide that investors may choose to submit a dispute either to the local courts of the host state or to arbitration, and once made, the choice is final. (125) Thus if the investor has already submitted the investment dispute to the local courts, it may no longer resort to arbitration. Hence the ‘fork in the road’.

8.58 Most tribunals have generally held that ‘fork in the road’ clauses bar arbitration claims under a treaty only where there is a ‘triple identity’, with the same object, parties,
and cause of action being pursued simultaneously before local courts and in arbitration. As the tribunal in Toto Construzioni Generali Spa v Lebanon held:

In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is ‘on a different road,’ i.e. that a claim with the same object, parties and cause of action, is already brought before a different judicial forum. (126)

8.59 Since disputes submitted to local courts tend to relate to contractual or regulatory issues that are distinct from the BIT breach issues submitted to arbitration, they do not usually trigger the fork-in-the-road provision. (127) As stated by the CMS tribunal in its decision on jurisdiction: ‘As contractual claims are different from treaty claims, even if there had been or there was a recourse to local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.’ (128)

8.60 The case law, however, is not unanimous on this subject. In the Pantechniki award, (129) the tribunal dismissed a claim by the same claimant based on a fork-in-the-road clause because the ‘fundamental basis of the claim’ in the arbitration matched that of the local court proceeding. In this regard, the tribunal noted that the prayer for relief in the local court proceedings—namely, of payment amounts due under a contract—matched the relief sought before the tribunal:

To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same ‘fundamental basis’. The Claimant’s grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID. (130)

8.61 Moreover, much may depend on the language of the treaty. Where a claimant is simultaneously pursuing a local remedy in respect of the same measures, (131) a tribunal constituted under an investment treaty should look carefully at whether the fork-in-the-road provision is limited to claims under the treaty, or merely to the resolution of a dispute arising out of the investment.

C Law Applicable to the Substance of the Dispute

8.62 Bilateral investment treaties do not always contain specific provisions on the law to be applied by arbitral tribunals appointed to resolve disputes under the treaties. Those BITs that do contain applicable law provisions often list both international law and domestic law, without indicating which is pre-eminent or how they are to be combined. By way of example, Article 8 of the United Kingdom–Argentina BIT (132) provides that:

The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflicts of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.

8.63 Where the investment treaty is silent as to the applicable law, other instruments may provide guidance. Article 35(1) of the 2010 UNCITRAL Arbitration Rules provides that, failing a designation of the applicable law by the parties, ‘the arbitral tribunal shall apply the law which it determines to be appropriate’. (133) Article 42 of the ICSID Convention provides that, in the absence of an agreement on the applicable law, ‘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’.

8.64 Ultimately, however, whether or not a BIT specifies the applicable law, the tribunal will apply and accord a controlling role to international law. (134) Because BITs are international law instruments, international law is applicable by virtue of the 1969 Vienna Convention on the Law of Treaties, which provides that treaties are ‘governed by international law’ and must be interpreted in the light of ‘any relevant rules of international law applicable’. (135)

8.65 In this regard, in the AAPL v Sri Lanka case, (136) which was brought under the Sri Lanka–United Kingdom BIT, (137) the tribunal held the BIT to be the ‘primary source of the applicable legal rules’, and added that the BIT was not a ‘closed legal system’, but had to be seen in the ‘wider juridical context’ of international law. This led the tribunal to apply general international law to complement the provisions of the BIT. Similarly, the annulment committee in the Vivendi case held that:

[I]n respect of a claim based upon a substantive provision of that BIT ... the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law ... (138)

8.66 International law provides the standard by reference to which the legality of the conduct of the host state is to be assessed. (139) This is made clear in Article 3 of the International Law Commission’s Draft Articles on State Responsibility, (140) which provides that the ‘characterisation of an act of a State as internationally wrongful is
In this sense, it may be necessary to refer to international law in order to interpret the terms of an investment treaty. For instance, while investment treaties generally include provisions regarding the expropriation of investments, they typically do not define the term ‘expropriation’. Tribunals can therefore refer to the concept of expropriation under customary international law in order to interpret the scope and content of the investment treaty. The application of international law, however, does not allow claimants to assert claims under customary international law as an independent cause of action.

The applicable law provisions in investment contracts or other agreements forming part of the background of the dispute do not preclude the application of international law. In Wena Hotels Ltd v Egypt, the annulment committee rejected the argument that the applicable law clauses of the lease agreements between Wena Hotels and an Egyptian state authority, which selected Egyptian law, applied to the BIT dispute:

The leases deal with questions that are by definition of a commercial nature. The [BIT] deals with questions that are essentially of a governmental nature, namely the standards of treatment accorded by the State to foreign investors. It is therefore apparent that Wena and EHC agreed to a particular contract, the applicable law and the dispute settlement arrangement in respect of one kind of subject, that relating to commercial problems under the leases. It is also apparent that Wena as a national of a contracting state could invoke the [BIT] for the purpose of a different kind of dispute, that concerning the treatment of foreign investors by Egypt. This other mechanism has a different and separate dispute settlement arrangement and might include a different choice of law provision or make no choice at all. [...] This Committee accordingly concludes that the subject matter of the lease agreements submitted to Egyptian law was different from the subject matter brought before ICSID arbitration under the [BIT].

This approach does not ignore domestic law or the text of Article 42(1) of the ICSID Convention set out earlier. However, it should be remembered that the Convention was itself drafted principally with investor–state contracts in mind, in which domestic law would play the critical, if not exclusive, role. Treaty interpretation, however, calls for a different approach. If a domestic legal system were to provide rules of decision, then a state could simply legislate itself out of a breach of treaty, contrary to Article 27 of the Vienna Convention (‘[a state] may not invoke the provisions of its internal law as justification for its failure to perform a treaty’). As the tribunal held in the Santa Elena case:

To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated.

This does not mean that the domestic law of the host state does not have a role to play. The domestic law of the host state will be taken into consideration in order to establish the facts to be analysed in determining whether the state is liable under the investment treaty. For instance, a tribunal will consider domestic law in determining whether particular assets or rights constituting an alleged investment exist and in whom they vest; the question of whether these assets or rights constitute an investment under the treaty will, however, be a question governed by the treaty and international law.

Similarly, the domestic law of the host state will typically constitute evidence of the measures taken by the state that are alleged to be in breach of the treaty, since the misconduct of the state will usually manifest itself through internal legal acts. The analysis of whether these acts or measures engage the host state’s liability under the treaty will, however, be governed by the terms of the treaty and international law.

The practice of BIT tribunals has been summarised by one commentator as follows:

The principle that treaties are on the plane of international law is too well established to warrant much argument. Therefore, alleged breaches of a BIT by a state are prima facie governed by international law. Be that as it may, the complex questions that arise in foreign investment disputes cannot simply be answered by a prior assumption of the sole applicability of international law. As is always the case, foreign investments are intrinsically connected to the national law of the host state. Suffice to say that questions as to whether an investment is properly made or whether a measure or regulation taken by a state meets the threshold of treaty violation may not be disposed of without a thorough examination of that state’s national law. Even if the relevant treaty does not provide for a choice of substantive law, arbitrators still have the obligation to consider the relevant national laws of the host state, with the caveat that such law may not be applicable if it is contrary to the obligations assumed by the state under the treaty – the principle that a state cannot rely on its internal laws to derogate from or modify its treaty obligations. To that extent, it is conceded that the arbitrators may have a certain margin and power of interpretation.

Potential conflicts between international and domestic law often fall away when tribunals take note that international legal principles and treaties are frequently
incorporated into domestic law, as did the tribunal in BG Group PLC v Republic of Argentina:

[T]he challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as 'the supreme law of the land', are incorporated into Argentine domestic law, superseding conflicting domestic statutes. (149)

8.74 As for conflicts between two international law instruments, these also often fall away, because it is possible to interpret both instruments harmoniously. Such issues have arisen in the context of BITs entered into by a non-EU member state with an EU member state when the former accedes to the European Union. The newly acceded states have argued that their BIT obligations were terminated, or modified, as a result of their accession. For instance, in Achmea BV v Slovak Republic, (150) the Slovak Republic argued that the Netherlands–Slovakia BIT was terminated, and its dispute settlement clause inapplicable, as a consequence of Slovakia's accession to the European Union, because the BIT was incompatible with Slovakia's obligations under EU law. The tribunal disagreed, holding that the BIT established rights that were neither duplicated by nor incompatible with EU law. The tribunal also held that the fact that it was bound to apply EU law to the extent that it formed part of the applicable laws did not deprive it of jurisdiction. (151)

8.75 In Electrabel SA v Republic of Hungary, (152) the claimant brought a claim under the ECT (of which the European Union is a member) in relation to the termination of an agreement by Hungary, carried out in compliance with a European Commission directive. The tribunal held that (a) European law formed part of international law, and was therefore applicable to the dispute under the ECT, and (b) European law, as part of Hungary's national law, should also be taken into account as a fact relevant to the dispute. (153) The tribunal held that there was no inconsistency between the ECT and European law, which should, in any event, be interpreted harmoniously. However, the tribunal held that, had it found an inconsistency between the two, EU law would prevail over the ECT. (154)

8.76 Finally, it should be noted that although there is 'a progressive emergence of rules through lines of consistent cases on certain issues', (155) there is no doctrine of precedent in investment treaty arbitration. (156) Therefore while investment treaty case law may be a subsidiary means for the determination of rules of international law, (157) tribunals are not bound by the decisions of other tribunals. Commenting on this issue, the tribunal in the SGS Société Générale de Surveillance SA v Republic of the Philippines case noted:

Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or jurisprudence constante, to resolve the difficult legal questions … (158)

8.77 The consequences of failing to identify and apply the applicable law may be grave. It can expose the tribunal's award to a challenge, or even annulment. Indeed, in the ICSID context, ad hoc committees annulled the awards rendered in Enron v Argentina and Sempra v Argentina on the basis that the arbitral tribunals exceeded their powers by failing to apply the applicable law. (159)

D Merits of the Dispute

8.78 If jurisdictional hurdles are overcome, the question arises whether the host state has breached its substantive treaty obligations. There is a surprising degree of uniformity between substantive protections in the treaties, aided by model treaties established as negotiating models by the main capital-exporting nations. The essential protections are:

- the protection against expropriation or measures equivalent to expropriation without compensation;
- the right to be treated fairly and equitably;
- the right to full protection and security;
- the protection against arbitrary or discriminatory treatment;
- the right to national and MFN treatment;
- the right to the free transfer of funds and assets; and
- the protection against a state's breaches of its investment obligations and
(a) No expropriation without prompt, adequate, and effective compensation

8.79 The obligation to compensate for expropriation is among the most crucial protections provided by investment treaties. This provision is frequently relied upon by foreign investors in treaty arbitration. The expropriation provisions in investment treaties are quite similar. A typical provision is, for example, Article 3(1) of the United States–Argentina BIT, (161) which states:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose, in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

8.80 Thus, in order to be lawful, BITs generally require that the expropriation be (a) for a public purpose, (b) non-discriminatory, (c) in accordance with due process, and (d) upon payment of prompt, adequate, and effective compensation.

(i) Direct expropriation

8.81 A direct expropriation involves the outright physical seizure of a foreign investor's property, or the title to such property, by the host state. In such cases, 'there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure'. (162) For instance, in Funnehottar v Zimbabwe, (163) the tribunal held that Zimbabwe had expropriated the claimants' investments in commercial farms by means of a government land acquisition programme, as well as by means of actual physical invasions.

