

INTERNATIONAL LAW ASSOCIATION

RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

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Interim Report

I. Relevant Practices and Recommendations Concerning the Rule of Law and International Investment Law

1. In its 2020 Interim Report, the Committee indicated its intention to draft recommendations or guidelines that could be adopted as an ILA resolution. These recommendations or guidelines should emphasize rule of law criteria relevant for investment law and investment arbitration. Following the Committee's twofold mandate, the recommendations and guidelines should cover both substantive and procedural issues, i.e. both the rule of law criteria found in investment standards as well as the rule of law requirements to be followed in investment arbitration.
2. This is based on the ILA's 2014 mandate for the Committee 'to study rule-of-law implications of international investment law on both substantive and procedural matters,' specifically requesting the Committee to study a) '[...] how substantive protections found in treaties attempt to ensure government decision-making based on the rule of law,' and b) the extent to which 'investment arbitration itself operates in a manner that is consistent with the rule of law.'¹
3. In its 2020 Interim Report, the Committee stated as follows:

First, based on the conclusions drawn from the papers published, rule of law criteria that allow a systematic assessment of national authorities' conduct in terms of rule of law standards will be identified. Secondly, the recommendations and guidelines will provide rule of law criteria which investment arbitral tribunals ought to consider and respect in their arbitral proceedings, and which the system of investment arbitration in general should observe. The Committee notes that the adoption of certain recommendations may occasionally be difficult due to disagreements between Committee members. While a compromise is desirable, the Committee will identify proposed recommendations even if no compromise can be reached on certain issues and highlight the disagreements since as such they may constitute important contributions to identifying and clarifying rule of law concerns in the field of investment law and investment arbitration. The Committee will now focus on this aspect in order to timely conclude its work with the Lisbon Conference 2022.²

4. ILA Committees have a tradition of elaborating draft recommendations, standards, and practical guidelines, as well as draft conventions and other instruments.³ In order to provide broader visibility of the outcomes of the work of ILA Committees, this Committee has decided, in consultation with the Director of Studies and other ILA Officers, to pursue such an

¹ Rule of Law and Investment Law Committee description 2014; available at [file:///C:/Users/abernj/Downloads/Rule%20of%20Law%20&%20International%20Investment%20Law%20Committee%20Description.%20\(2\).pdf](file:///C:/Users/abernj/Downloads/Rule%20of%20Law%20&%20International%20Investment%20Law%20Committee%20Description.%20(2).pdf).

² ILA Committee on the Rule of Law and International Investment Law, Interim Report (2020) <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=25079&StorageFileGuid=ac2c5b90-a2b8-4c3f-85b1-1483719d91b3>>.

³ ILA Committee on Cultural Heritage Law, Resolution No. 3/2016, Annex: Recommendations in (2016) 77 Int'l L Ass'n Rep Conf 15, 24-26; ILA Committee International Commercial Arbitration, Resolution No. 4/2016, Annex: Recommendations, (2016) 77 Int'l L Ass'n Rep Conf 15, 31-33; ILA Committee on Rights Of Indigenous Peoples, Resolution No. 5/2012, Annex: Conclusions and Recommendations of the Committee on the Rights of Indigenous Peoples (2012) 75 Int'l L Ass'n Rep Conf 17, 34-26.

approach as well.

5. It should also be recalled that the mandate of the present ILA Committee was formulated against the background of the outcome of an ILA Study Group on the Role of Soft-Law Instruments in International Investment Law (2008-2014). The ILA Study Group, having undertaken a study on the ripeness of a codification of substantive investment standards, concluded that it was not feasible at that stage to attempt such a codification.⁴ This was mainly the result of too much uncertainty about the precise interpretation of certain substantive protection standards, in particular in regard to issues like the scope of most-favoured-nation (MFN) clauses, the proper interpretation of umbrella clauses, the reach of the notion of indirect expropriation, the content of the requirements of fair and equitable treatment (FET), etc.⁵ However, the Study Group also concluded that it might be appropriate to focus on distinct areas of investment law, in particular, focusing on the topic 'The Rule of Law and Investment Law'.⁶
6. This suggestion was endorsed by the ILA at its Washington Conference in 2014 when it selected the topic of the present Committee and formulated its mandate, focusing on the rule of law content of investment protection standards and the rule of law features of investment dispute settlement.⁷
7. During a hybrid Committee working meeting on 27 September 2021 in Vienna, many aspects of an initial draft of this interim report prepared by the chair and the co-rapporteurs were extensively discussed by Committee members who met partly in person and partly by joining the debate online. At a second hybrid Committee working meeting in Vienna on 18 November 2021 further aspects of the report were discussed. The entire interim report reflects the discussion among the Committee members as well as additional suggestions received from individual members. At the Vienna meetings, consensus emerged on the terminology to be used for the descriptive as well as for the prescriptive part of what should eventually become part of a final resolution to be adopted at the ILA Conference receiving the Committee's final output. Based on an analysis of the practice of investment dispute settlement, i.e. mostly investment treaty arbitration, the Committee has identified in a descriptive summary the main approaches that can be qualified as 'relevant practices' for the purposes of analysing rule of law content. The term 'relevant' was preferred over 'established', 'existing' or other qualifications in order to avoid at this stage any suggestion of a normative endorsement. Committee members also generally agreed to use the expression 'recommendations' in order to denote the prescriptive elements that should be followed by adjudicators in order to strengthen the rule of law.
8. The present set of relevant practices and recommendations will address the main protection standards contained in international investment agreements (IIAs), including bilateral investment treaties (BITs) and treaties with investment provisions, such as the Energy Charter Treaty (ECT), NAFTA/USMCA and others. Based on an examination of these protection standards and how they have been interpreted in practice, it will identify relevant practices that reflect rule of law demands and then formulate recommendations for adjudicators of investment treaty disputes to assist them to uphold rule of law principles in the application of these standards. The expression 'adjudicators' has been adopted in this report to include

⁴ ILA Study Group on the Role of Soft-Law Instruments in International Investment Law, Report 2014 (2014) 76 Int'l L Ass'n Rep Conf 986, 987 & 995.

⁵ See also Andrea K. Bjorklund & August Reinisch (eds.), *International Investment Law and Soft Law* (Edward Elgar 2012).

⁶ ILA Study Group on the Role of Soft-Law Instruments in International Investment Law, Report 2014 (2014) 76 Int'l L Ass'n Rep Conf 986, 995 (suggesting the 'broader topic 'The Rule of Law and Investment Law'. This topic would encourage the exploration of themes such as (1) certainty, predictability, and accessibility of the law and legal institutions; (2) equality under and before the law; (3) respect for human rights; and the (4) requirements for parties to receive a fair trial.').

⁷ See also *supra* para. 2.

investment arbitration tribunals as well as possible future forms of more court-like institutions settling investor-state disputes.⁸ In its working meetings, the Committee also discussed whether the recommendations should also be more broadly addressed to treaty-negotiators. Since this would have considerably enlarged the perspective of the present work, it was deemed preferable at this stage to limit the inquiry to the application and interpretation of existing treaty standards and to focus on recommendations to adjudicators on how to emphasize the rule of law elements contained in existing treaty standards. Although the draft recommendations are not primarily intended as recommendations for treaty-makers, they may nonetheless provide useful input for drafters and negotiators.

9. The Committee will next turn to rule of law criteria which investment arbitral tribunals ought to consider and respect in their arbitral proceedings, and which the system of investment arbitration in general should observe. The Committee will analyse to what extent such standards are found in the practice of investor-state dispute settlement (ISDS), in particular, its currently dominant form of investment arbitration. Based on these practices it will also formulate recommendations for adjudicators of investment disputes to adhere to rule of law demands when deciding investment disputes. This analysis will be undertaken in the next Committee report due at the 2024 Conference.

II. The Rule of Law and Investment Protection Standards

10. This interim report will first briefly summarize the Committee's previous work on the different rule of law notions and explain the rule of law criteria used by the Committee for the purposes of analysing the relevant investment dispute settlement practice.
11. Subsequently, the report will analyse at some length the rule of law aspects of the most widely used investment protection standards contained in IIAs. It will not exhaustively deal with all standards found in IIAs. Rather, it focuses on standards that are most frequently included in such treaties and are regularly invoked in investment disputes. The report will thus address expropriation, FET, full protection and security (FPS), and national treatment, as well as MFN treatment, and umbrella clauses, being aware that other standards may also have rule of law-relevant content. The Committee is equally mindful of the fact that the exact wording of such treaty standards often varies in different IIAs. Both its descriptive findings as well as its prescriptive recommendations are therefore formulated at a relatively high level of abstraction.
12. This interim report contains rather comprehensive analyses of the actual investment practice applying the above-mentioned protection standards under the heading 'Investment law practice'. These findings provide the basis for the Committee's descriptive summaries under the title of 'Relevant practices' which are then followed by concise prescriptive sections entitled 'Recommendations'. It is envisaged that the latter two short sections, the 'Relevant practices' and 'Recommendations', will form the substance of a final Committee resolution.

III. The Rule of Law Criteria Used

13. The Committee has devoted considerable time and energy to identifying a broadly acceptable concept of the rule of law.⁹ The Committee was aware that this concept, as well as related

⁸ See August Reinisch & Marc Bungenberg, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer, 2nd ed., 2020).