(ii) Indirect expropriation

8.82 It is now a well-accepted principle of international law that expropriation may occur indirectly, by measures resulting in a substantial deprivation of the use and value of the investment, even though the actual title of the asset remains with the investor. (164) As explained in Ronald S Lauder v The Czech Republic: "The concept of indirect (or "de facto", or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property." (165)

8.83 International arbitral tribunals have recognised this principle and upheld claims for indirect expropriation when the state has not seized the investment, but has taken measures that have destroyed its value.

8.84 For example, in Total v Argentina, the tribunal explained:

[Undertaken international law a measure which does not have all the features of a formal expropriation could be equivalent to an expropriation if an effective deprivation of the investment is thereby caused. An effective deprivation requires, however, a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if formal title continues to be held. (166)

8.85 Indirect expropriation can also arise from a deprivation of control or interference in management by the state, thus preventing the investor from controlling the day-to-day operation of the investment. Such measures would include:

... depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part. (167)

In evaluating the degree to which the host state's measures have interfered with the investor's rights, tribunals typically consider the economic impact of the measures on the investment, their interference with the investor's reasonable expectations, and their duration. (168)

8.86 Under exceptional or 'extreme' circumstances, the imposition of taxes, which are considered part of a state's regulatory powers, can be expropriatory. In the Burlington case, (169) the tribunal explained that 'a tax measure may be tantamount to expropriation if (i) it produces the effects required for any indirect expropriation and (ii) in addition, it is discriminatory, arbitrary, involves a denial of due process or an abuse of rights'.
(iii) Acts contrary to undertakings and assurances granted to investors may constitute indirect expropriation.

8.87 States may also expropriate foreign investments by means of measures that interfere with assurances that they offered to investors to induce them to invest. The assurances that a state offers to create a favourable investment environment may amount to essential conditions for those investments and, as such, may form part of the legal framework underlying, and protecting, those investments. A failure by the state to honour those undertakings may give investors who reasonably relied on them a right to compensation.

8.88 International arbitral tribunals have held that government assurances and undertakings create ‘acquired rights’ for investors. (170) The rationale is simple. Investors looking to invest in developing countries cannot predict with confidence that conditions of stability and security will exist throughout the period of their investment; thus the state provides certain core promises to foreign investors (in contracts or licenses), which motivate the decision to invest. If those promises are unilaterally withdrawn by the state within the agreed lifespan of the investment (for example a thirty-year concession) in a manner that destroys the value of the investment, then an indirect expropriation may have occurred. (171)

8.89 The tribunal in CME v Czech Republic (172) reached such a conclusion when it was asked to consider the expropriation claim of an investor in a joint venture in the Czech Republic. The investor alleged that the joint venture collapsed after the Czech broadcasting authority forced the investor to give up its exclusive licensing rights and changed other key terms of the joint venture agreement. The tribunal held that the acts of the Czech regulatory authority interfered with the ‘economic and legal basis of CME’s investment’ and ‘destroyed the legal basis (“the safety net”) of the Claimant’s investment’, which ruined the ‘commercial value of the investment’ and thus amounted to expropriation.

8.90 However, in the absence of such government assurances or undertakings, the effects alone (as grave as they may be) may be insufficient to constitute expropriation. In the Methanex case, (173) the tribunal held that a non-discriminatory, bona fide regulation within the police powers of the state, which banned a harmful gasoline additive containing methanol, had not expropriated Methanex, a Canadian producer of methanol, in the absence of a breach of specific commitments by the state.

8.91 Similarly, a simple breach of contract by a state does not amount to an expropriation in the absence of an act of the state in its sovereign (as opposed to contractual) capacity. (174) The Waste Management (175) tribunal explained: ‘[i]t is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent to, tantamount to, an expropriation.’ Tribunals have nevertheless found that contractual rights were expropriated where a state acted in a sovereign manner by terminating a contract by decree, (176) and following a series of ‘sovereign acts designed illegitimately to end the concession or to force its renegotiation’. (177)

8.92 In sum, the paramount concern of tribunals in indirect expropriation cases is whether a state’s interference with prior assurances that it gave to an investor, be it direct or indirect, express or covert, creeping or not, deprives the investor, in whole or in significant part, of the use or reasonably expected benefit of its investment. (178)

(iv) Purpose of the host state’s measures does not affect their characterisation.

8.93 The form of measures or their motive is irrelevant if the effect is to deprive the owner of the economic benefit of the asset. This is an enquiry based on effect, rather than intention. (179) Arbitral tribunals have held that it is immaterial that the property was expropriated for laudable environmental reasons, (180) or as part of the political reorientation of the country. (181)

8.94 Although the purpose of an expropriatory measure may affect its legality, it does not affect the host state’s obligation to provide the expropriated investor with prompt and adequate compensation. This point was affirmed by the ICSID tribunal in Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica:

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies; where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains. (182)

8.95 Whilst considering whether there has been expropriation in a particular case, a tribunal need not examine each state measure in isolation. If the cumulative effect of multiple state measures is substantially to deprive the investor of the use, value, and enjoyment of its investment, expropriation may still be construed. (183) This is known as ‘creeping expropriation’. As the tribunal noted in Siemens AG v The Argentine Republic: By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back.
The preceding straws may not have a perceptible effect but are part of the process that led to the break. (184)

(b) ‘Fair and equitable treatment’ and the international minimum standard

8.96 Almost all investment treaties require host states to accord ‘fair and equitable treatment’ to investors of the other contracting state. (185) It is the treaty standard most frequently invoked before investment tribunals and the one most frequently found to be breached. To highlight the significance of this standard of protection, it is frequently addressed at the beginning of the general treatment clauses. For example, Article II(2)(a) of the United States–Argentina BIT (186) provides: ‘Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.’

8.97 It is difficult to reduce the words ‘fair and equitable treatment’ to a precise statement of a legal obligation. They grant considerable discretion to tribunals to review the ‘fairness’ and ‘equity’ of government actions in light of all of the facts and circumstances of the case. (187)

8.98 International arbitral tribunals called upon to decide cases on the basis of the ‘fair and equitable treatment’ standard have developed the elements of the obligation that it imposes upon states. (188) In accordance with the ‘plain meaning’ approach required by the Vienna Convention, tribunals have concluded, based on the object and purpose of the treaties, that the standard is intended to accord to foreign investors broad objective protections. These include a stable and predictable investment environment, in order to maximise investments. (189) As the tribunal noted in LG&E Energy Corporation and ors v Argentine Republic:

[T]he stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law. (190)

8.99 International arbitral tribunals have identified the protection of investors’ legitimate expectations as the ‘dominant element’ (191) of the fair and equitable treatment standard. In order to determine if a state’s measures violate the standard, tribunals frequently examine ‘the impact of the measure on the reasonable investment-backed expectations of the investor; and whether the state is attempting to avoid investment-backed expectations that the state created or reinforced through its own acts’. (192) It is on this basis that the UNCITRAL ad hoc tribunal in CME v Czech Republic (193) found that the Czech Republic’s legislative and regulatory changes had unlawfully harmed CME’s investment by altering the country’s investment framework, and held that the government had ‘breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest’.

8.100 In Técnicas Medioambientales Tecmed SA v The United Mexican States, (194) the basic expectation of the claimant was that the laws applicable to its investment in a landfill for hazardous waste would be used by the government for the purpose of assuring compliance with the environmental and health goals underlying such laws. In particular, upon making its investment, the claimant ‘reasonably trusted, on the basis of existing agreements and of the good faith principle’ that the permit it acquired in order to make its investment, as explained by the tribunal in LG&E:

[T]he investor’s fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor’s fair expectations cannot fail to consider parameters such as business risk or industry’s regular patterns. (197)

8.102 It has been held that failure to ensure due process, consistency, and transparency in the functioning of public authorities, (198) and the lack of a predictable and stable framework for investment contrary to the legitimate expectations of the investor and commitments made by the host state, (199) are breaches of fair and equitable treatment standards. (200) The legal stability requirement does not require that a state’s legal system remain frozen in time. However, legislative changes that are unfair and inequitable in the face of specific commitments to the contrary may constitute a compensable treaty breach:

Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment ... What is prohibited however is for a
State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.

8.103 The fair and equitable standard has also been held to be breached by the effective discrimination of host states in favour of domestic entities. In *Eastern Sugar BV v The Czech Republic*, (202) the claimant invested in sugar factories in the Czech Republic. Those subsidiaries were then targeted by a decree passed by the Czech authorities in a very different manner from its application to domestic entities. (203) As explained by the tribunal, ‘the Czech Republic penalized a foreign company that had done nothing illegal in the previous years, while Czech newcomers who had exceeded their quota within the previous years were now rewarded for having done so’. (204) As a result, the tribunal held that the effect of one of the decrees was discriminatory, and therefore in violation of the Netherlands–Czech and Slovak Federal Republic BIT. (205)

8.104 The standard also requires host states to offer basic protections in their internal judicial systems. Failure to provide such protection is categorised as ‘denial of justice’. (206) Such a finding can be made ‘whenever an uncorrected national judgment is vitiated by fundamental unfairness’. (207) Specifically, the tribunal in *Azinian v Mexico* (208) explained how such a claim could be advanced in the following terms:

[A] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way … There is a fourth type of denial if justice, namely the clear and malicious misapplication of the law. (209)

8.105 In summary, it is therefore now possible to identify certain kinds of conduct and treatment that would be likely to constitute a violation of the fair and equitable treatment standard. As explained by the tribunal in *Joseph Charles Lemire v Ukraine*, (210) the standard requires ‘an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm’. In assessing that threshold of propriety, that tribunal will consider whether:

- the state has failed to offer a stable and predictable legal framework;
- the state made specific representations to the investor;
- due process has been denied to the investor;
- there is an absence of transparency in the legal procedure or in the actions of the state;
- there has been harassment, coercion, abuse of power, or other bad faith conduct by the host state; and
- any of the actions of the state can be labelled as arbitrary, discriminatory, or inconsistent. (211)

(i) International minimum standard and fair and equitable treatment

8.106 There is disagreement over whether the concept of ‘fair and equitable treatment’ is synonymous with the minimum standard of protection required by customary international law, or whether it represents an independent concept requiring greater protection. (212) Under customary international law, the minimum standard has traditionally been understood to be based on a standard of review that was set out in the 1926 *Neer* decision of the United States–Mexico General Claims Commission:

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. (213)

8.107 The *Neer* standard, however, has been subject to considerable criticism on the grounds that ‘it did not lay down a general rule’ and is of only ‘limited import’ in the interpretation of investment treaties. (214)

8.108 In an oft-cited article on British investment treaty practice, one commentator concluded that:

[T]he terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words … The terms are likely to be understood and applied independently and autonomously. (215)

8.109 Unless there is a clear and express link with the minimum international standard, tribunals have overwhelmingly interpreted fair and equitable treatment provisions in BITs as an independent and self-contained treaty standard with an autonomous meaning, which provides protections beyond the customary international law standard. (216)
8.110 A difficulty occurs when treaties link the fair and equitable standard to ‘international law’. Typical language is ‘fair and equitable treatment in accordance with international law’. The argument has frequently been made that this type of reference restricts the protection to the customary international law minimum standard of treatment. (217) However, several tribunals have concluded that this cannot be the case, since ‘international law’, as a general reference, must also take into account treaty practice. As the tribunal in the Vivendi case held:

The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone.... [T]he language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago. (218)

8.111 But what happens where there is a clear reference to the customary international law standard, and is it different from a stand-alone fair and equitable treatment standard? Some tribunals have concluded that the evolution of the customary standard makes the analysis a distinction without a difference. (219) For example, the NAFTA tribunal in Mondev v United States, (220) applying the customary international law standard, made a clear distinction with the Neer standard and held that: ‘To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.’ (221)

8.112 It is clear that there is significant overlap between the customary and the treaty standards, and that the distinctions between the two ‘may well be more apparent than real’. (222) In recent years, BIT tribunals have ‘seemed to be less interested in the theoretical discussion on the relationship between the FET and the MST [minimum standard of treatment] and turned their attention primarily to the content of the FET [fair and equitable treatment] obligation, whether or not it is qualified by the MST’. (223)

(c) Full protection and security

8.113 As in the case of ‘fair and equitable treatment’, it is difficult to give a precise meaning to the notion of ‘full protection and security’. However, its scope may be illustrated by reference to its practical application. In contrast with most of the other investor protections, which impose restrictions or prohibitions on certain types of host state activity, the ‘full protection and security’ clause seeks to impose certain positive obligations on the host state to protect investments.