⁹ ILC Committee on the Rule of Law and International Investment Law, Report 2018 (2018) 78 Int'l L Ass'n Rep

ideas, such as ‘prééminence du droit’, ‘état de droit’, ‘primauté de droit’, and ‘Rechtsstaatlichkeit’/‘Rechtsstaatsprinzip’, have developed within different national legal systems and have particular socio-legal connotations in domestic law and in other international law contexts.¹⁰

14. The Committee undertook to analyse different domestic and international conceptualizations of the rule of law. In its 2018 Sydney Report, it outlined different traditions of the rule of law notion. In particular, in common law traditions the concept of rule of law emphasizes equality, procedural protections, such as access to justice and the right to a fair trial, as well as judicial control.¹¹ In contrast, other legal cultures focus more on the (formal) legality of state action, such as the German concept of ‘*Rechtsstaat*’¹² or the French idea of ‘*principe de légalité*’.¹³ In spite of these differences, the Committee espoused the notion that ‘a government of laws, the supremacy of the law, and equality before the law’ could be viewed as core elements of the rule of law.¹⁴
15. The Committee also discussed so-called ‘thick’ or ‘substantive’ concepts of the rule of law, adding justice, fairness, and human rights standards to the ‘thin’, formal notion of the rule of law.¹⁵ While the ‘thin’ or formal notion of the rule of law focuses on the element of legality and implies that governments both respect the law and govern through law, a ‘thick’ or ‘substantive’ concept focuses on the content of laws. For purposes of its work, the Committee considered that the ‘thick’ rule of law encompassed the ‘thin’ one, in any event.¹⁶ As such, it views the concepts of ‘thin’ and ‘thick’ rule of law not as mutually exclusive, but rather as complementary or at least adding thick elements to a thin conception.¹⁷ In the work of the Committee both rule of law concepts have been taken into account.
16. As explained in earlier Committee reports, the rule of law criteria of the United Nations, as expressed in the 2004 UN Secretary-General’s *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*¹⁸ served not only as a starting point for the Committee discussions in 2018 and 2019, but were also largely regarded as reflecting a generally accepted notion of a combined (thin and thick) rule of law concept. Although this report was specifically adopted for the transitional justice context, the underlying notion of the

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¹⁰ See H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), vol. 1.; J. Waldron, *The Law* (Routledge, 1990); D. Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999); R. Grote, “Rule of Law, Rechtsstaat and ‘Etat de droit’”, in C. Starck (ed.), *Constitutionalism, Universalism and Democracy* (Nomos, 1999) 269-306; B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge 2004); T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001); P. Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework* (Ashgate/Dartmouth, 2005); G. Palombella, “The Rule of Law and its Core”, in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart, 2009) 17-42; T. Bingham, *The Rule of Law* (Allen Lane, 2010); I. Flores and K. Himma (eds.), *Law, Liberty, and the Rule of Law* (Springer, 2013).

¹¹ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1885) Pt II, at 172, 177-78, 208 (emphasizing the supremacy of law over governmental power, equality before the law, and the enforcement of the law through the courts).

¹² H. Kelsen, *Pure Theory of Law* (University of California Press, 2d ed., 1970).

¹³ Société française pour le droit international, *L’Etat de droit en droit international* (Pedone 2008).

¹⁴ S. Chesterman, “An International Rule of Law” (2008) 56 *American Journal of Comparative Law* 331, 342, cited in ILA Committee on the Rule of Law and International Investment Law, Report 2018 (2018) 78 Int’l L Ass’n Rep Conf 380, 382-383.

¹⁵ ILA Committee on the Rule of Law and International Investment Law, Report 2018 (2018) 78 Int’l L Ass’n Rep Conf 380. See also B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

¹⁶ Jørgen Møller & Svend-Erik Skaaning, “Systematizing Thin and Thick Conceptions of the Rule of Law” (2012) 33(2) *Justice System Journal* 136.

¹⁷ Peter Rijpkema, “The Rule of Law: Beyond Thick and Thin” (2013) 32 *Law and Philosophy* 793.

¹⁸ See United Nations Security Council, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004.

rule of law and the rule of law demands elaborated in the report appear to include important criteria for assessing national legal systems more generally.¹⁹ This makes the rule of law criteria contained therein particularly useful for present purposes. The core section of the Report provides:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁰

17. In a similar direction, the 2012 General Assembly Rule of Law Declaration calls for ‘an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil, and administrative justice.’²¹ It also expressly emphasizes the need for judicial independence and impartiality as ‘an essential prerequisite for upholding the rule of law’ as well as effective ‘access to justice.’²² In addition to these mostly ‘procedural’ rule of law aspects, the 2012 Declaration also endorses a more substantive concept of the rule of law by referring to ‘just, fair and equitable laws’ as well as to ‘equal protection of the law’ ‘without any discrimination.’²³
18. Based on an analysis of investment arbitration practice, the Committee considers that the following aspects are of particular relevance in order to ascertain the rule of law content of investment standards as well as the rule of law conformity of investor-state dispute settlement:
 - Access to dispute settlement, as expressed in ‘the right of equal access to justice for all’, including judicial review of legislative and administrative acts,
 - Adjudicatory (judicial and arbitral) independence and impartiality,
 - Due process and absence of denial of justice,
 - Legal certainty, including the accessibility and predictability of legal norms,
 - Consistency and predictability of dispute settlement outcomes,
 - Legality, including a transparent, accountable, and rules-based/democratic process for enacting legislation,
 - Prohibition of arbitrariness,
 - Proportionality,
 - Transparency,
 - Respect for human rights,
 - Non-discrimination and equality before the law.

IV. Expropriation

¹⁹ Recently, an investment tribunal, *inter alia*, relied upon this report to determine the normative content of the concept of rule of law, see *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, para. 1744.

²⁰ United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, 30 November 2012, para. 10.

²¹ *Ibid.*, para. 12.

²² *Ibid.*, paras 13 & 14.

²³ *Ibid.*, para. 2.

19. The law on expropriation embraces a number of rule of law principles. Although the protection of property is sometimes listed as a fundamental right in human rights treaties, neither customary international law nor IIAs generally prohibit the taking of property, in general, or of foreign investments, in particular. Rather, they permit expropriations on the condition that certain rule of law requirements such as public purpose, due process, and non-discrimination are complied with and that compensation is paid.

A. *Investment Law Practice*

20. The due process and non-discrimination requirements are particularly clear expressions of core rule of law demands,²⁴ also found in the context of FET.²⁵ The requirement of a public purpose or interest and the need to compensate expropriated investors also reflect rule of law mandates.

1. Due Process

21. The way that the due process requirement has been interpreted in investment arbitration demonstrates not only an overlap with FET, but also that the demand for a fair procedure can be seen as a convergence of rule of law and human rights concepts.
22. Some IIAs even explicitly provide for a particularly important due process requirement, by stating that it implies the right to have the legality of the expropriation reviewed by the domestic courts or administrative agencies of the host state.²⁶ Such clarifications demonstrate that the customary international law requirement of due process in the context of expropriation can be regarded as an expression of the rule of law notion of access to court or access to an independent and impartial adjudicator.²⁷
23. These demands have been explicitly endorsed by a number of investment tribunals. A well-known explication of due process requirements in case of an expropriation can be found in the ICSID award of *ADC v. Hungary*:

‘Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. [...]’²⁸

24. In a similar way, the ICSID tribunal in *Kardassopoulos v. Georgia*²⁹ referred to ‘several

²⁴ OECD Draft Convention on the Protection of Foreign Property, 12 October 1967, 7 ILM 117 (1968), Notes and Comments to Article 3 (Taking of Property) 5. a (“In essence, the contents of the notion of due process of law make it akin to the requirements of the “Rule of Law”, an Anglo-Saxon notion, or of “Rechtsstaat”, as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the national law of the parties concerned. The “due process of law” of each of them must correspond to the principles of international law.”).

²⁵ See *infra* paras. 42 et seq.

²⁶ See, e.g., Article 13(2) ECT (1994) (“The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).”).

²⁷ See *supra* 12.

²⁸ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, ICSID Case No. ARB/03/16, 2 October 2006, para. 435.

²⁹ *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010.

elements which may be considered to form part of the due process obligation, such as reasonable advance notice and a fair hearing.’³⁰ The tribunal in *Teinver v. Argentina*³¹ assessed whether ‘the expropriation process provided [the investor] with a legal procedure that granted “a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard”.’³² The tribunal in *Quiborax v. Bolivia*³³ found that ‘[t]he standard of due process under international law, and more specifically in the expropriation context, has been summarized in *ADC v. Hungary* as demanding “an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.”’³⁴ Numerous other tribunals have also recognized the rule of law inspired access to justice element inherent in the due process requirement of the expropriation standard.³⁵

25. In some IIAs the due process requirement emphasizes another rule of law aspect, i.e. formal legality or conformity with national law.³⁶ This formal legality corresponds to an aspect of some civil law traditions of ‘Rechtsstaatlichkeit’, as an understanding of the rule of law requiring authorities to act on a statutory basis.³⁷ Based on such a formal understanding, some tribunals found that expropriations carried out in violation of the host state’s own law constituted breaches of the legality requirement.³⁸

2. Non-discrimination

26. In a number of investment cases, tribunals have emphasized another rule of law aspect of the legality requirements concerning expropriations, both under customary international law as well as under IIAs, i.e. non-discrimination. It seems that this requirement is less interpreted as a broad non-discrimination or equal treatment obligation, but rather in a narrower sense as focusing on the prohibition of unjustifiable distinctions³⁹ or distinctions on the basis of particularly condemned grounds, such as race or ethnicity,⁴⁰ gender or religious beliefs. Tribunals have held, though, that different treatment may be rationally justified and thus not

³⁰ *Ibid.*, para. 397.

³¹ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017.

³² *Ibid.*, para. 1002.

³³ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

³⁴ *Ibid.*, para. 221 (citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, ICSID Case No. ARB/03/16, 2 October 2006, para. 435).

³⁵ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015; *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016; as well as further cases discussed in Reinisch/Schreuer, *International Protection of Investments* (Cambridge University Press 2020) 216-222.

³⁶ See, e.g., Article 4(3) China-Poland BIT (1998); Article 4(a) Portugal-Venezuela BIT.

³⁷ See *supra* para. 14.

³⁸ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 494. (‘The Tribunal further concludes that the failure of Venezuela to observe the requirements of its own nationalisation legislation is sufficient to constitute a breach of Article 4(a) of the Portuguese Treaty, which has an explicit *renvoi* to Venezuelan domestic law through the language: “in accordance with the legislation in force.”’[emphasis in original]); *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 171.

³⁹ *GAMI Investments v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 114; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 393.

⁴⁰ See, e.g. *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Southern African Development Community Tribunal (SADC Tribunal), SADC (T) Case No. 2/2007, Judgment, 28 November 2008.

constitute discrimination.⁴¹

27. Expropriation affecting only foreigners is not always and automatically regarded as unlawful if it can be based on justifiable grounds. However, there is arbitral practice according to which expropriatory measures directed against foreigners as opposed to nationals may be regarded as unlawful.⁴²
28. The non-discrimination requirement for lawful expropriations also appears sometimes to fall under a broader prohibition of arbitrary and discriminatory treatment,⁴³ which in turn seems to overlap with the rule of law demand not to act arbitrarily.⁴⁴ In this sense, tribunals have regarded expropriations as unlawful if they were motivated by extraneous political reasons and were thus arbitrary and discriminatory.⁴⁵

3. Public Purpose/Interest

29. The requirement that any expropriation in order to be considered lawful must be in the public interest or for a public purpose is found in practically all IIAs and is clearly established in the jurisprudence of arbitral tribunals.
30. From a rule of law perspective, the public interest requirement can be regarded as encapsulating the idea that state action must pursue some public good or enhance the general welfare.⁴⁶ Thus, the public interest requirement is a limitation on a state's sovereign right to expropriate and prevents the arbitrary exercise of such power.⁴⁷
31. Investment tribunals generally accord states broad discretion when assessing public interest and rarely second-guess a state's assessment of what is in the public interest.⁴⁸ Nevertheless, a

⁴¹ *Amoco v. Iran* (1987) 15 Iran-USCTR 189, 232, para. 142 ('[it] finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference in treatment.').

⁴² *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 ICSID Reports 343, para. 366 et seq.; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 242; *ADC v. Hungary*, ICSID Case No. ARB/03/16, 2 October 2006, para. 443; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 344.

⁴³ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 100 ('The measure must not be arbitrary and discriminatory within the generally accepted meaning of the terms.'). On the self-standing standard prohibiting arbitrary and discriminatory measures contained in some IIAs, see Reinisch/Schreuer, *International Protection of Investments* (Cambridge University Press 2020) 813-854.

⁴⁴ See *supra* para. 18.

⁴⁵ *British Petroleum v. Libya*, Award, 10 October 1973 und 1 August 1974 (1979) 53 ILR 297, at 329 ('[...] the taking by the Respondent of the property, rights and interests of the Claimant clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.').

⁴⁶ *Norwegian Shipowners' Claims (Norway v. US)* (1922) 1 RIAA 307, 332 (referring to the '[...] power of a sovereign state to expropriate, take or authorize the taking of any property within its jurisdiction which may be required for the "public good" or for the "general welfare"').

⁴⁷ See Reinisch/Schreuer, *International Protection of Investments* (Cambridge University Press 2020) 194-204.

⁴⁸ See, e.g., *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, para. 126; *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award (Redacted), 15 March 2016, para. 6.64; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras. 243 et seq.; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, para. 985 ('[...] that a State must be accorded a certain amount of deference in determining how to best advance its public interest [...]'); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 294.

few tribunals have scrutinized whether a purported public interest was genuine.⁴⁹ For instance, the tribunal in *ADC v. Hungary*⁵⁰ insisted that ‘[...] a treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.’⁵¹

4. Public Interest, Proportionality, and Police Powers

32. As a consequence of the concern that too-strict scrutiny of state measures could result in many regulatory measures being regarded as compensable indirect expropriations, investment tribunals as well as treaty makers have increasingly relied upon the so-called police powers doctrine,⁵² ensuring that the right to regulate is not unduly limited.
33. In cases like *Methanex v. United States*⁵³ and *Saluka v. Czech Republic*,⁵⁴ arbitral tribunals have held that non-discriminatory, *bona fide* regulatory measures, adopted with due process and for a public purpose should not be regarded as compensable expropriation. To a certain extent this interpretation of a state’s police powers transforms the legality criteria, discussed above, into yardsticks for the assessment of whether an expropriation occurred in the first place.
34. Some tribunals have added the criterion of proportionality in order to assess whether state action constituted regulatory measures or regulatory expropriation.⁵⁵ They have referred, among others, to the ‘proportionality between the means employed and the aim sought to be

⁴⁹ *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 431 et seq.; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 247 et seq.; *UP and C.D Holding Internationale v. Hungary* (formerly: *Le Chèque Déjeuner and C.D Holding Internationale v. Hungary*), ICSID Case No. ARB/13/35, Award, 9 October 2018, para 414 et seq.

⁵⁰ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

⁵¹ *Ibid.*, para. 432.

⁵² See e.g. C Titi, ‘Police Powers Doctrine and International Investment Law’ in A Gattini, A Tanzi and F Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff 2018) 323; A Pellet, ‘Police Powers or the State’s Right to Regulate’ in Meg Kinnear et al. (eds), *Building International Investment Law – The First 50 Years of ICSID* (Wolters Kluwer 2016) 451; B Mostafa, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’ (2008) 15 *Australian Journal of International Law* 267

⁵³ *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, IV D, para.7 (‘[...] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.’).

⁵⁴ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255 (‘It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.’).

⁵⁵ *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 826 (‘[...] the economic harm consequent to the non-discriminatory application of generally applicable regulations adopted in order to protect the public welfare do not constitute a compensable taking, provided that the measure was taken in good faith, complied with due process and was proportionate to the aim sought to be achieved.’); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 343 (‘Instead, international law requires [...] that the host State’s implementation of the existing regulatory framework under its police powers complies, in addition to due process, with the principle of good faith, is neither arbitrary nor discriminatory, and is otherwise proportionate.’).

realized,’⁵⁶ and ‘whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.’⁵⁷

35. The police powers carve-out from the notion of indirect expropriation is in turn inspired by the notion that states need to be able to act in the public interest,⁵⁸ and should be able to do so if acting in a *bona fide*, non-discriminatory, proportionate manner that follows due process. The police powers doctrine, protecting the regulatory freedom of states, has been considered to be based on customary international law by a number of investment tribunals.⁵⁹ However, it has also been criticized for elevating the legality criteria for expropriation (in particular public interest) to the level of assessing whether an expropriation has taken place in the first place, thus in effect dispensing with the need to compensate for a lawful expropriation.⁶⁰
36. Investment tribunals have emphasized that the precise distinction between non-compensable regulation and compensable indirect expropriation is one of the most difficult questions and

⁵⁶ *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, para. 176 (‘To distinguish between a compensable expropriation and a noncompensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized and the *bona fide* nature of the measure.’).

⁵⁷ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 195 (‘With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed. The proportionality to be used when making use of this right was recognized in *Tecmed*, which observed that “whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.”’).

⁵⁸ *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009, para. 498 (‘International investment treaties were never intended to do away with their signatories’ right to regulate. As found in *Saluka*, where the instant Treaty was being applied, notwithstanding the breadth of its prohibition against expropriation and the absence of an express regulatory power exception, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. This is common sense. [...]’ [footnote omitted]).

⁵⁹ See *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255; *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, IV D, para.7; *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103, referring to ‘international law’, ‘general international law’, and ‘customary international law’ respectively.

⁶⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.21 (‘Also, the structure of Article 5(2) of the Treaty directs the Tribunal first to consider whether the challenged measures are expropriatory, and only then to ask whether they can comply with certain conditions, *ie* public purpose, non-discriminatory, specific commitments, et cetera. If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid. Respondent’s public purpose arguments suggest that state acts causing loss of property cannot be classified as expropriatory. If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose. [...]’); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 310 (‘[...] the issue was not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. In the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate. The tribunal in *S.D. Myers* found the purpose of a regulatory measure a helpful criterion to distinguish measures for which a State would not be liable: “Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State.” This Tribunal finds the criterion insufficient [...]’ [footnote omitted]).

particularly hard to ascertain in the abstract.⁶¹ They nonetheless attempt to do so by focusing on the specific facts of each case, taking into account rule of law criteria such as public interest, absence of arbitrariness and discrimination, due process, etc. The tribunal in *ADC v. Hungary* even asserted that the rule of law provided delimiting criteria.⁶² Other tribunals seem to focus on assessing the proportionality between the public purpose pursued and the effect on the property affected,⁶³ in practice suggesting a double-layered test.⁶⁴

37. Treaty practice has also endorsed the police powers doctrine and many more recent IIAs incorporate explicit provisions carving out regulatory measures from the notion of compensable indirect expropriation.⁶⁵ The Committee debated at length whether the regulatory freedom of host states protected by the police powers doctrine should be regarded as a rule of law element. It was asserted that a ‘thick’ rule of law-concept may encompass a host state’s responsibility not only vis-à-vis foreign investors, but also its own population including the need to balance these responsibilities in specific situations. It was also mentioned that host states often pursue regulatory measures in order to comply with their human rights and other internationally recognized obligations, such as in the fields of the environment or public health, as specific forms of acting in the public interest.

⁶¹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 263 (‘[...] international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.’).

⁶² *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 (Highlighting ‘[...] basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries.’).

⁶³ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 195 (‘With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed. [...]’).