8.114 Arbitral tribunals have traditionally found breaches of the ‘full protection and security’ obligation in situations in which the host state failed to prevent physical damage to qualifying investments by not taking measures that fell within the normal exercise of governmental functions of policing and maintenance of law and order. (224) In Vattenfall v Sri Lanka, (225) the tribunal held that Sri Lanka violated its obligation of full protection and security by not taking all possible measures to prevent the destruction of an investor’s shrimp farm and the killing of more than twenty of its employees during a counterinsurgency operation.

8.115 The standard applied is one of ‘due diligence’, or an obligation de moyens, requiring the host state to exercise reasonable care, within its means, (226) to protect investments, rather than a ‘strict liability’ standard. However, there is no need for the claimant to establish negligence or bad faith.

8.116 The obligation of the host state to provide full protection and security to investors is independent, and not relative to the level of protection provided by the state to its own nationals or to nationals of other states. Therefore the fact that the state did not protect the property of its own nationals is no defence to a claim by an investor of breach of this obligation. (227) However, the resources available to a state and the reasonable deployment of those resources will be elements that are taken into account. For example, if, in the context of civil disturbances, a factory belonging to a foreign investor were burned down because all of the police were protecting a neighbour’s domestic factory to prevent looting, liability might well be established. If, however, the police were fully engaged in protecting the population, and many local businesses, whether locally or foreign-owned, were damaged, it may be difficult to establish liability.

8.117 Whilst this standard has normally been applied in situations of physical protection of real and tangible property, its scope has been extended to other circumstances. (228) For instance, it has been held that withdrawal of an authorisation vital to the operation of the investment amounts to a breach of ‘full protection and security’. (229) Similarly, a change in the legal framework, making it impossible to preserve and continue contractual arrangements underpinning the investment, has also been found incompatible with a BIT’s ‘full protection and security’ provision. (230)

(d) No arbitrary or discriminatory measures impairing the investment

8.118 Most investment treaties impose an obligation upon the host state not to impair the management or operation of the investment by arbitrary or discriminatory measures. (231)
For instance, Article II(3)(b) of the United States–Ecuador BIT provides: ‘Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments …’

8.119 The concepts of ‘arbitrary’, or ‘discriminatory’, measures are not defined in the treaties. The International Court of Justice (ICJ) formulated the test of ‘arbitrariness’ in the ELSI case. (233) The court observed:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law … It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. (234)

8.120 In the words of the tribunal in Joseph Charles Lemire v Ukraine, (235) arbitrariness is defined as:

[…]

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure. (236)

8.121 For instance, in the Azurix case, (237) involving an investment in a water concession, government measures that included inciting consumers not to pay their bills, requiring the concessionaire not to apply the new tariffs resulting from a review, and denying the concessionaire access to documentation on the basis of which it had been sanctioned, were considered to be arbitrary.

8.122 To take another example, in the El Paso case, (238) the tribunal concluded that measures taken by Argentina to address the economic crisis at the end of 2001 were reasonable, consistent with the aim pursued, had the desired result, and therefore were not tainted by arbitrariness. The tribunal observed that there were several methods that Argentina could have employed to address the crisis, that evidence presented by the experts demonstrated a difference of opinion as to which would have been the preferred solution, and that, ultimately, the measures resulted in the positive evolution of Argentina’s economy.

8.123 In relation to ‘discriminatory’ treatment, a measure is considered discriminatory if (a) ‘the intent of the measure is to discriminate’, or (b) ‘if the measure has a discriminatory effect’. (239) As a result, although evidence of discriminatory intent may be relevant, it is ‘the fact of unequal treatment which is key’. (240) Thus it is not essential to establish any bad faith on the part of the host state. (241) It has been held that, in general, a measure is discriminatory in effect if it results in a treatment of an investor that is different from that accorded to other investors in a similar or comparable situation, where there appears to be no reasonable basis for such differentiation. (242) The issue of whether investors are in such a comparable situation is a question of fact. Typically, tribunals have been reluctant to find that investors are in sufficiently comparable positions to take advantage of this protection.

(e) National and ‘most favoured nation’ treatment

8.124 Investment treaties also provide comparative protection standards—that is, standards that do not set an autonomous standard of treatment, but rather require treatment no less favourable than that of nationals and companies of the host state (national treatment), or of any other state (MFN treatment). Article 3(1) of the United Kingdom–Egypt BIT (243) is a representative provision:

Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

8.125 Being relative standards of protection, their scope cannot be defined in the abstract, but will vary according to the circumstances of each case. This requires an analysis of facts, including the protections and assurances granted by the host state to other investors. (245)

8.126 In order to succeed in a claim based on the national treatment or MFN provisions of a BIT, a claimant must establish that more favourable treatment has been granted to another foreign investor or national in similar circumstances. (244) The requirement for a
similar basis of comparison is explicit in NAFTA, which provides that national treatment applies only where the foreign and domestic investor are ‘in like circumstances’. Tribunals do not require proof of discriminatory or protectionist intent in order to find a treaty breach. However, the pursuit of legitimate policy objectives may justify differential treatment.

8.127 Traditionally, the MFN clause is relied on in the context of substantive rights. For example, the host state of an investment may provide tax concessions to French investors in the oil industry, but not to British investors in that industry. In those circumstances, the British investor could rely on the MFN clause to claim the same treatment or compensation for the loss suffered as a result of the discrimination. However, as seen earlier, tribunals in Maffezini and other cases have extended the application of this provision from substantive to procedural matters, such as the dispute resolution mechanism between the host state and investors. This trend has led to a new generation of investment treaties that include more deliberate language to exclude procedural rights from the reach of the MFN clause.

8.128 The presence of MFN clauses in investment treaties creates a diffusive effect of investor protection, as additional gains obtained by one state flow to other states. This can lead to the creation of a single ‘highest’ standard for all contracting parties to BITs with a particular state.

(f) Free transfer of funds related to investments

8.129 Many investment treaties provide guarantees relating to the free movement of funds. Article IV of the United States–Ecuador BIT provides:

Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation ‘pursuant to provisions of the treaty’; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the data of transfer with respect to spot transactions in the currency to be transferred.

8.130 This obligation entitles foreign investors to compensation if suddenly affected by currency control regulations, or other host state acts, which effectively confine the investor’s money in the host state. As is evident from the United States–Ecuador BIT, the free transfer provisions are broad in scope, being not limited to the invested funds, but covering any amounts derived from or associated with the investment, including profit, dividend, interest, capital gain, royalty payment, management, technical assistance or other fee, or returns in kind.

8.131 However, treaties often provide for exceptions to the free movement of funds by allowing host states to restrict transfers during unusual periods of low foreign exchange or balance-of-payments problems. Further, it may be permissible for the host state to maintain laws and regulations requiring reports of currency transfer, or to take measures for protection of creditor interests. Such regulations must nevertheless comply with the other investor treaty provisions requiring equitable and non-discriminatory treatment.

8.132 Despite their fundamental importance, few awards have considered free transfer of funds provisions in BITs. Following Argentina’s imposition of a ‘ring fence’ restricting transfers of currency abroad, several investors claimed a breach of ‘free transfer of funds’ BIT provisions. The tribunal in Metalpar v Argentina held that the claimants had not complied with the established procedure for transferring funds abroad (that is, seeking the authorisation of the central bank) and could not therefore complain that Argentina had breached the free transfer of funds provision in the Chile–Argentina BIT. The tribunal in Continental Casualty Co. v Argentine Republic noted that not every cross-border movement of funds will be ‘related to the investment’ and protected by the BIT. It held that the frustrated transfer at issue—a short-term placement to a bank account outside Argentina for the purpose of protecting the funds from the impeding devaluation—was not a transfer protected by the BIT.

8.133 In White Industries v India, the claimant alleged that the retention of bank guarantees by Coal India (a state-owned company) was a violation of India’s obligation to ‘permit all funds of an investor related to an investment to be transferred freely without unreasonable delay’ under the BIT. The tribunal, however, dismissed the claim, finding, inter alia, that the provision was meant to apply to the movement of capital and exchange of currency, not assertions of contractual rights.

(g) Observance of specific investment undertakings

8.134 Treaties often contain a so-called umbrella clause—that is, the obligation of the host state to respect specific undertakings towards investors. The final sentence of Article 2(2) of the United States–Argentina Treaty sets out such an ‘umbrella clause’, whereby the host state is required to observe specific obligations entered into with the investor: ‘Each
8.135 Unlike other treaty terms, umbrella clauses come in many varieties, and it is particularly important to consider the language of the specific clause in question. These linguistic differences have given rise to different interpretations as to the scope and meaning of these clauses.

8.136 There is disagreement as to the whether the legal effect of umbrella clauses is to elevate any breach of contractual obligations in direct agreements between states and investors to the level of treaty breach. The award in SGS v Pakistan (257) was the first to consider the issue of the scope of umbrella clauses. The tribunal concluded, on the terms of the particular clause in question, that it did ‘not believe that transmutation of SGS’s contract claims into BIT claims has occurred’ through the operation of such a clause.

8.137 The arbitral tribunal concluded that the legal consequences of such an interpretation of the BIT were ‘so far-reaching in scope, and so automatic and sweeping in their apparent operation, so burdensome in their potential impact upon the contracting party’, (259) that clear and convincing evidence had to be adduced by the claimant to demonstrate that such was the shared intent of the contracting parties to the BIT. In the absence of such evidence, the arbitral tribunal rejected the claimant’s interpretation, which would, according to the tribunal, amount to ‘incorporating by reference an unlimited number of state contracts as well as other municipal law instruments setting out state commitments including unilateral commitments to an investor of the other contracting party’. (260)

8.138 This limitative interpretation of umbrella clauses was rejected in another case (261) brought by the same investor against the Philippines under the Switzerland–Philippines BIT. (262) That case concerned Article X(2): ‘Each Contracting Party shall observe any obligation it may have entered into with regard to investments.’