⁶⁴ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 276 (‘[...] (i) On the one hand, there are certain types of measures or state conduct that are considered a form of expropriation because of their material impact on property, and which are legitimate only if adopted for public purpose, without discrimination, and against the payment of compensation according to the general or specific applicable standards. One may distinguish between: (a) outright suppression or deprivation of the right of ownership, usually by its forced transfer to public entities; (b) limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property. Both of these types of measures entail indemnification under relevant international treaties, as well as under most constitutions which respect fundamental human rights. (ii) On the other hand, there are limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public (being ultimately beneficial also to the property affected). These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners. These restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however that they do not affect property in an intolerable, discriminatory or disproportionate manner.’ [footnotes omitted]).

⁶⁵ See, e.g., already Annex B US Model BIT 2004 (‘(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.’); Annex 8-A (3) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016 (‘For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.’).

5. Compensation

38. The obligation to provide compensation for the taking/expropriation of property/investments has long been controversial, less as a matter of principle than in regard to the appropriate standard and exact amount of compensation due in a given case.⁶⁶ The Committee noted though that there remains some debate on whether the mere non-payment of compensation immediately makes an expropriation unlawful.⁶⁷
39. The controversy over whether the classic standard expressed in the *Hull* formula, requiring ‘prompt, adequate and effective compensation,’⁶⁸ or a lower standard, as demanded in the course of the debate on a New International Economic Order, particularly in the 1960s/1970s, calling for merely ‘appropriate compensation [...] taking into account [the host State’s] relevant laws and regulations and all circumstances that the State considers pertinent’⁶⁹ should be used, has dominated much of the second half of the 20th century.⁷⁰ Today, almost all IIAs contain language requiring states to compensate investors in case of expropriation in a prompt, adequate and effective manner, often spelling out that the fair market value has to be paid.
40. However, the more interesting aspect appears to be the fact that the underlying assumption that a state may not deprive an investor of its investment without any compensation at all can be seen as reflecting the basic notion that a state should not be unjustly enriched at the expense of the person/entity expropriated. This rationale also applies if the expropriation is carried out pursuant to the requirements of public interest and due process because an uncompensated expropriation would shift the burden to the expropriated owner in a discriminatory way. Even if the public at large would benefit, leaving the costs of that advantage to be exclusively borne by the uncompensated former owner would violate core rule of law principles of equal treatment.⁷¹

⁶⁶ Reinisch/Schreuer, *International Protection of Investments* (2020) 225-250.

⁶⁷ See *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 141 (‘[a]n expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.’); *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 301 (‘[...] the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful.’) and contrast with *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.28 (‘[...] the Respondent has not made any meaningful offer of compensation or provided any meaningful procedure for compensation to KOMSA as required by [the applicable BIT]’); *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 411 (‘It is undisputed that no compensation was offered or paid by Respondent after the 2011 Reform. For that reason alone, it is clear that Respondent breached Art. 5(2) of the BIT.’).

⁶⁸ G. H. Hackworth, *Digest of International Law, Vol. 3* (1942) 658-59, § 288 (‘The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.’).

⁶⁹ UNGA Res. 3281 (XXIX), UN GAOR, 29th Sess., UN Doc. A/9631 (1974).

⁷⁰ B. Sabahi, N. Rubins and D. Wallace, *Investor-State Arbitration* (2nd edn, Oxford University Press 2019) 576-581; AF Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008) 486-493; G. Sh. Varges, *The New International Economic Order Legal Debate* (Peter Lang 1983).

⁷¹ B. Cheng, ‘The Rationale of Compensation for Expropriation’ (1984) 78 *American Journal of International Law* 121, 297 (‘It is submitted that the rationale of compensation for expropriation consists in the fact that certain individuals in a community, or certain categories of individuals, without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken represents precisely the corresponding contributions made by the rest of the community in

41. In addition, the obligation to compensate in case of expropriation may conform to the fundamental rights obligation under human rights treaties requiring such compensation. The Committee is, of course, aware that different human rights instruments provide for different compensation standards and that the compensation practice of human rights bodies is often considerably lower than the full compensation practice of most investment tribunals. Because the obligation to compensate is provided for as a substantive, human rights obligation it may be viewed as a thick rule of law aspect.

B. Relevant Practices

- a) “The standard of expropriation is meant to further certain aspects of the rule of law. It imposes demands on host states.”
- b) “In particular, the requirements of due process and of non-discrimination are expressions of core rule of law demands and contribute to the prevention of arbitrary and discriminatory governmental measures.”
- c) “The requirements of a public purpose or public interest and payment of compensation for expropriations further rule of law demands, ensuring that expropriatory measures serve the public at large and do not unilaterally disadvantage individual investors. When assessing public purpose or public interest in relation to the effect of a measure on an investment, tribunals give particular weight to considerations of proportionality.”
- d) “Investment jurisprudence on the regulatory space of host states (police powers), carving out non-discriminatory, good faith measures in the public interest from the notion of compensable expropriation, enhances the regulatory freedom of states to act in the public interest. In distinguishing between regulatory measures and compensable expropriation, tribunals give particular weight to considerations of proportionality and to the existence of specific commitments to investors/investments.”

C. Recommendations

- a) “When deciding upon expropriation claims, adjudicators should take into account the rule of law demands of the expropriation standard.”
- b) “Adjudicators should assess whether the rule of law-requirements of due process and non-discrimination as well as public purpose and compensation have been complied with when called upon to determine whether an expropriation was lawful.”
- c) “At the same time, adjudicators should ensure that the regulatory space of host states is sufficiently respected, enabling them to adopt proportionate, non-discriminatory, good faith measures in the public interest without the need for compensation of foreign investors.”
- d) “When assessing the public interest of states, as part of determining the existence of an indirect expropriation or whether an expropriation is lawful, adjudicators should give due deference to states and refrain from substituting their own view for that of sovereign decision-makers with respect to the determination of whether their acts fulfilled a public purpose. Still, they should retain their competence to scrutinize state compliance with their

order to equalise the financial incidence of this taking of individual property.’); cf F.V. Garcia-Amador, ‘Fourth Report on State Responsibility’ UN Doc A/CN.4/119 (1959), para. 14 (‘[T]he very *raison d’être* of compensation for expropriation ordered in the public interest is the idea that the State, i.e. the community, must not benefit (unduly) at the expense of private individuals.’).

obligations towards investors, including the proportionality of host state measures as well as their potentially discriminatory character.”

V. Fair and Equitable Treatment

42. FET, like FPS, is rooted in the international minimum standard based on customary international law. However, it is debated to what extent FET obligations contained in IIAs are expressions of and equal to the customary international minimum standard or go beyond it and are independent, autonomous duties. For NAFTA’s FET clause, which refers to ‘treatment in accordance with international law, including fair and equitable treatment’,⁷² the issue was authoritatively resolved by the interpretation of NAFTA’s Free Trade Commission which decided in 2001 that FET was equivalent to the international minimum standard.⁷³ FET clauses in other IIAs, whether they contain references to international law or not, have often been interpreted as ‘autonomous’⁷⁴ or ‘self-contained’⁷⁵ FET standards. In particular, a dynamic interpretation of the customary international minimum standard has at times led to similar expressions of the two standards, leading some tribunals to conclude that ‘[...] the difference between the treaty standard and the customary minimum standard, when applied to the specific facts of the case, may be more apparent than real.’⁷⁶
43. In the practice of investment arbitration, fair and equitable treatment has been interpreted as comprising a range of elements, from procedural due process or fair trial guarantees, a lack of discrimination and arbitrariness, transparency, predictability/stability, to the protection of investors’ legitimate expectations.⁷⁷
44. Some of these elements are generally accepted; others are more contested. Contestation often concerns the extent to which elements such as transparency, stability, or the protection of legitimate expectations can be regarded as forming part of the customary international law

⁷² Article 1105 NAFTA (1992).

⁷³ NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, 31 July 2001 (‘1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.’).

⁷⁴ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 294; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 591; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, para. 155; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 530.

⁷⁵ *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, para. 184; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008, para. 452.

⁷⁶ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 291.

⁷⁷ See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609 (‘[The FET] standard encompasses *inter alia* the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor’s reasonable and legitimate expectations.’); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 7.74 et seq. (‘[...] the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor’s reasonable expectations with respect to the legal framework adversely affecting its investment [and] the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations.’).

minimum standard.

45. Some commentators regard fair and equitable treatment as an ‘expression’ of the rule of law.⁷⁸ More recently, arbitral tribunals have also explicitly linked the ‘rule of law’ with fair and equitable treatment in their analysis of state conduct and compliance with the obligations assumed in investment treaties.⁷⁹

A. *Investment Law Practice*

46. A host state’s obligation to afford due process or a fair trial before its courts and administrative bodies,⁸⁰ as well as to abstain from arbitrary or discriminatory measures, belongs to the generally accepted aspects of FET.

1. Due Process/Fair Trial

47. The procedural due process/fair trial element of FET can be regarded as a version of (customary)⁸¹ international law standards prohibiting denial of justice.⁸² It has been pointed out in the Committee’s debate that one may also understand denial of justice as depriving private parties of their right of access to an impartial and independent adjudicator, whereas due process focuses more on a fair trial and procedure.

⁷⁸ See, e.g., Nicolas Angelet, ‘Fair and Equitable Treatment’ in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (MPEPIL online) para. 5; see also Stephan W. Schill, ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law’ *Global Administrative Law* (2006) Series IILJ Working Paper 2006/6.