8.139 The diverging approaches adopted by the SGS v Pakistan and SGS v Philippines tribunals have led to the development of conflicting lines of jurisprudence, which one leading commentator has grouped into four ‘camps’:

The first camp adopts an extremely narrow interpretation of umbrella clauses, holding that they are operative only where it is possible to discern a shared intent of the parties that any breach of contract is a breach of the BIT (SGS v Pakistan; Joy Mining v Egypt). The second camp seeks to limit umbrella clauses to breaches of contract committed by the host State in the exercise of sovereign authority (Pan American Energy v Argentina; El Paso Energy v Argentina).

A third view goes to the other extreme: the effect of Umbrella clauses is to internationalise investment contracts, thereby transforming contractual claims into treaty claims directly subject to treaty rules (Fedax v Venezuela; Eureko v Republic of Poland; Noble Ventures v Romania).

Finally there is the view that an umbrella clause is operative and may form the basis for a substantive treaty claim, but that it does not convert a contractual claim into a treaty claim. On the one hand it provides, or at least may provide, a basis for a treaty claim even if the BIT in question contains no generic claims clause (SGS v Philippines, CMS v Argentina (Annulment)); on the other hand, the umbrella clause does not change the proper law of the contract or its legal incidents, including its provisions for dispute settlement. (264)

8.140 Recent cases involving umbrella clauses have continued to divide into these camps. (265) For instance, in interpreting nearly identical umbrella clauses, the tribunals in BIVAC v Paraguay and SGS v Paraguay came to opposite conclusions. Both tribunals determined that the umbrella clause imports contractual obligations into the investment treaty. However, the BIVAC tribunal determined that the claim was inadmissible because the parties had agreed to the exclusive jurisdiction of national courts, (266) whereas the SGS tribunal determined that the forum selection clause was not a bar to its jurisdiction. (267) In the words of one commentator, ‘the situation seems to remain as uncertain today as it was 10 years ago when the first two SGS Tribunals were called to interpret and apply the clause for the first time in a legal vacuum’. (268)

E Measures of Compensation under Bilateral Investment Treaties

8.141 In the context of investment treaty arbitration, the term ‘compensation’ is commonly used to describe (a) a prerequisite for a lawful expropriation of private property, (b) one
form of reparation for injury caused by a state's unlawful act under international law, and/or (c) the obligation to pay damages as a consequence for a breach of contract. (269)

In customary international law, compensation is considered an alternative to restitution in the sense that 'restitution is a primary remedy for international wrongs, while compensation has a supplementary function in achieving the ultimate objective of reparation, viz wiping out all the consequences of the illegal act'. (270)

8.142 The quantification of compensation is left to the arbitral tribunal's discretion:

This is not a matter to be resolved simply on the basis of the burden of proof. To be sure, the tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it. (271)

8.143 A tribunal will award compensation, however, only if the party seeking it has established causation. As articulated by the majority in Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania:

Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the claimant]. (272)

8.144 The elements of causation include, inter alia, 'a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote'. (273) In other words, proof of causation requires cause, effect, and a logical link between the two. (274)

8.145 The issue of compensation can be usefully considered first in terms of remedies for expropriation and remedies for other international law breaches, before turning to certain ancillary issues (moral damages, interest, costs, and attorneys' fees).

(a) Expropriation remedies

8.146 The almost universal standard of compensation in expropriation established by BITs for lawful expropriations is the 'fair market value' of the investment immediately prior to the expropriatory measure. This standard dates from 1938 and is known as the 'Hull formula' after US Secretary of State Cordell Hull, who declared, in a dispute between the United States and Mexico concerning the expropriation of US oil fields, that international law required Mexico to pay 'prompt, adequate and effective' compensation. (275) The standard requires the payment of full market value of the expropriated asset speedily in a convertible currency. The World Bank Guidelines on the Treatment of Foreign Direct Investment state:

1. Compensation for a specific investment taken by the State will, according to the details provided below, be deemed 'appropriate' if it is adequate, effective and prompt.

2. Compensation will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known. (276)

8.147 Fair market value is generally accepted to mean the price at which a willing buyer and willing seller would conclude an arm's-length transaction. (277) As the tribunal in Starrett Housing Corporation v Iran (278) summarised it:

... the price [at which] a willing buyer would buy ... and the price at which a willing seller would sell ... on condition that none of the two parties [is] under any kind of duress and that both parties have good information about all relevant circumstances involved in the purchase. (279)

8.148 There are various accepted methods of calculating the fair market value of an asset. The fair market value of an income-producing asset, or 'going concern', is often calculated by measuring its future prospects by using the discounted cash flow (DCF) analysis. The World Bank Guidelines define DCF as:

... the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. (280)

8.149 This is exactly what a willing buyer and seller would do in the real world when fixing a price for a business. In order to calculate future cash flows, future revenues, operating expenditure, capital expenditure, and applicable taxes will all need to be estimated. (281) The discount rate will, in turn, be established using a formula that takes into account the particular risk of the industry in question by means of what is known as the 'beta' (282) and the relevant country risk. This exercise is usually undertaken by expert economist witnesses.
8.150 Once a figure is obtained from the DCF analysis, it is often supported by reference to comparative transactions, which show what comparable assets in comparable countries have been sold for at similar moments in time.

8.151 Another common valuation methodology where the affected asset is part of a publicly traded company is to look to the stock market valuation. This is of greater value where the affected asset represents the whole (or the bulk of) the traded corporation and the market in question is liquid.

8.152 Where the affected asset is not publicly traded, is not a going concern and has no clear prospect of future earning power (for example a factory as yet unopened, which was to make a product in respect of which the local market is uncertain), tribunals have looked to book value (using the numbers appearing in the asset's accounting books or balance sheets) or 'sunk costs' (the repayment of investments undertaken that cannot be recovered), with interest appropriate to the country in which the asset is located. (283)

8.153 In this context, it is important to consider whether the asset in question has a history of producing income. In AAPL v Sri Lanka, (284) the tribunal refused to award lost profits, since the future profitability of a shrimp farm could not be reasonably established with a sufficient degree of certainty. This approach had been adopted earlier by the Iran–United States Claims Tribunal, where an American investor was unable to obtain lost profits from a factory that had been expropriated before it had started operations. (285)

8.154 The question remains as to the circumstances in which an asset with no history of revenue production may properly give rise to a DCF-type calculation. In the Karaha Bodos and Himpurma arbitrations, which involved a geothermal power project that was terminated, damages were awarded for lost profits notwithstanding the absence of any revenue-generating activity based on expected future demand. (286)

8.155 Similarly, assets linked to natural resources with proven or probable reserves (such as oil fields or mines) are one class of investments the market value of which is intrinsically linked to those reserves, rather than simply the result of a historic analysis of revenue generation. In such circumstances, whether the assets are in production or not will not affect market value materially, because the market values the resources proven in the ground, which will be eventually extracted by a 'willing buyer'. (287)

8.156 Recent awards have distinguished between the standard of compensation for lawful expropriations (288) and unlawful expropriations. (289) In ADC v Hungary, (290) the tribunal stated that:

[T]he BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. (291)

8.157 In other words, if any of the cumulative conditions set out in the treaty expropriation article are not met, then (by definition) the expropriation has not complied with the treaty obligations and the treaty standard need no longer apply. As a consequence, tribunals have held that unlawful expropriations are to be compensated under the customary international law standard, rather than under the express terms of the BIT. (291) The customary standard of compensation is set out in the famous Chorzów Factory case as one of full reparation, which 'must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'. (292)

8.158 The application of this standard may lead to higher compensation than for lawful expropriation. (293) For example, in ADC v Hungary, (294) the asset expropriated—an airport concession—increased in value after its expropriation by the state. The tribunal held that, in order to restore the investor to the position in which it would have been 'but for' the expropriation, the investor should be awarded the higher value of the asset at the time of the award, rather than the value of the asset at the time of expropriation (the valuation date set out in the BIT). (295) This approach was recently adopted by the majority in the ConocoPhillips v Venezuela arbitration. (296) Other tribunals, however, have found that, in certain circumstances, 'the distinction between compensation for a lawful expropriation and compensation for an unlawful expropriation may not make a significant practical difference'. (297)

(b) Compensation for other treaty breaches

8.159 As in the expropriation context, a claimant who has prevailed in establishing other types of treaty breach—that is, breaches of the ‘fair and equitable’, and other, treatment protections provided in the treaties—must also establish its entitlement to compensation for those breaches. For instance, the tribunal in Rompetrol Group NV v Romania (298) found that the claimant had established Romania’s breach of the BIT’s fair and equitable treatment provision, but had not proven that it suffered economic loss or damage as a result of that breach. Consequently, the tribunal awarded no compensation. To take another example, in Joseph Chorles Lemire v Ukraine, (299) the claimant demonstrated a causal link between the host state’s wrongful denial of public tenders and the loss in value of his broadcasting company, showing that it was ‘probable—and not simply possible’ that his company would have been awarded the tender but for the wrongful acts.
8.160 Bilateral investment treaties usually do not specify the damages to which the claimant would be entitled as compensation for the host state’s other treaty breaches. However, international tribunals have awarded damages for breach of the fair and equitable treatment standard according to the Chorzów Factory case—that is, the ‘wiping out’ of all consequences of the illegal act.

8.161 International tribunals have applied the Chorzów Factory principle, confirming that, under international law, treaty breaches give rise to the obligation to compensate the economic harm that they cause in an amount equivalent to the losses that the claimant can prove were caused by the measures in question. (300) It should be noted that, in case of successful claims for expropriation and other treaty breaches, compensation will not be cumulative.

8.162 In applying the Chorzów Factory principle, several tribunals have used the standard of fair market value in determining damages for violations of fair and equitable treatment. (301) Although ‘fair market value’ is a standard employed in compensating for an expropriation, in CMS v Argentina, (302) the tribunal resorted to the fair market value standard in assessing damages arising out of Argentina’s breach of the treaty, noting that the standard ‘might be appropriate for breaches different from expropriation if their effect results in important long-term losses’. The tribunal established the quantum of damages using the DCF method to calculate the net present value (NPV) of expected cash flows. It adopted a (hypothetical) scenario without the adverse measures, from which it subtracted the NPV of expected cash flows in the (actual) scenario with the adverse measures. (303)

8.163 Restitution also remains available as a remedy for fair and equitable treatment breaches. In Mr Franck Charles Arif v Republic of Moldova, (304) the respondent requested the option to offer restitution instead of damages were it found to have breached its treaty obligations. The tribunal obliged, noting that ‘restitution is more consistent with the objective of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and Host State’. (305) The tribunal gave Moldova sixty days in which to make proposals for restitution and allowed the claimant to accept or reject those proposals. (306)

(c) Moral damages

8.164 In recent years, an increasing number of arbitral tribunals have been presented with claims for ‘moral damages’, a compensatory remedy for a category of intangible harm. (307) The first example of an award of such damages was the 2008 decision in Desert Line v Yemen. (308) The Desert Line tribunal found that it had jurisdiction to award moral damages, which may be requested in ‘exceptional circumstances’ and by corporate claimants only in ‘specific circumstances’. It then awarded US$1 million in damages for physical duress suffered by executives of the claimant company at the hands of government security forces, as well as for the company’s loss to its ‘credit and reputation’. (309)

8.165 In the wake of Desert Line, a significant number of claimants have, unsuccessfully, sought moral damages. In denying a claim for moral damages, the Lemire majority articulated a test that has been adopted in several subsequent cases, holding that moral damages can be awarded only in exceptional cases in which:

- the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilised nations are expected to act;
- the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- both cause and effect are grave or substantial. (310)

(d) Interest

8.166 Investment arbitration tribunals routinely award interest, which forms part of the overall compensation for loss owed to a prevailing party. For example, in the case of an expropriation, the obligation to pay arises prior to the expropriatory act. Failure to make such payment causes the affected investor to lose the use of those funds in the period between the taking and payment of the compensation, and is part of the loss. As noted by one leading commentator: ‘The most commonly cited reason for awarding interest is to compensate the claimant for the loss of the ability to benefit from the use of the principal sum.’ (311)

8.167 Many BITs provide for payment of interest in their expropriation clauses, and the International Law Commission’s Draft Articles of State Responsibility codify the customary international law view that interest is part of full reparation for other types of breach. (312) In deciding whether to award interest, investment arbitration tribunals consider the applicable interest rate, the starting date for the calculation (for example date of
expropriation), whether compounding of interest is appropriate, and whether to grant post-award interest. (313) In the terms of the rate of interest, tribunals have adopted a number of different approaches, including the rate in the host country, (314) the cost of capital of the investor, (315) or the borrowing rate that an investor would have been charged, (316) among others. (317) As to the award of simple versus compound interest, the ‘overwhelming trend’ is to award compound interest, (318) such that there is now a ‘jurisprudence constante where the presumption has shifted from a decade or so ago with the result that it would now be more appropriate to order compound interest’. (319)

(e) Costs and attorneys’ fees

8.168 The traditional position in investment treaty arbitration, in comparison to commercial arbitration, has been for each party to bear its own costs of legal representation and related expenses, and to divide tribunal costs equally. (320) More recently, however, there has been a trend toward requiring the losing party to pay the costs and legal fees of the prevailing party in certain circumstances, based on the parties’ degree of success and/or conduct. (321) As summarised by one commentator, those circumstances may include where the unsuccessful party (a) advances patently unmeritorious or legally untenable claims, (b) abuses the investment arbitration process, (c) presents poor and inefficient pleadings, or (d) engages in egregious underlying conduct. (322)

8.169 This practice is consistent with the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules, both of which give tribunals considerable discretion in awarding costs. Indeed, Article 42 of the UNCITRAL Rules was revised in 2010, and now includes a default principle that costs and legal fees shall be borne by the unsuccessful party. (323) ICSID Arbitration Rule 28(1), however, does not contain any default principle concerning the allocation of costs and legal fees. (324)

References

1) This thesis was first published in 1868 in the seminal Calvo, Derecho internacional teórico y práctico de Europa y América (Paris, 1868).
3) Free translation from the Italian.
4) Ponevežys-Saldutiskis Railway (Estonia v Lithuania) [1939] PCIJ Series A/B 76, ICGJ 328 (1939), at [16].
6) Testimony of Dan Price, one of the negotiators of the North American Free Trade Agreement (NAFTA), addressing investment protection issues before a US Senate Ways and Means Committee Hearing on the Free Trade Area of the Americas.

... Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a Host State might in its investment protection legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

9) See 1967 OECD Draft Convention on the Protection of Foreign Property (1968) 7 ILM 117; see also earlier draft at (1963) 2 ILM 241.
10) The history of BITs is described in greater detail in Vandeveldt, Bilateral Investment Treaties: History, Policy, and Interpretation (Oxford University Press, 2010).
13) Obviously, the investor could have access to litigation before the courts of the host state. However, this would clearly be a last resort, since it raises serious questions of neutrality of forum and ultimate enforceability. On the advantages of international arbitration to resolve investment disputes, see Parra, ‘Provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments on investment’ (1997) 12 ICSID Rev—Foreign Investment LJ 287, at 288–289.


18) Signed on 26 February 2009, entered into force on 29 March 2012. This agreement covers investments from investors of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam in the territory of these states.

19) NAFTA, Ch. 11 (‘Investment’), signed on 17 December 1992, entered into force on 1 January 1994. This agreement covers investments from investors of Canada, Mexico, and the United States in the territory of these states.

20) Signed on 17 December 1994, entered into force on 16 April 1998. The ECT covers investments in the energy sector for investors of its state parties (which number more than fifty) within the territory of those states.

21) DR-CAFTA, Ch. 10 (‘Investment’), signed on 5 August 2004, entered into force between 2006 and 2009 in seven signatory countries. This agreement covers investments from investors of the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic in the territory of these states.


23) Canada–Panama Free Trade Agreement, signed on 14 May 2010, entered into force on 1 April 2013.


29) See the list of ICSID contracting states online at https://icsid.worldbank.org/.


32) An investor may derive protections for the same investment from more than one treaty or from other non-treaty sources, such as foreign investment laws or contracts. It may be possible for claims based on different instruments to be dealt with in the same arbitral proceedings: see Pac Rim Cayman LLC v The Republic of El Salvador, Decision on the Respondent’s Jurisdictional Objections, ICSID Case No. ARB/09/12, IIC 543 (2012), at [4.45]: ‘[T]he Tribunal finds no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions, here CAFTA and the Investment Law.’

33) The UNCTAD website provides a database of international investment agreements at http://investmentpolicyhub.unctad.org/IIA.

34) Treaties that have been signed may not necessarily be in force. A treaty enters into force in accordance with the procedure provided for within the treaty itself. This usually involves the exchange of instruments of ratification between the contracting states.

36) Award, ICSID Case No. ARB(AF)/00/02, IIC 247 (2003). The tribunal noted, however, that the pre-BIT acts of the host state would be relevant to considering a continuing or aggravating breach of the BIT. See also Empresas Lucchetti, SA and Lucchetti Peru, SA v Republic of Peru, Award, ICSID Case No. ARB(03)/4, IIC 88 (2005), at [53]; Phoenix Action Ltd v The Czech Republic, Award, ICSID Case No. ARB(06)/5, IIC 367 (2009), at [68].

37) For instance, in May 2008, the Bolivarian Republic of Venezuela denounced its BIT with the Netherlands. In accordance with its terms, the termination of the BIT took effect on 1 November 2008. However, in view of its fifteen-year survival clause, investments made prior to 1 November 2008 remain protected by the BIT until 2023: see Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed on 22 October 1991, entered into force 1 November 1993, Art. 14.


41) ICSID Convention, Art. 25(2)(a).

42) See Ioan Micula and ors v Romania, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB(05)/20, IIC 339 (2008), at [101]; Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, Decision on Jurisdiction, ICSID Case No. ARB(05)/15, IIC 288 (2007).

43) Most BITs contain no such exclusions. An exception to this general practice is the Canada–Venezuela BIT, which excludes persons holding citizenship of both the contracting states from the definition of ‘investors’ for the purposes of the agreement: see Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed on 1 July 1996, entered into force on 28 January 1998, Art. 1(g).

44) See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic, signed on 20 October 1992, entered into force on 1 October 1994, Art. 1(b): [T]he term ‘investor’ shall comprise with regard to either Contracting Party: ... (ii) ... legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party in which a place of effective management is situated; and (iii) legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.

45) Interim Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. AA 228, IIC 416 (2009).

46) Ibid., at [415]. Similarly, in Mobil Corporation, Venezuela Holdings BV and ors v Bolivarian Republic of Venezuela, Decision on Jurisdiction, ICSID Case No. ARB/07/27, IIC 435 (2010), the host state, Venezuela, argued, among other things, that the exercise of genuine control by a Dutch national over a non-Dutch investor entity was required for the nationality requirement under the Netherlands–Venezuela BIT to be met, even though this was not provided for in the BIT. The tribunal held that formal control was sufficient and that the exercise of genuine control was not relevant.

47) Decision on Jurisdiction, ICSID Case No. ARB/02/18, IIC 258 (2004). The tribunal refused to pierce the corporate veil because there was no evidence that the claimant had used its status as a Lithuanian entity for an improper purpose, noting, at [56], that ‘the claimant manifestly did not create Tokios Tokoles for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force’.


49) Award, ICSID Case No. ARB/05/5, IIC 358 (2008), at [160]–[162].

50) Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic, signed on 20 October 1992, entered into force on 1 October 1994.

51) Decision on Respondent’s Objections to Jurisdiction, ICSID Case No ARB/02/3, IIC 8 (2005).

52) Ibid., at [330].
53) Mobil Corporation Venezuela Holdings BV and ors v Bolivarian Republic of Venezuela, Decision on Jurisdiction, n. 46, at [405], citing Phoenix Action Ltd v The Czech Republic, Award, n. 36, at [53] and [164]. See also Tidewater Inc. and ors v The Bolivarian Republic of Venezuela, Decision on Jurisdiction, ICSID Case No. ARB/10/5, IIC 573 (2013), at [146].

54) See n. 46.

55) See, e.g., Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment, Art. XII:

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and: (a) the denying Party does not maintain normal economic relations with the third country; or (b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.

56) See Plama Consortium Ltd v Republic of Bulgaria, Decision on Jurisdiction, ICSID Case No. ARB/03/24, IIC 189 (2005), at [162]–[165] (holding that denial-of-benefits clause cannot be invoked retroactively, after an investment has been made); Guarachichi America Inc. and Rurelec Plc v The Plurinational State of Bolivia, Award, PCA Case No. 2011-17, IIC 628 (2014), at [376]–[378] (holding that the denial-of-benefits clause under the United States–Bolivia BIT could be validly invoked after the dispute arose).

57) See, e.g., Ulysseas Inc. v The Republic of Ecuador, Interim Award, UNCITRAL, 28 September 2010, at [166].

58) Article 25(2)(b) states:

National of another Contracting state means: ... any juridical person which had the nationality of the Contracting state party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting state for the purposes of this Convention.

This 'agreement' is usually explicit (e.g. in the definition of 'investor' in a BIT). It may also be implicit: see Millicom International Operations BV & Sentel GSM SA v The Republic of Senegal, Decision on Jurisdiction, ICSID Case No. ARB/08/20, IIC 450 (2010), at [109]–[115] (holding that consent can be implied where the host state entered into an agreement with a local entity containing an ICSID arbitration clause).


60) See UNCTAD, Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II (UN, 2011), available online at http://unctad.org/.


64) American Manufacturing and Trading Inc. v Republic of Zaire, Award, ICSID Case No. ARB/93/1, IIC 14 (1997), at [5.08]–[5.15].


66) CMS Gas Transmission Co. v The Republic of Argentina, Decision on Jurisdiction, ICSID Case No. ARB/01/8, IIC 64 (2003), at [36]–[65]. See also Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrados del Agua SA v The Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/17, IIC 236 (2006), at [51].


69) See n. 46.

70) See n. 37.
71) But see Standard Chartered Bank v United Republic of Tanzania, Award, ICSID Case No. ARB/10/12, IIC 581 (2012). In this case, the tribunal held that a loan made in Tanzania was not a protected investment. The passive indirect ownership of the loan by the claimant, a British company, did not suffice for the purposes of the United Kingdom–Tanzania BIT, which it interpreted as requiring an investor to contribute actively to an investment.

72) See also Tobios Tokoles v Ukraine, Decision on Jurisdiction, n. 47, at [77]–[80], in which the tribunal noted that the requirement that there be a transfer of capital was absent from the text, and contrary to the object and purpose of the BIT.