⁷⁹ See e.g. *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 246 (‘FET is an autonomous standard generally guaranteeing the rule of law in the treatment of foreign investors under the legal systems of host states. [...]’); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1308 (‘Absent any further guidance from the Treaty itself, it is generally accepted that the obligation to afford fair and equitable treatment (FET) contained in a treaty is a requirement that host States abide by a certain standard of conduct vis-à-vis protected investors. [...] A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor.’); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 243 (‘These rule of law-elements flowing from fair and equitable treatment [...]’); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 491 (‘Un Estado lo [i.e. FET] viola cuando adopta un acto (o una cadena de actos) manifiestamente antijurídicos o que desconocen las exigencias básicas del *rule of law*.’ [footnote omitted]); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, para. 1715 (‘In the case of the FET standard and of investment protection standards in general, the most useful guidance can often be found in general principles of law. [...] This includes core principles such as the rule of law, legal certainty, transparency and predictability, non-arbitrariness and non-discrimination. Indeed, some commentators have argued that the FET standard reflects general principles of law, while others argue that the FET standard “should properly be understood as an embodiment of the concept of the rule of law (or Rechtsstaat in the German, *état de droit* in the French tradition)”.’ [footnotes omitted]).

⁸⁰ *Rupert Binder v. The Czech Republic*, UNCITRAL, Final Award, 15 July 2011, para. 449 (referring to ‘failure of the state’s administrative or judicial system.’).

⁸¹ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador [II]*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 8.23 (‘There is a consistent line of awards over many years, amounting to a *jurisprudence constante*, deciding that a denial of justice in violation of customary international law will also amount to a breach of an FET standard in a treaty [...]’).

⁸² *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 452 (‘[t]he concepts of “due process” and “denial of justice” are closely linked. A failure to allow a party due process will often result in a denial of justice.’); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 218 (‘[...] fair treatment implies that there is no denial of justice.’).

48. The notion of denial of justice has its roots in customary international law concerning the treatment of foreign nationals.⁸³
49. In investment arbitration, a number of elements have been developed by arbitral tribunals to ascertain the procedural requirements of due process demanded from host states. These requirements often closely resemble the international minimum standard of due process.
50. At the same time, the due process/fair trial demand enshrined in FET also corresponds to the obligation to afford access to justice and a fair trial as found in many human rights instruments, such as, e.g., Article 10 Universal Declaration of Human Rights,⁸⁴ Article 6 ECHR,⁸⁵ Article 14 ICCPR,⁸⁶ Article 8 American Convention on Human Rights,⁸⁷ and Article 7 African Charter on Human and People's Rights.⁸⁸ Many of these instruments provide for special additional due process/fair trial rights in criminal proceedings, such as the presumption of innocence, the right of appeal, and other heightened procedural standards.⁸⁹ Although

⁸³ See, e.g., Article 9 Harvard Research Draft on the Law of State Responsibility, cited in: E. M. Borchard, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23 *American Journal of International Law Spec. Suppl.* 131, 173 ('Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.');

Draft Article 4(2) on International Responsibility proposed by ILC Special Rapporteur García Amador, in: *Yearbook of the International Law Commission* (1957), vol. II, 104, 108 and 113, ('[...] a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (f), (g) and (h) of this draft;'); the provisions of Article 6, referred to in Article 4, stated as follows: ('[...] (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms; (g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law; (h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.').

⁸⁴ Article 10 Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.').

⁸⁵ Article 6(1) European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.').

⁸⁶ Article 14(1) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) ('All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.').

⁸⁷ Article 8(1) American Convention on Human Rights: "Pact of San José, Costa Rica" (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ('Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.').

⁸⁸ Article 7(1) African Charter on Human and People's Rights (Adopted 28 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ('Every individual shall have the right to have his cause heard. This comprises: 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; 2. The right to be presumed innocent until proved guilty by a competent court or tribunal; 3. The right to defence, including the right to be defended by counsel of his choice; 4. The right to be tried within a reasonable time by an impartial court or tribunal.').

⁸⁹ See, e.g., Article 14(2)-(7) International Covenant on Civil and Political Rights.

investment cases mostly concern issues of judicial and administrative due process, some tribunals have had to assess whether due process/fair trial demands have been fulfilled in cases where host states have instituted criminal investigations or proceedings against company officials.⁹⁰

51. A human rights understanding has even partly informed the interpretation of the due process aspects of FET.⁹¹
52. This seems to play a particularly important role in regard to identifying elements of what due process requires. From a human rights perspective, a fair trial comprises a number of important procedural rights, such as the right of access to court, the right to be heard, the right to an independent and impartial tribunal, and the right to a fair and public hearing as well as to a decision within a reasonable time.⁹²
53. Some of these due process elements are echoed in investment jurisprudence.⁹³ Tribunals have held that the right of access to courts (or other adjudicatory or even administrative decision-making bodies) is a basic aspect of due process.⁹⁴ Similarly, tribunals have found that undue delay may constitute a denial of justice and thus violate the due process element of FET.⁹⁵ In this context they often stress that a long duration of proceedings alone is not sufficient. Rather, ‘the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to consider in the

⁹⁰ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 278 ([...] a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a protected investor by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful.); *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, para. 621 ([...] that denial of justice constitutes a clear violation of the FET standard. Failure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor amounts to a breach of the investment treaty. The Tribunal concludes that in the present case, the Claimant was not properly notified of the criminal charges against him, he was tried and convicted *in absentia* and the sentence was not properly notified to the Claimant. The Claimant was not able to appoint legal counsel and was not able to appeal his sentence. The Tribunal concludes, therefore, that the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR for the above reasons – and not for any other pleaded by the Claimant. Accordingly, the Claimant’s fair and equitable treatment claim is upheld.).

⁹¹ See, e.g., *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, para. 621; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador [II]*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 8.56 et seq.

⁹² See the overview of the pertinent ECtHR jurisprudence in Council of Europe/European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb)*, updated to 30 April 2018; available at <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf>.

⁹³ *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, para. 432 ([...] that under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that “... denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.”).

⁹⁴ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, para. 102 ([a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit [...]); *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 75 ([d]enial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).).

⁹⁵ *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 659; *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 583.

analysis' whether a delay was undue.⁹⁶ Echoing the ICJ's famous *ELSI* standard,⁹⁷ investment tribunals often only regard rather extreme deficiencies in the administrative or judicial process, such as 'a manifest failure of natural justice,'⁹⁸ or 'serious procedural shortcomings,'⁹⁹ as amounting to due process violations,¹⁰⁰ although sometimes 'justified concerns as to the judicial propriety of the outcome' appear sufficient.¹⁰¹ A violation of the right to be heard has often been crucial for a finding of an FET breach.¹⁰² As in human rights jurisprudence, investment tribunals have insisted on the importance of the requirement of independent and impartial adjudicators.¹⁰³ They have equally recognized that, exceptionally, a violation of due process may also result from a judgment or administrative decision that is not merely erroneous, but rather egregiously wrong or 'manifestly unjust or incorrect',¹⁰⁴ sometimes referred to as 'substantive denial of justice'.¹⁰⁵

⁹⁶ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 290; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, paras. 10.4.10 et seq; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras. 602 et seq.

⁹⁷ *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Reports 15, para. 128 ('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 judicial propriety.').

⁹⁸ *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 ('A lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice.').

⁹⁹ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 292.

¹⁰⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 418 ('In the opinion of the Tribunal, Respondent's above described practice constitutes a violation of the FET standard established in Article II.3 of the BIT, because it facilitates the secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review. The practice must be considered arbitrary, since it meets the *Saluka* test of "manifestly violat[ing] the requirements of consistency, transparency, even-handedness and non-discrimination". The lack of propriety is such that – as the test was articulated in *Tecmed* and *Loewen* – the practice also "shocks, or at least surprises, a sense of juridical propriety." [footnotes omitted]).

¹⁰¹ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Final Award, 11 October 2002, para. 127.

¹⁰² *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, paras. 143 et seq.; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 617.

¹⁰³ *Rupert Binder v. The Czech Republic*, UNCITRAL, Final Award, 15 July 2011, para. 448 ('An important part of fair and equitable treatment is the investor's access to independent and impartial courts in order to vindicate his rights and protect his investment. If the courts are unable to give effect to the law in an impartial and fair manner, the investor may find himself in a situation of denial of justice which is clearly incompatible with the notion of fair and equitable treatment.'). *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, para. 228; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador [II]*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, paras. 8.56 et seq.

¹⁰⁴ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 94 ('Wrongful application of the law may nonetheless provide "elements of proof of a denial of justice." But that requires an extreme test: the error must be of a kind which no "competent judge could reasonably have made." Such a finding would mean that the state had not provided even a minimally adequate justice system.'). *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 442 ('[...] denial of justice is engaged if and when the judiciary has rendered final and binding decisions [...] which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.'). *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 377 ('In the exercise of due deference, and taking into account that arbitrariness is more than a violation of a rule of law, but rather of the rule of law, the Tribunal's examination is limited to the issue of whether the decisions in question appear so manifestly incorrect that they must be deemed to constitute an abuse of power and thus constitute arbitrary conduct from the perspective of international law.').

¹⁰⁵ *Jan Oostergetel and Theodora Laurentius v. Slovakia*, UNCITRAL, Final Award, 23 April 2012, para. 291 et

54. These developments have partly been codified in more recent IIAs, specifying that ‘denial of justice in criminal, civil or administrative proceedings’ constitutes a violation of FET.¹⁰⁶

2. The Obligation not to Act in an Arbitrary or Discriminatory Fashion/Reasonableness/Proportionality

55. Although IIAs often contain separate clauses prohibiting ‘arbitrary/unreasonable and/or discriminatory measures’,¹⁰⁷ according to investment jurisprudence ‘[p]rotection from arbitrary or discriminatory conduct also forms part of the fair and equitable treatment standard.’¹⁰⁸
56. Some tribunals have emphasized the rule of law link when trying to define the notion of arbitrariness, characterizing it as ‘prejudice, preference or bias [...] substituted for the rule of law.’¹⁰⁹ Similarly, the absence of any rational justification for host state measures is often regarded as arbitrary behaviour.¹¹⁰ Arbitrariness has also been characterized as ‘requir[ing] a qualitatively significant breach, an abuse of power, that imposes harm on a foreign investor contrary to the rule of law.’¹¹¹
57. Linked to the prohibition of arbitrariness, but certainly broader, is the requirement of reasonableness, which has been understood to demand that a ‘State’s conduct bears a reasonable relationship to some rational policy [...]’.¹¹² In the view of some tribunals, reasonableness is a core element of FET.¹¹³

seq.