73) Decision on Objections to Jurisdiction, ICSID Case No ARB/96/3, IIC 101 (1997). The definition contained in the applicable BIT was substantially the same as that one quoted at paragraph 8.28.

74) Ibid., at [41].

75) Ibid.

76) Ceskoslovenska Obchodni Banka AS v The Slovak Republic, Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/4, IIC 49 (1999). In this case, no funds were actually transferred to the Slovak Republic pursuant to the loan. However, owing to the close connection of the loan facility to the development of banking facilities in the Slovak Republic, the same was held to be an investment.

77) Abaclat and ors v The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, IIC 504 (2011); see also Ambiente Ufficio SPA and ors v The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/08/9, IIC 576 (2013).

78) Ceskoslovenska Obchodni Banka, n. 76.

79) See, e.g., Agreement between the Government of Canada and the Government of the Republic of Argentina for the Protection and Promotion of Investments, signed on 5 November 1991, entered into force on 29 April 1993, Art. 3(a), requiring that the investment be made in accordance with the laws of the host state.

80) Decision on Jurisdiction, ICSID Case No. ARB/03/26, IIC 134 (2006). See also Gustav F W Hamester GmbH & Co. KG v Republic of Ghana, Award, ICSID Case No. ARB/07/24, IIC 456 (2010), at [122]–[124].

81) See n. 36. See also Cementownia ‘Nowa Huta’ SA v Republic of Turkey, Award, ICSID Case No. ARB(AF)/06/2, IIC 390 (2009), at [146]–[149].


83) Award, ICSID Case No. ARB/05/17, IIC 319 (2008), at [116]–[118].

84) See 8.42.

85) ICSID, ‘Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention’, n. 8, p. 44, para. 27 explains that: ‘[N]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).’


87) See, e.g., SGS Société Générale de Surveillance SA v Republic of Paraguay, Decision on Jurisdiction, ICSID Case No. ARB/07/29, IIC 525 (2010), at [93].

88) Salini Costruttori Spa and Italstrade SpA v Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4, IIC 207 (2004); Fedax NV v Republic of Venezuela, Decision on Objections to Jurisdiction, n. 73.

89) Fedax NV v Republic of Venezuela, ibid., at [43].

90) The first paragraph of the Preamble to the ICSID Convention reads: ‘Considering the need for international cooperation for economic development, and the role of private international investment therein...’

91) Award, ICSID Case No. ARB/05/3, IIC 354 (2008). See also Mr Saba Fakes v Republic of Turkey, Award, ICSID Case No. ARB/07/20, IIC 439 (2010), at [110].


93) Ibid., at [33].

94) Decision on Jurisdiction, ICSID Case No. ARB/05/10, IIC 289 (2007).

95) Award, PCA Case No. AA280, IIC 400 (2009).

96) See n. 56, at [364].

97) See paragraph 8.38. However, in GEA Group Aktiengesellschaft v Ukraine, Award, ICSID Case No. ARB/05/18, IIC 487 (2011), the tribunal found that a conversion contract involving the delivery of diesel, catalysts, and other materials, as well as know-how on logistics and market and other services, was a ‘complex relationship going far beyond the simple sale of raw materials’, and therefore constituted a protected investment.

98) Joy Mining Machinery Ltd v Arab Republic of Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11, IIC 167 (2004), at [44]–[47]. The tribunal reached this conclusion notwithstanding the fact that the BIT defined ‘investment’ as every kind of asset, including mortgage, lien or pledge, and claims to money or to any other performance under contract having a financial value: see ibid., at [38].

100) See, e.g., European Free Trade Association (EFTA)–Mexico FTA, signed 27 November 2000, entered into force on 1 July 2001, Art. 45.


102) See, e.g., United States Model BIT (2012), Art. 1, which defines ‘investment’ as ‘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’.

103) For instance, in 1974, Jamaica excluded legal disputes arising directly out of an investment relating to minerals or other natural resources. In 2007, Ecuador provided a similar notice under Art. 25(4) of the ICSID Convention in respect of disputes arising out of investments in the natural resources sector. (Ecuador then notified its denunciation of the Convention on 6 July 2009.)

104) Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey, Decision on Bifurcated Jurisdictional Issue, ICSID Case No. ARB/11/28, IIC 583 (2013), at [83].


106) Tulip Real Estate, n. 104, at [83].

107) Decision on Jurisdiction, ICSID Case No. ARB/08/5, IIC 436 (2010), at [334]–[337]. See also Murphy Exploration and Production Co. International v Republic of Ecuador, Award on Jurisdiction, ICSID Case No. ARB/08/4, 15 December 2010, at [102]–[105].


110) Ibid., at [187]. Moreover, in the tribunal’s view (at [190]), “[t]he parties insist that the arbitration proceedings cannot be commenced until six months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties’.

111) Award, ICSID Case No. ARB/05/22, IIC 330 (2008), at [343].

112) Final Award, UNCITRAL, IIC 321 (2007).

113) Ibid., at [147]. The conclusion of the tribunal on this point led Argentina to challenge the award before the courts of the seat, which was Washington, DC. Under the terms of the lex arbitri, the US Federal Arbitration Act of 1925 (FAA), the district court confirmed the award. However, the award was subsequently vacated by the district appellate court. An application for certiorari to the US Supreme Court was made and granted. This was the first time that an investment arbitration had been reviewed by the Supreme Court. The justices overruled the appellate court and held that the obligation to go to local courts for a set period without any obligation to await a final decision (or to agree to the final decision) was effectively a procedural precondition, which, in light of Supreme Court precedent, meant that deference should be given to the arbitral tribunal’s decision.

114) See n. 56 at [386] and [388]. See also Enron Corporation and Panderosa Assets LP v Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/01/3, IIC 92 (2004); Burlington Resources Inc. v Republic of Ecuador, Decision on Jurisdiction, n. 107; Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey, Decision on Bifurcated Jurisdictional Issue, n. 104.

115) Emilio Agustín Maffezini v The Kingdom of Spain, Award on Jurisdiction, ICSID Case No. ARB/97/7, IIC 85 (2000).


118) Since Maffezini, several tribunals have applied MFN clauses in order to bypass conditions for access to arbitration: see e.g. Gas Natural SDG, SA v Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/10, IIC 115 (2005), at [30]–[31]; Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic, Decision on Jurisdiction, n. 66.

119) Award, ICSID Case No. ARB/04/14, IIC 357 (2008). Similarly, in Daimler Financial Services G mbH v Argentine Republic, Award, ICSID Case No. ARB/05/1, IIC 669 (2012), the tribunal held, by majority, that the clause requiring the pursuit of remedies before local courts for eighteen months was a condition precedent to arbitration that could not be altered through the application of the MFN clause.


121) Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, Decision on Annulment, n. 105.

122) Ibid., at [101] (emphasis added).

123) See, e.g., Camuzzi International SA v Argentine Republic, Decision on Objections to Jurisdiction, ICSID Case No. ARB/03/2, IIC 41 (2005), at [89].

125) See, e.g., Agreement between the Republic of Korea and the Republic of Chile on the Reciprocal Promotion and Protection of Investments, signed on 6 September 1999, entered into force on 16 September 1999, Art. 8(4): ‘Once the investor has submitted the dispute to the competent tribunal of [the Host State], that selection shall be final.’

126) Toto Costruzioni Generali SpA v Republic of Lebanon, Decision on Jurisdiction, ICSID Case No. ARB/07/12, IIC 391 (2009), at [211].

127) Ibid., at [211]–[212]; Total SA v The Argentine Republic, Decision on Liability, ICSID Case No. ARB/04/01, IIC 484 (2010), at [443].


129) Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania, Award, ICSID Case No. ARB/07/21, IIC 383 (2009), at [61] and [67].

130) Ibid., at [67].

131) Defensive local actions that challenge measures impairing investments have been found not to trigger fork-in-the-road clauses: see, e.g., Genin and ors v Republic of Estonia, Award, ICSID Case No. ARB/99/2, IIC 10 (2001).


133) This stands in contrast to the less flexible approach set out in the 1976 UNCITRAL Rules, Art. 33(1) which provided that ‘failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable’. See Caron and Caplan, The UNCITRAL Arbitration Rules (2nd edn, Oxford University Press, 2012), pp. 112ff.


136) Ibid.


138) Compañía de Aguas del Aconcagua SA and Vivendi Universal SA v Argentine Republic, Decision on Annulment, n. 105, at [102].


140) See the ICSID Annulment Committee’s reliance on this provision in Compañía de Aguas del Aconcagua, n. 105, at [95]–[96].

141) Accession Mezzanine Capital LP v Hungary, Decision on Respondent’s Objection under Arbitration Rule 41(5), ICSID Case No. ARB/12/3, IIC 577 (2013), at [58.70]. See also 2012 United States Model BIT, Annex B, which states the ‘shared understanding’ of the parties that expropriation (Art. 6(1)) ‘is intended to reflect customary international law concerning the obligation of States with respect to expropriation’.

142) Generation Ukraine Inc. v Ukraine, Award, ICSID Case No. ARB/00/9, IIC 116 (2003), at [11.3].

143) Wena Hotels Ltd v Arab Republic of Egypt, Decision on Annulment Application, ICSID Case No. ARB/98/4, IIC 274 (2002).

144) Ibid., at [31]–[36].

145) See paragraph 8.63.

146) See Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB/00/5, IIC 20 (2003), at [336]: ‘[T]his Tribunal believes that there is no reason in this case, especially considering that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law.’

147) Compañía del Desarrollo de Santa Elena SA v The Republic of Costa Rica, Final Award, ICSID Case No. ARB/96/1, IIC 73 (2000), at [64]. See also Enron Corporation and Ponderosa Assets LP v Argentine Republic, Decision on Jurisdiction, n. 11a, at [206]–[209]; LG&E Energy Corporation and ors v Argentine Republic, Decision on Liability, ICSID Case No. ARB/02/1, IIC 152 (2006), at [98].

By contrast, in AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary, Decision of the Ad Hoc Committee on the Application for Annulment, ICSID Case No. ARB/07/22, IIC 592 (2012), at [161], and [168]–[174], the tribunal held that the applicable law of the arbitration was the ECT and that EU law was a fact only potentially relevant to whether Hungary had violated its ECT obligations.

The Tribunal has no doubt that indirect expropriation can take many forms. Yet, as in Üretim ve Ticaret Ltd Şirketi v Republic of Turkey, ICJ Statute, Art. 38(d), Decision on Jurisdiction, n. 87.

Both cases were based on nearly identical facts.

Indeed, tribunals have reached different conclusions based on the same facts and law. See, e.g., the decisions in CME Czech Republic BV (The Netherlands) v Czech Republic, Partial Award, UNCTRAL, 13 September 2001, IIC 61 (2001); Ronald S Lauder v Czech Republic, Final Award, n. 109, in which claims were brought under two different treaties based on identical facts. In Lauder, the case was dismissed. In CME, the Czech state was ordered to pay over US$300 million. On legal issues, there has been a clear split on the scope of the so-called umbrella clause in the cases of Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay, Decision on Jurisdiction, ICSID Case No. ARB/07/9, IIC 428 (2009), and SGS Société Générale de Surveillance SA v Republic of Paraguay, Decision on Jurisdiction, n. 87. For a detailed analysis of these substantive treaty obligations, see Reinisch (ed.) Standards of Investment Protection (Oxford University Press, 2008); Newcombe and Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009); Vandevelde, Bilateral Investment Treaties (Oxford University Press, 2010); Salacuse, The Law of Investment Treaties (2nd edn, Oxford University Press, 2015); Schreuer and Dolzer, Principles of International Investment Law (Oxford University Press, 2012).

See n. 35.


BERNARDUS HENRICUS FUNNEKOTTER and ors v Republic of Zimbabwe, Award, ICSID Case No. ARB/05/6, IIC 224 (2004), at [97]. See also Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentina Republic, Decision on Jurisdiction, n. 66, at [189].


See n. 35.
170) Acquired rights have been defined as follows:
Acquired rights are any rights, corporeal or incorporeal, properly vested under
municipal law in a natural or juristic person and of an assessable monetary value.
Within the scope of such rights fall interests which have their basis in contract as well
as in property, provided they concern an undertaking or investment of a more or less
permanent character.


171) Fatouros, Government Guarantees to Foreign Investors (Columbia University Press,
1962).

172) CME Czech Republic BV (The Netherlands) v Czech Republic, n. 156, at [551], [554]–[555],
and [591].

173) Methanex Corporation v United States of America, Final Award on Jurisdiction and
Merits, UNCITRAL, 19 August 2005, IIC 167 (2005), at [7].

174) See Parkerings-Compagniet AS v Republic of Lithuania, Award, ICSID Case No.
ARB/05/8, IIC 302 (2007), at [443]–[445]; Azurix Corporation v Argentine Republic,
Award, n. 139, at [315]; Suez, Sociedad General de Aguas de Barcelona SA and InterAgua
Servicios Integrales del Agua SA v Argentine Republic, Decision on Liability, ICSID Case
No. ARB/03/17, IIC 442 (2010), at [140]–[145].

175) Waste Management Inc. v United Mexican States, Award, ICSID Case No. ARB(AF)/00/3,
IIC 270 (2004), at [175]. See also Biwater Gauff (Tanzania) Ltd v United Republic of
Tanzania, Award, n. 111, at [458].

176) Siemens AG v Argentine Republic, Award, n. 149, at [271].

177) Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic,
Award, ICSID Case No. ARB/97/3, IIC 307 (2007), at [7.5.22].

178) Eureko BV v Republic of Poland, Partial Award of the Ad Hoc Committee, UNCITRAL, 19
August 2005, IIC 98 (2005), at [242]; Fireman’s Fund Insurance Co. v The United Mexican
States, Award, ICSID Case No. ARB(AF)/02/01, IIC 291 (2006), at [176]; ADC Affliate Ltd
and ADC & ADMC Management Ltd v Republic of Hungary, Award, ICSID Case No.
ARB/03/16, IIC 1 (2006), at [424]; LG&E Energy Corporation and ors v Argentine Republic,
Decision on Liability, n. 147, at [190].

179) Compañía de Aguas del Aconquija, at [7.5.20]:

There is extensive authority for the proposition that the state’s intent, or its
subjective motives are at most a secondary consideration. While intent will weigh in
favour of showing a measure to be expropriatory, it is not a requirement, because the
effect of the measure on the investor, not the state’s intent, is the critical factor.

180) Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica, Final Award, n.
147, at [71]–[72].

116.

182) Compañía del Desarrollo de Santa Elena, n. 147, at [71]–[72].

183) Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, Award, ICSID Case No.
ARB/05/22, IIC 330 (2008), at [455]; Walter Bau AG v The Kingdom of Thailand,
Award, UNCITRAL, 1 July 2009, IIC 429 (2009), at [10.10]. See also Weston, ‘Constructive takings
under international law: A modest foray into the problem of creeping expropriation’
(1976) 16 VJIL 103; UNCTAD, Taking of Property, Series on Issues in International
Investment Agreements (UN, 2000), available online at
http://unctad.org/en/docs/psiteiitd15.en.pdf, p. 11; Restatement (Third) of Foreign

184) Siemens AG v Argentine Republic, Award, n. 149, at [263].

185) UNCTAD, Fair and Equitable Treatment: A Sequel, Series on Issues in International
Investment Agreements II (UN, 2012), available online at
five ‘most important and widespread approaches to the FET standard in treaty
practice’).

See n. 35.

186) See, e.g., Schreuer, ‘Fair and equitable treatment in arbitral practice’ (2005) 6 JWIT
357; Kalicki and Medeiros, ‘Fair, equitable and ambiguous: What is fair and equitable
 treatment in international investment law?’ (2007) 22 ICSID Rev—Foreign Investment
LJ 24; Kinnear, ‘The continuing development of the fair and equitable treatment
Issues III (British Institute of International and Comparative Law, 2009), p. 214;
Yannaca-Small, ‘Fair and equitable treatment standard’, in Yannaca-Small (ed.)
 Arbitration under International Investment Agreements (Oxford University Press, 2010),
pp. 385–410; UNCTAD, Fair and Equitable Treatment: A Sequel, Series on Issues in
International Investment Agreements II (UN, 2012), available online at

187) Enron Corporation and Ponderosa Assets LP v Argentine Republic, Award, ICSID Case No.
ARB/01/3, IIC 292 (2007), at [256]–[257].
189) See decisions in which tribunals have referred to the object and purpose of the BIT to interpret the fair and equitable treatment standard: Azurix Corporation v Argentine Republic, Award, n. 139, at [360]; MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile, Award, ICSID Case No. ARB/01/17, IIC 174 (2004), at [109]–[113]; Saluka Investments BV v Czech Republic, Partial Award, UNCITRAL, 17 March 2006, ICG 368 (PCA 2006), at [300].

190) Decision on Liability, n. 147, at [12].

191) Saluka, n. 189, at [302].


193) CME Czech Republic BV (The Netherlands) v Czech Republic, n. 156, at [611].

194) Award, ICSID Case No ARB(AF)/00/02, IIC 247 (2003), at [157].

195) Ibid., at [160].

196) Ibid., at [164].

197) LG&E Energy Corporation and ors v Argentine Republic, Decision on Liability, n. 147, at [130]; Saluka Investments BV v Czech Republic, n. 189, at [304]. Tribunals have enquired on the level of investors’ due diligence in considering the extent to which the investor actually relied on the state’s representations when investing: see Parkerings-Compagniet AS v Republic of Lithuania, Award, n. 174, at [335]–[336]; MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile, n. 189, at [176]–[178].

198) Emilio Agustín Maffezini v Kingdom of Spain, Award, ICSID Case No. ARB/97/7, IIC 86 (2000), at [83]; Encana Corporation v Republic of Ecuador, Award, LCIA Case No. UN3481, IIC 91 (2006), at [158].

199) CME Czech Republic BV (The Netherlands) v Czech Republic, Partial Award, n. 156, at [611]; PSEG Global, Inc., The North American Coal Corporation, and Konya İngin Elektrik Üretim ve Ticaret Ltd ?irhetti v Republic of Turkey, Award, n. 167, at [253]–[254]; Saluka Investments BV v Czech Republic, Partial Award, n. 189, at [279] and [309].

200) CMS Gas Transmission Co. v Republic of Argentina, Award, ICSID Case No. ARB/01/8, IIC 65 (2005), at [276] (‘fair and equitable treatment is inseparable from stability and predictability’); see also Occidental Petroleum Corporation and ors v Republic of Ecuador, Final Award, LCIA Case No. UN 3467, IIC 202 (2004), at [183].

201) Parkerings-Compagniet AS v Republic of Lithuania, Award, n. 174, at [322]; CMS Gas Transmission Co. v Republic of Argentina, n. 200, at [277] (‘It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made’).


203) Ibid., at [335].

204) Ibid., at [337].

205) Ibid., at [338].

206) NAFTA tribunals have held that a denial of justice would constitute a breach of the standard: see The Loewen Group Inc. and Raymond L Loewen v United States of America, Award, ICSID Case No. ARB(AF)/98/3, IIC 254 (2003), at [132]; Waste Management Inc. v United Mexican States, Award, n. 175, at [98]; International Thunderbird Gaming Corporation v The United Mexican States, Award, UNCITRAL, 26 January 2006, IIC 136 (2006), at [194], rejecting the investors’ denial of justice claims. For a comprehensive analysis, see Paulsson, Denial of Justice in International Law (Cambridge University Press, 2005).

207) Ibid., p. 5.

208) Azinian and ors v Mexico, Award on Jurisdiction and Merits, ICSID Case No. ARB(AF)/97/2, IIC 22 (1999).

209) Ibid., at [102]–[103].

210) Decision on Jurisdiction and Liability, ICSID Case No ARB/06/18, IIC 424 (2010), at [284].

211) Ibid.


result of its failure to exhaust all remedies under the US legal system.

While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.


226) Pontechniiki SA Contractors & Engineers v Republic of Albania, Award, n. 129, at [81]–[84].

227) American Manufacturing and Trading Inc. v Republic of Zaïre, Award, n. 64.

228) Waguih Elie George Siag and Clarinda Vecchi v Arab Republic of Egypt, Award, ICSID Case No. ARB/05/15, IIC 374 (2009), at [445]–[448]; AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary, Award, ICSID Case No. ARB/07/22, IIC 455 (2010), at [13.3.2]; Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica, Award, ICSID Case Nos ARB/08/1 and ARB/09/20, IIC 554 (2012), at [281]. Other tribunals, however, have rejected this extension of the standard: see, e.g., Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan, Award, n. 224, at [668]–[669]; AWG Group Ltd v Argentine Republic, Decision on Liability, UNCTAD, 30 July 2010, IIC 443 (2010), at [174]–[177].

229) Antoine Goetz and ors v République du Burundi, Award, ICSID Case No. ARB/95/3, IIC 16 (1999), at [125]–[131].

230) CME Czech Republic BV (The Netherlands) v Czech Republic, Partial Award, n. 156, at [613]; National Grid Plc v Argentine Republic, Award, UNCTAD, 3 November 2008, IIC 361 (2008), at [189]; Azurix Corporation v Argentine Republic, Award, n. 189, at [408].

231) Not all investment treaties use the term ‘arbitrary’; some instead refer to ‘unreasonable or discriminatory’ measures. As explained by the tribunal in National Grid, n. 230, at 197, the terms are synonymous: ‘It is the view of the Tribunal that the plain meaning of the terms “unreasonable” and “arbitrary” is substantially the same in the sense of something done capriciously, without reason.’


234) Pope & Talbot Inc. v Government of Canada, Award, 31 May 2002, IIC 195 (2002), at [52] and [55]; International Thunderbird Gaming Corporation v The United Mexican States, Award, n. 206, at [194].

235) Mondev International Ltd v United States of America, Final Award, ICSID Case No. ARB(AF)/99/2, IIC 173 (2002).

236) Ibid., at [116].

237) Solinka Investments BV v Czech Republic, Partial Award, n. 189, at [292]–[295]. See also CMS Gas Transmission Co. v Republic of Argentina, n. 200, at [284]:

238) While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.