¹⁰⁶ Article 8.10(2)(a) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016.

¹⁰⁷ See, e.g., Article II (2)(b) Argentina-US BIT (1991) (‘Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.’); Article 10(1) ECT (1994) (‘[...] no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.’).

¹⁰⁸ *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017, para. 286. See also *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. The Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 480 (‘[...] while FET may have a broader meaning than “unreasonable or discriminatory measures,” such measures would automatically constitute a breach of FET.’).

¹⁰⁹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 263; see also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, 8 July 2016, para. 133 (‘One of the central elements of the guarantee of “fair and equitable treatment” is a protection against arbitrary treatment. This guarantee reflects a fundamental aspect of the rule of law: citizens are entitled to treatment, by their government, which is rational and proportionate. Irrational or arbitrary governmental measures, which are unrelated to any legitimate governmental objective, or which are gravely disproportionate to the achievement of such an objective, are neither fair nor equitable, and they betray, rather than advance, the rule of law.’).

¹¹⁰ *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, para. 282 (‘Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be.’).

¹¹¹ *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 348 (‘Indicators for arbitrariness in this sense can be, for example, a manifest lack of competence of the host State’s authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power.’).

¹¹² *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 460.

¹¹³ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July

58. Reasonableness is in turn viewed as closely related to the notion of proportionality.¹¹⁴ Tribunals have employed proportionality tests in order to ascertain whether host state action was arbitrary or unreasonable.¹¹⁵

59. In regard to discriminatory conduct, some tribunals regard distinctions on the basis of nationality alone insufficient to be in breach of FET¹¹⁶ and instead focus on ‘unjustifiable distinctions’, such as ‘sectional or racial prejudice.’¹¹⁷ Others seem to consider that distinction on the basis of nationality may in itself amount to prohibited discrimination under FET.¹¹⁸ In most cases, distinctions on the basis of nationality are not regarded as being contrary to general international law or to FET, but may be incompatible with a host state’s obligations under national treatment and/or MFN clauses.

3. Transparency

60. The transparent exercise of state authority is often considered to be a core rule of law demand.¹¹⁹

61. While some IIAs contain specific transparency provisions,¹²⁰ tribunals have usually regarded

2008, para. 692; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award, 30 November 2018, para. 263 (‘[The] main criterion to be applied for the interpretation of the FET standard is that of reasonableness’).

¹¹⁴ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award, 30 November 2018, para. 463 et seq. (stating that ‘proportionality is the main test for reasonableness’, and proposing the following criteria: ‘• *Legitimacy of purpose*, inasmuch as it represents interests of the society as a whole and does not alter the substance of the rights affected by the regulation. • *Necessity*, which implies the existence of a pressing social need. The threshold for “necessary” is more demanding than the one for “useful” or “desirable”. • *Suitability*, in that it must make it possible to achieve the legitimate objective pursued.’ [emphasis in original]).

¹¹⁵ *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 179 (‘[...] this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.’ [footnotes omitted]).

¹¹⁶ *Methanex Corporation v. United States of America*, UNCITRAL Final Award on Jurisdiction and Merits, 3 August 2005, Part IV, Ch. C., para. 25 (‘As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens. As the previous discussion shows, no conventional rule binding on the NAFTA Parties is to the contrary with respect to the issues raised in this case.’).

¹¹⁷ *Ibid.*, Part IV, Ch. C., para. 26; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 261. See also Article 8.10.2(d) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016 (‘targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief.’).

¹¹⁸ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 146 (‘[...] in order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.’); *Eureko B.V. v. Republic of Poland*, Ad hoc Arbitration, Partial Award, 19 August 2005, para. 233.

¹¹⁹ M. Jacob and St. W. Schill, ‘Fair and Equitable Treatment: Content, Practice, Method’ in M. Bungenberg, J. Griebel, St. Hobe and A. Reinisch (eds), *International Investment Law. A Handbook* (C.H. Beck-Hart-Nomos 2015) 700, 733.

¹²⁰ See, e.g., Article 10(1) ECT (1994) (‘Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other

transparency to be one of the inherent elements of FET.¹²¹

62. In investment jurisprudence, in particular in NAFTA cases, it has been controversial whether transparency can be regarded as an element of FET,¹²² even leading to the partial setting aside of the *Metalclad* award by a Canadian court. However, the court mainly took issue with the fact that the *Metalclad* tribunal based its decision on Chapter 18 of NAFTA and did not even attempt to ground it in customary international law.¹²³
63. It is questionable, however, whether the very high transparency demands as formulated in some early cases, such as *Metalclad*¹²⁴ and *Tecmed*,¹²⁵ are still treated as persuasive. In a number of cases, investment tribunals have applied a considerably lower standard, considering only ‘a complete lack of transparency and candour’ to violate FET.¹²⁶

4. Certainty, Stability and Predictability

64. It is broadly accepted that stability and predictability correspond to the core values of ‘legal certainty and legal security’ found in most conceptualizations of legal systems that adhere to the rule of law.¹²⁷
65. There is, however, some uncertainty in investment jurisprudence whether stability/predictability/legal certainty can be regarded as a separate element of FET or should instead be viewed as an aspect of legitimate expectations.¹²⁸ A majority of investment

Contracting Parties to make Investments in its Area. [...].’); Article 7 Australia-India BIT (1999) (‘Each Contracting Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by investors of the other Contracting Party, make such laws public and readily accessible.’).

¹²¹ *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008, para. 511; *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 320.

¹²² *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 294.

¹²³ *United Mexican States v. Metalclad*, 2001 BCSC 664, reprinted in *ICSID Reports*, vol. 5 (2002) 236 et seq.

¹²⁴ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76 (‘[...] that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.’).

¹²⁵ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, para. 154 (‘The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relation with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.’).

¹²⁶ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 399.

¹²⁷ M. Jacob and St. W. Schill, ‘Fair and Equitable Treatment: Content, Practice, Method’ in M. Bungenberg, J. Griebel, St. Hobe and A. Reinisch (eds), *International Investment Law. A Handbook* (C.H. Beck-Hart-Nomos 2015) 700, 729 (‘The essence is again traceable to rule of law ruminations that are familiar to most legal systems, often expressed as legal certainty and legal security (*Rechtssicherheit*, *sécurité juridique*).’ [italics in original]). See also *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, para. 1741 (‘The principle of legal certainty is widely recognised as a fundamental component of the rule of law which, in turn, has long been recognised by international law. [...] The use of “rule of law” as a foundational concept in these judgments has in turn been reflected in investment treaty jurisprudence.’).

¹²⁸ See in particular a number of cases interpreting the ECT’s FET clause: *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award, 12 July 2016, para. 756; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, para. 646 (‘[...] the stability [...] obligation is simply an illustration of the

tribunals appears to consider it to be a separate element.¹²⁹ Some tribunals have specifically referred to preambular language, emphasizing the goal of maintaining a stable framework for investment.¹³⁰

66. A related issue is the degree of stability that can be expected from host states, which has to be balanced with the right to regulate.
67. Investment tribunals have developed an approach according to which only fundamental,¹³¹ radical,¹³² drastic or arbitrary/discriminatory¹³³ changes in the regulatory framework can amount to a breach of stability.
68. At the same time, tribunals are increasingly acknowledging that respect for a state's regulatory sovereignty requires a balancing exercise,¹³⁴ which is often inspired by proportionality considerations.¹³⁵ As a result, extreme measures that are proportional may not amount to a breach, whereas non-drastic measures that are disproportional may be considered a breach of FET.

obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation.').

¹²⁹ See, e.g., *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA No. UN 3467, Award, 1 July 2004, para. 183; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 248 ('[...] stability of the legal and business framework is an essential element of fair and equitable treatment [...]'); see also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 173; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (NAFTA), ICSID Administered, Award, 31 March 2010, para. 232; see also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, 8 July 2016, para. 42 ('The rule of law serves to ensure predictability, stability, neutrality, and objectivity; it ensures that generally applicable legal rules, rather than personal or political expedience, govern human affairs. [...]').

¹³⁰ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 124.

¹³¹ *Greentech Energy Systems A/S, Foresight Luxembourg Solar I S.A.R.L., Foresight Luxembourg Solar 2 S.A.R.L., GWM Renewable Energy I S.P.A. and GWM Renewable Energy II S.P.A. v. The Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, para. 398 (finding 'a fundamental change to the legal and regulatory framework that crossed the line from a non-compensable regulatory measure to a compensable breach of the FET standard in the ECT.').

¹³² *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, para. 656 (assessing whether 'subsequent legislation by the Respondent radically altered the essential characteristics of the legislation in a manner that violates the FET standard.'). See also *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, 15 June 2018, para. 532.

¹³³ See, e.g., *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 244 ('In the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction.').

¹³⁴ *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360 ('[...] the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.'). *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (November 30, 2012), paras. 7.77 ('While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.').

¹³⁵ *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. The Slovak Republic*, PCA Case No. 2017-08, Award 7 October 2020, paras. 566 et seq.