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242) Antoine Goetz and ors v République du Burundi, Award, n. 229, at [121]; Nykomb
Synergetics Technology Holding AB v Republic of Latvia, Award, Stockholm Rules, IIC
182 (2003), at [64]; Saluha Investments BV v Czech Republic, Partial Award, n. 189, at
[313] ("State conduct is discriminatory, if (i) similar cases are (ii) treated differently
(iii) and without reasonable justification").
243) Treaty between the United States of America and the Arab Republic of Egypt
Concerning the Reciprocal Encouragement and Protection of Investments, signed on
244) Parkerings-Compagniet AS v Republic of Lithuania, Award, n. 174, at [368]; United Parcel
Service of America Inc. v Government of Canada, Award, UNCITRAL, 24 May 2007, IIC 306
(2007), at [173]–[184].
245) NAFTA, Art. 1102(1).
246) Gami Investments Inc. v The Government of the United Mexican States, Award,
UNCITRAL, 15 November 2004, IIC 109 (2004), at [114]; Parkerings-Compagniet AS v
Republic of Lithuania, Award, n. 174, at [371].
247) See EDF International and ors v Argentine Republic, Award, ICSID Case No. ARB/03/23,
IIC 555 (2012), at [929].
249) See, e.g., UNCTAD, Most-Favored-Nation Treatment: A Sequel, Series on Issues in
International Investment Agreements II (UN, 2010), available online at
Colombia FTA of 2006, Annex 9.3, the Canada–Peru FTA of 2008, Annex 804.1, and the
250) Treaty between the United States of America and the Republic of Ecuador Concerning
the Encouragement and Reciprocal Protection of Investment, signed on 27 August
251) See, e.g., the Protocol attached to the Treaty between the United States of America
and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and
Protection of Investments, 29 September 1982, para. 10.
252) One tribunal noted that the guarantees provided by free transfer of funds provisions
are ‘fundamental to the freedom to make a foreign investment and an essential
element of the promotional role of BITs’: see Continental Casualty Co. v Argentine
Republic, Award, ICSID Case No. ARB/03/9, IIC 336 (2008), at [245].
253) Metalpar SA and Buen Aire SA v Argentine Republic, Award, ICSID Case No. ARB/03/5,
IIC 326 (2008), at [179].
254) Continental Casualty, n. 252, at [242].
255) White Industries Australia Ltd v Republic of India, Final Award, UNCITRAL, 30 November
2011, IIC 529 (2011), at [13.2.1]–[13.2.4].
256) See n. 35.
on International Investment No. 2006/3 (October 2006), available online at
and contract in investment arbitration’ (2008) 24 Arb Intl 351; Kunoy, ‘Singing in the
258) SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, Decision on
Jurisdiction, ICSID Case No. ARB/01/13, IIC 223 (2003), at [156].
259) Ibid., at [167].
260) Ibid., at [168].
261) SGS Société Générale de Surveillance SA v Republic of the Philippines, Decision on
Jurisdiction, n. 158.
262) Agreement between the Swiss Confederation and the Republic of the Philippines on
the Promotion and Reciprocal Protection of Investments, signed on 23 August 1991,
entered into force on 25 April 1999.
263) SGS Société Générale de Surveillance SA v Republic of the Philippines, Decision on
Jurisdiction, n. 158, at [155].
366–367.
265) See, e.g., Gustav F W Hamester GmbH & Co. KG v Republic of Ghana, Award, n. 80; EDF
International SA and ors v Argentine Republic, Award, n. 247; Bash International, Inc.
and B&P Ltd Foreign Investments Enterprise v Ukraine, Award, ICSID Case No.
ARB/08/11, IIC 565 (2012).
266) Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of
Paraguay, Decision on Jurisdiction, n. 156, at [141]–[142], and [159].
267) SGS Société Générale de Surveillance SA v Republic of Paraguay, Decision on
Jurisdiction, n. 156, at [162]–[171].
268) Yannaca-Small, ‘BIVAC BV v Paraguay versus SGS v Paraguay: The umbrella clause still

270) Ripinsky and Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008), p. 55, citing the ruling in Chorzów Factory that the state was under ‘the obligation to restore the undertaking [i.e. restitution] and, if this be not possible, to pay its value at the time of the indemnification [i.e. compensation], which value is designed to take the place of restitution which has become impossible’: see Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland) [1928] PCIJ Series A No. 17, at 48.

271) Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan, Award, n. 228, at [147] (emphasis added); see also Kantor, Valuation for Arbitration (Kluwer Law International, 2008), pp. 1–2.

272) Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, Award, n. 111, at [779].

273) Ibid., at [785], citing Crawford, The International Law Commission’s Commission’s Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), pp. 204–205. The majority determined that although Tanzania had violated the BIT, none of the violations caused the loss and damage in question: Biwater Gauff, n. 111, at [797]–[798]. The concurring and dissenting opinion, at [16]–[19], considered the majority’s analysis to confuse issues of causation, on the one hand, and quantum of damages, on the other. Tanzania seized the claimant’s business, which clearly caused injury to it. However, the claimant had failed to demonstrate damages, so the majority’s analytical confusion was not decisive in the outcome.

274) Joseph Charles Lemire v Ukraine, Decision on Jurisdiction and Liability, n. 210, at [157]. That a claimant could potentially recover against a respondent state on the basis of a contract does not preclude the claimant for recovering damages for the state’s breach of the relevant BIT: see, e.g., Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka, Award, ICSID Case No. ARB/09/2, IIC 578 (2012), at [556]–[565].


279) Ibid., at [18], [27], and [274].


281) See Phillips Petroleum Co. Iran v Islamic Republic of Iran, n. 181, at [111].

282) The ‘beta’ measures the volatility of the particular industry vis-à-vis the stock market as a whole.


287) Occidental Petroleum Corporation and ors v Republic of Ecuador, Award, ICSID Case No. ARB/06/11, IIC 561 (2012), at [707]–[708], [722], [733], and [737]–[738] (awarding US$1.77 billion—US$2.3 billion with interest applied).

288) Namely, the treaty standard described at paragraph s 8.79–8.95.


290) ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary, Award, n. 178, at [481]. See also Soipem SpA v People's Republic of Bangladesh, Award, ICSID Case No. ARB/05/07, IIC 378 (2009), at [201].

291) ADC v Hungary, n. 178.


293) Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, Award, n. 177, at [B.2.5].

294) ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary, Award, n. 178.

295) Ibid., at [496].

296) ConocoPhillips Petrozuata BV and ors v Bolivarian Republic of Venezuela, Decision on Jurisdiction and the Merits, ICSID Case No. ARB/07/30, IIC 605 (2013), at [343].

297) Waguih Elie George Siag and Clarinda Vecchi v Arab Republic of Egypt, Award, n. 228, at [539]–[542]; Bernardus Henricus Funnehketter and ors v Republic of Zimbabwe, Award, n. 163, at [124]; Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica, Award, n. 228, at [305] and [307].
298) Award, ICSID Case No. ARB/06/3, IIC 591 (2013), at [283], [286], and [288]. See also Nordzucker AG v Republic of Poland, Third Partial and Final Award, UNCITRAL, 28 January 2009.

299) See n. 210, at [163][ff]. Ukraine objected that any such analysis would be inherently speculative.

300) MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile, n. 189; Petrobatt Ltd v Kyrgyz Republic, Award, SCC Arbitration No. 126/2003, IIC 184 (2005); Azurix Corporation v Argentine Republic, Award, n. 189; S D Myers Inc. v Government of Canada, Final Award on the Merits, UNCITRAL, 30 December 2000, IIC 249 (2000); Metaland Corporation v United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, IIC 161 (2000).

301) Reed and Bray, Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation? (Brill, 2007); CMS Gas Transmission Co. v Republic of Argentina, n. 200; Enron Corporation and Ponderosa Assets LP v Argentine Republic, n. 188; Azurix Corporation v Argentine Republic, Award, n. 189; Saluka Investments BV v Czech Republic, Partial Award, n. 189.

302) CMS Gas Transmission, n. 200, at [410].

303) One possible measure of the value of a claimant's investment in a company ‘but for’ the respondent state's measures is the actual price paid for the claimant's shares: see EDF International and ors v Argentine Republic, Award, n. 247, at [1232].


305) Ibid., at [570].

306) Ibid., at [633].


308) Desert Line Projects LLC v Republic of Yemen, Award, n. 83. The previous case was SARL Benvenuti & Bonfant v People's Republic of the Congo, Award, ICSID Case No. ARB/77/2, 8 August 1980, (1982) 21 ILM 740, which was decided ex aequo et bono rather than under a BIT.

309) Desert Line, n. 83, at [289]–[290].

310) Joseph Charles Lemire v Ukraine, n. 210, at [333]. The majority was sympathetic to the claimant's claim that recurring rejections of his applications had a negative impact on his entrepreneurial image, which would be likely to satisfy the second requirement for moral damages. Nevertheless, the 'gravity' required under the moral damages standard was not present, for Lemire's situations could not be compared to the armed threats or witnessing of deaths for which other tribunals have awarded moral damages: ibid., at [339]. The Lemire test has been adopted in other cases: see, e.g., Sr Tzo Yap Shum v Republic of Peru, n. 68, IIC 382 (2009); Mr Franck Charles Arif v Republic of Moldova, Award, n. 304, at [584]–[592], and [615].


312) Ibid., citing the International Law Commission's Draft Articles of State Responsibility, Art. 38.


314) CME Czech Republic BV (The Netherlands) v Czech Republic, Final Award, n. 156, at [636]–[641].

315) Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, Award, n. 177, at [9.2.8].

316) Alpha Projektholding GmbH v Ukraine, Award, ICSID Case No. ARB/07/16, IIC 464 (2010), at [514].

317) See generally Marboe, n. 283, ch. 6; Ripinsky and Williams, n. 270, ch. 9.

318) Ioan Miculo and ors v Romania, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, IIC 339 (2008), at [1266].

319) Geoparcus SA and ors v The United Mexican States, Award, ICSID Case No. ARB(AF)/04/3, IIC 488 (2010); Talsud SA v The United Mexican States, Award, ICSID Case No. ARB(AF)/04/4, IIC 488 (2010), at PI XVI, [26].

320) See, e.g., ICS Inspection and Control Services Ltd (United Kingdom) v Republic of Argentina, Award on Jurisdiction, PCA Case No. 2010-9, UNCITRAL, IIC 528 (2012), at [340]; Chevron Corporation and Texaco Petroleum Co. v Republic of Ecuador, Final Award, UNCITRAL, 31 August 2011, IIC 505 (2011), at [375]. For a detailed discussion of costs and fees in international commercial arbitrations, see Chapter 9.

321) See, e.g., Libananco Holdings Co. Ltd v Republic of Turkey, Award, ICSID Case No. ARB/06/8, IIC 506 (2011), at [565]–[569] (ordering the claimant to pay the Republic of Turkey US$15 million and to reimburse the Republic for its arbitration costs); TECO Guatemala Holdings LLC v Republic of Guatemala, Award, ICSID Case No. ARB/10/17, IIC 628 (2013), at [769]–[779] (ordering the Republic of Guatemala to reimburse 75 percent of the claimant's costs, amounting to US$7.5 million). See also a detailed survey of costs allocation in more than 200 investment arbitration awards in Hodgson, ‘Counting the costs of investment treaty arbitration’, Global Arbitration Review, 24 March 2014.


324) See Gotanda, ‘Consistently inconsistent: The need for predictability in awarding costs and fees in investment treaty arbitrations’ (2013) 28 ICSID Rev—Foreign Investment LJ 420, at 433 (arguing that ‘[t]he system for awarding costs and fees in investment treaty arbitrations can be greatly improved by ICSID’s adoption of a clearer allocation rule’).