69. On a more specific level, tribunals seem to be ready to acknowledge that legal certainty, as a rule, entails the prohibition of retroactive legislation.¹³⁶

5. Legitimate Expectations

70. Closely linked to stability and predictability is the element of legitimate expectations.¹³⁷ Although some investment tribunals have regarded the protection of legitimate expectations of investors to be the ‘dominant’¹³⁸ or ‘primary element,’¹³⁹ the ‘most important function,’¹⁴⁰ or at least ‘central’ to FET,¹⁴¹ it still remains a contested aspect.¹⁴² The International Court of Justice has recently held that legitimate expectations could not form the basis of legal obligations on the inter-State level.¹⁴³
71. Inspired by domestic law analogies such as estoppel, *venire contra factum proprium*, and ‘Vertrauensschutz’, investment tribunals have also emphasized FET’s close link to the principle of good faith,¹⁴⁴ since investors may legitimately expect that they can rely on certain

¹³⁶ *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, para. 1757 (‘[...] the Tribunal finds that the principle of legal certainty (and its corollaries, stability and predictability) provides significant guidance when determining whether retroactive taxation is compatible with the FET standard [...] Thus, in accordance with the principle of legal certainty, the general rule in a system governed by the rule of law is that the law applies prospectively. Subject to exceptions where this is justified by a specific public purpose as discussed below, the retroactive application of legislation constitutes a fundamental affront to the principle of legal certainty and runs afoul of the guarantee of predictability of the legal environment.’).

¹³⁷ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 285.

¹³⁸ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 302 (‘The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the ‘fair and equitable treatment’ standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.’).

¹³⁹ *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, para. 648 (‘[...] the Tribunal agrees with the Respondent that the FET’s primary element is the legitimate and reasonable expectations of the Claimant.’).

¹⁴⁰ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.75 (‘It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations.’).

¹⁴¹ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, para. 348 (‘[...] the legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties [...]’); *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. The Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, para. 927.

¹⁴² *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. The Argentine Republic* (joint cases), Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, para. 3 (‘[...] the assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor [...] does not correspond, in any language, to the ordinary meaning to be given to the terms “fair and equitable”.’).

¹⁴³ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, I.C.J. Reports 2018, 507, 559, para. 162 (‘The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. [...]’).

¹⁴⁴ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 128

promises or other conduct by host states reasonably creating such reliance.¹⁴⁵

72. In some cases, investment tribunals have explicitly acknowledged the rule of law quality of the protection of legitimate expectations.¹⁴⁶
73. Tribunals have been clear, though, that under the concept of legitimate expectations only ‘legitimate’,¹⁴⁷ ‘justified’,¹⁴⁸ or ‘reasonable’¹⁴⁹ expectations merit protection, not simply any subjective hope or unreasonable wish on the part of an investor.¹⁵⁰ Thus, tribunals have stressed that the protection of legitimate expectations is an objective standard.¹⁵¹ They have also emphasized the ‘due diligence’ of investors as a prerequisite to forming ‘legitimate’ expectations.¹⁵²

(‘Since the concept of legitimate expectations is based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law, the Tribunal believes that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified at this point.’).

¹⁴⁵ See e.g. *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 241; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.83; Reinisch/Schreuer, *International Protection of Investments* (2020) 503-517.

¹⁴⁶ See e.g. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 129 (‘[...] the doctrine of legitimate expectations supports “the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation”. This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), [...]’).

¹⁴⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602 (‘[...] as long as these expectations are reasonable and legitimate’); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, para. 200 (‘To establish a failure to meet legitimate expectations, several factors must be demonstrated – the nature of the expectation, the reliance on the expectation and the legitimacy of that reliance.’).

¹⁴⁸ See *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 131 (‘[...] a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.’).

¹⁴⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 309 (‘[...] the investor’s underlying legitimate and reasonable expectations.’); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 7.74 (‘[...] the investor’s reasonable and legitimate expectations’); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609 (‘[...] the State must respect the investor’s reasonable and legitimate expectations.’); *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 955 (‘[...] the breach of a legitimate and reasonable expectation may give rise to a violation of the FET standard.’); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.53 (‘[...] the Claimant must also establish that: (i) its expectations were reasonable in the circumstances.’).

¹⁵⁰ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304 (‘[...] the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.’).

¹⁵¹ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, para. 358 (‘[...] legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State.’); *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain*, SCC Case No. V 062/2012, Award, 21 January 2016, para. 495 (‘A finding that there has been a violation of investor’s expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient.’).

¹⁵² *Hydro Energy I S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, para. 600 (‘[...] given the State’s

74. The form and specificity of host state conduct in creating investor expectations also play an important role in assessing legitimate expectations. Tribunals have differentiated between precise contractual stipulations (such as stabilizations clauses), specific or targeted promises, and rather general political endorsements;¹⁵³ in some cases they have concentrated on the particular language found in legislation or administrative regulations.¹⁵⁴ Such arbitral practice seems to have influenced recent treaty making practice, emphasizing the need for ‘specific representations’ in order to create legitimate expectations¹⁵⁵ or clarifying that a mere disappointment of investor expectations does not lead to liability.¹⁵⁶
75. Furthermore, in line with the way the concept has been applied in certain domestic legal systems,¹⁵⁷ a few tribunals have distinguished between (the existence of) legitimate expectations, on the one hand, and the frustration of such expectations on public interest grounds, on the other hand.¹⁵⁸ These tribunals have thus acknowledged that ‘the determination of a breach of [the FET provision] requires a weighing of the Claimant’s legitimate and reasonable expectations, on the one hand, and the Respondent’s legitimate regulatory interests, on the other.’¹⁵⁹

B. Relevant Practices

- a) “The standard of fair and equitable treatment, regularly contained in IIAs, is meant to further certain aspects of the rule of law and imposes demands on host states.”

regulatory powers, in order to rely on legitimate expectations, the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.’).

¹⁵³ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, para. 378 (‘• Political statements which can – “regrettably but notoriously” [...] – create no legal expectations; • general legislative statements which “engender reduced expectations;” • contractual undertakings by governments which can create more legitimate expectations and “deserve clearly more scrutiny,” as “they generate as a rule legal rights and therefore expectations of compliance.” [...]’).

¹⁵⁴ *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, paras. 512 (‘[...] there is no reason in principle why such a commitment [able to create a legitimate expectation] of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimants’ investments and, once made, resulted in losses to the Claimants.’).

¹⁵⁵ Article 8.10 (Treatment of investors and of covered investments) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016 (‘4. When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.’).

¹⁵⁶ Article 9.6(4) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (‘For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.’).

¹⁵⁷ *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, Separate Opinion Prof Thomas Wälde, 1 December 2005, paras. 2 and 27 (‘European law does not prevent a public authority from reversing its course, but requires a balancing process where the strength of the individual’s interest is balanced against the need for flexibility in public policy.’); Elizabeth Snodgrass, ‘Protecting Investors’ Legitimate Expectations: Recognizing and Delimiting a General Principle’ (2006) 21 *ICSID Review* at 31.

¹⁵⁸ *Saluka v Czech Republic*, Partial Award, 17 March 2006, paras 348 and 350 (‘The Tribunal will assess the legitimacy and reasonableness of these expectations and, if they were legitimate and reasonable, whether they have been frustrated by the Czech Republic without reasonable justification.’).

¹⁵⁹ *Saluka*, para. 306. See more recently *CEF Energia BV v Italy*, Award, 16 January 2019, paras. 234-39. *Contra Masdar v Spain*, Award, 16 May 2018 and *NextEra Energy v Spain*, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019.

- b) “Specifically, the requirement to afford due process/fair trial corresponds to a core rule of law demand as well as a fundamental human rights guarantee. The due process/fair trial requirement is generally found to apply to civil, criminal, and administrative adjudicatory proceedings of the host state. Due process is understood to require access to justice before an independent and impartial adjudicator, a fair procedure entailing equal treatment of the parties and the right to be heard, leading to a decision within a reasonable period of time. Sometimes the avoidance of a manifestly unjust outcome, referred to as ‘substantive denial of justice’, is also regarded as being implied in the obligation to accord due process.”
- c) “The good faith-inspired obligation not to act in an arbitrary or discriminatory fashion is also widely considered to form part of the fair and equitable treatment standard. It requires host states to abstain from unjustifiable or unreasonable distinctions. More far-reaching obligations to act with reasonableness and in a proportionate way have also been deduced from the prohibition of arbitrariness and discrimination.”
- d) “Whether and to what degree transparency forms an inherent element of FET has remained more controversial. In general, however, ‘a complete lack of transparency’ has been considered to fall short of fair and equitable treatment in investment arbitration.”
- e) “Similarly, the degree of predictability/stability/legal certainty owed by host states, and particular its relationship with the right to regulate, has remained open to debate. While legal certainty/predictability are recognized as core rule of law demands, the sovereign right to regulate is acknowledged as permitting adaptations or changes to the legal framework of host states and a balancing of interests. However, legal certainty, as a rule and subject to limited exceptions, precludes retroactive application of legislation or regulation.”
- f) “Related to the concept of predictability/stability/legal certainty, the protection of the investors’ legitimate expectations, though often regarded as a central and crucial element of FET, remains controversial, in particular in cases based on the international minimum standard of treatment. In investment arbitration, the role of host states in creating investor expectations, as well as of investors in acting reasonably and with due diligence when relying on host state behaviour, have been important aspects in assessing the legitimacy of such expectations. In this context, the more direct and specific the commitments made to investors are, the more likely they are to create legitimate expectations. In some instances, the need to balance the investor’s legitimate and reasonable expectations, on the one hand, and the host State’s legitimate regulatory interests, on the other hand, has also been recognized.”

C. Recommendations

- a) “Adjudicators should take into account the rule of law demands of the FET standard.”
- b) “When assessing whether host states have complied with the due process/fair trial element of FET, adjudicators should ensure that it is interpreted in accordance with traditional rule of law requirements. Specifically, due process should be interpreted as requiring access to justice before an independent and impartial adjudicator, a fair procedure entailing equal treatment of the parties and safeguarding their right to be heard as well as receiving a decision within a reasonable time. In addition, manifestly unjust outcomes, often referred to as ‘substantive denial of justice’, should be regarded as being in violation of the obligation to accord due process.”
- c) “When assessing whether host states have complied with the good faith-inspired obligation not to act in an arbitrary or discriminatory fashion, adjudicators should assess

whether host states have applied unjustifiable or unreasonable distinctions to the detriment of investors.

- d) “In addition, adjudicators should take into account whether host states have acted reasonably and in a proportionate way.”
- e) “When assessing whether host states have complied with FET, adjudicators should also take into account the level of transparency in the legal and regulatory framework adopted by host states.”
- f) “When assessing whether host states have complied with FET, adjudicators should also take into account the predictability/stability of host state behaviour as well as its proportionality. When assessing legal certainty and predictability, adjudicators should also take into account the sovereign right to regulate and engage in a balancing of interests.”
- g) “When assessing whether host states have complied with FET, adjudicators should also consider the legitimate expectations of investors. In assessing the legitimacy and reasonableness of such expectations, adjudicators should take into account the role of host states in creating investor expectations as well as the investors’ obligation to act reasonably and with due diligence.”

VI. Full Protection and Security

76. In the practice of investment arbitration, FPS has been regarded as a standard closely linked to FET. Some tribunals have even found that the two standards were practically identical, and sometimes that both were equivalent to or subsets of the international minimum standard.¹⁶⁰ The dominant view, however, is that FPS is a standard separate from FET¹⁶¹ and, although equally based on the international minimum standard, is also qualitatively different from it.¹⁶²

A. Investment Law Practice

77. Many tribunals adhere to the traditional view that FPS primarily protects against (physical) interference stemming from private parties or even from state organs.¹⁶³

¹⁶⁰ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 190 (‘The Tribunal is of the opinion that in the instant case the Treaty standard [FET and FPS] is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law [...]’).

¹⁶¹ *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, para. 272 (‘Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II (3)(a) of the BIT.’); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.80 (‘The FET standard and this FPS standard are two distinct standards of protection under the ECT, dealing with two different types of protection for foreign investors [...]’).

¹⁶² *American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.06 (‘These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and care required by international law.’).

¹⁶³ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 484 (‘The “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence. [...] [T]he “full security and protection” clause is not meant to

78. It remains controversial whether FPS clauses can also be invoked as protection demanding legal protection of investors/investments. Some tribunals have held that FPS may be relied upon in order to demand access to effective legal remedies in the host state. Often this follows the specific formulation of FPS clauses, which sometimes expressly refer to ‘legal protection.’¹⁶⁴ However, many tribunals have denied the application of the FPS standard beyond (physical) interference or as a guarantee of legal stability.¹⁶⁵ Some more recent treaties expressly clarify that FPS is intended to relate only to physical security or police protection.¹⁶⁶ Still, it has been argued that the broad concept of investment, comprising not only physical assets, but also intangible ones, seems to require that a host state’s duty to protect necessarily extends to both physical and other interference with such investments.¹⁶⁷
79. Investment jurisprudence has largely converged on the notion that FPS does not impose strict liability.¹⁶⁸ Rather, the standard requires host states to employ due diligence in order to prevent interference with investor rights and properties.¹⁶⁹ Some tribunals take the economic, social and political conditions prevailing in host states into account when assessing due diligence.¹⁷⁰

cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.’). See also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 622-623.

¹⁶⁴ See, e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 303 (‘In the instant case, “security” is qualified by “legal”. In its ordinary meaning “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.” It is clear that in the context of this meaning the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term “security”, whether the Treaty covers physical security at all. Arguably it could be considered to be included under “full protection”, but that is not an issue in these proceedings.’ [Footnote omitted]).

¹⁶⁵ See, e.g. *BG Group Plc. v. The Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, para. 326 (‘The Tribunal is mindful that other tribunals have found that the standard of “protection and constant security” encompasses stability of the legal framework applicable to the investment. By relating the standards of “protection and constant security” and “fair and equitable treatment” such tribunals have found that the host State is under an obligation to provide a “secure investment environment”. However, in light of the decisions quoted above, the Tribunal finds it inappropriate to depart from the originally understood standard of “protection and constant security”.’); *Olin Holdings Ltd v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 365 (‘[...] the Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical protection and security. Such interpretation best accords with the ordinary meaning of the terms “protection” and “security”.’).

¹⁶⁶ E.g. Article 8.10.5 CETA; Article 10.5.2(b) Regional Comprehensive Economic Partnership; Article 9.6(2)(b) Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

¹⁶⁷ *Siemens AG v. Argentina*, ICSID Case ARB/02/8, Award, 6 February 2007, para. 303 (‘It is difficult to understand how the physical security of an intangible asset would be achieved.’).

¹⁶⁸ *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 177 (‘[...] the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.’). See also *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 484; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 181.

¹⁶⁹ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 164 (‘The latter is not a strict standard, but one requiring due diligence to be exercised by the State.’); *Ampal-American Israel Corp., and others v. Egypt*, ICSID Case No. ARB/I 2/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 241.

¹⁷⁰ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 77 (‘A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.’); *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 229 (‘[...] the Tribunal believes that the duty of due diligence

80. The rule of law content of the FPS standard is more indirect than that of FET. However, to the extent that FPS requires states to prevent attacks against the property (and possibly even broader the rights) of foreign investors, it embodies the peace and security function of states based on the rule of law.
81. FPS has also been invoked to require host states to make their courts and administrative organs available for redress in cases of infringements of investor rights by third parties.¹⁷¹
82. Additionally, to the extent it requires a host state to abide by its own law in order to provide the required protection to foreign investors, it can be seen as an expression of the rule of law requirement that states themselves are bound by the law.

B. *Relevant Practices*

- a) “The standard of FPS, requiring host states to exercise due diligence in protecting the physical (and possibly also the legal) security of foreign investments, primarily pursues the peace-securing function of states based on the rule of law.”
- b) “To the extent that FPS requires host states to provide access to legal redress for infringements of investor rights by third parties, this obligation overlaps with the rule of law requirements under FET to provide access to justice and to afford due process.”
- c) “To the extent that FPS requires host states to abide by their own laws in order to provide the required protection to foreign investors it can be seen as an expression of the rule of law requirement that states themselves are bound by the law.”

C. *Recommendations*

- a) “Adjudicators should take into account the rule of law demands of the FPS standard.”
- b) “When assessing whether host states have complied with the FPS standard requiring host states to exercise due diligence in protecting foreign investments, adjudicators should ensure that it is interpreted in accordance with rule of law requirements.”
- c) “When assessing whether host states have complied with the FPS standard, adjudicators should ascertain whether host states have employed due diligence in order to prevent interference with investor rights and properties. They should also take into account the economic and social conditions prevailing in host states when assessing compliance with the due diligence requirement.”
- d) “When assessing whether host states have complied with the FPS requirement to provide access to legal redress for infringements of investor rights by third parties, adjudicators should ensure that this requirement is interpreted in accordance with rule of law requirements. Specifically, compliance with the access to justice/due process demands of

cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya during 2011 and for much of the time since. Respondent’s obligation under the Treaty to accord constant protection exists in a setting of weak and uncertain State authority, recurring armed conflict, and widespread breakdown of the law in wide areas of the country. The reality of these circumstances cannot be ignored in assessing Respondent’s obligations. [...]”).

¹⁷¹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 360 (‘The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court.’).

obtaining redress before an independent and impartial adjudicator, and a fair procedure entailing equal treatment of the parties and their right to be heard, should be scrutinized.”

VII. National Treatment

83. Most IIAs contain national treatment provisions, usually requiring contracting states to provide investors and investments from the other contracting parties “treatment no less favourable” than that accorded to their own investors and investments. The main purpose of the national treatment obligation lies in preventing protectionist measures by host states intended to favour national investors over foreign competitors. It serves the idea of equality of treatment.

A. Investment Law Practice

84. National treatment obligations are treaty-based and go beyond what is owed to investors on the basis of customary international law.¹⁷²

85. IIAs vary considerably in particular as to whether the application of national treatment is limited to the post-establishment phase or extends to the pre-establishment phase, thereby implicitly providing for a right of access, i.e. a right to make an investment.¹⁷³

86. Together with MFN clauses, national treatment provisions are the cornerstone of the non-discrimination rules of IIAs. They are so-called contingent, comparative,¹⁷⁴ or relative¹⁷⁵ standards, by which treatment of investors depends upon the level of treatment given to nationals or to foreign investors from third states. This sets them apart from the so-called absolute standards of treatment like fair and equitable treatment or full protection and security.

87. In its non-discrimination function, national treatment pursues the core rule of law aim of upholding equality before the law.

88. In assessing whether host states accord national treatment, investment tribunals have developed and relied upon the so-called ‘three-step test,’ which they apply in a fairly consistent fashion.

89. First, they identify a domestic comparator ‘in like circumstances’ against which to measure the allegedly discriminatory behaviour. Second, they investigate whether the treatment accorded to a foreign investor was indeed less favourable than that received by domestic investors. Finally, tribunals examine whether there were legitimate reasons justifying different treatment.¹⁷⁶

¹⁷² *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Chapter C, para. 25 (‘As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens.’).

¹⁷³ E.g. Articles 1102 NAFTA (1992); Article 3 US Model BIT (2004); Article 3 Canadian Model FIPA (2004); Article 8.6 CETA (2016).

¹⁷⁴ T. Grierson-Weiler and I. Laird, ‘Standards of Treatment’ in P. Muchlinski, F. Ortino and Ch. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 259, 261.

¹⁷⁵ UNCTAD, *National Treatment*, Series on Issues in International Investment Agreements (1999), UNCTAD/ITE/IIT/11 (Vol. IV), 7; J. Griebel, *Internationales Investitionsrecht* (C.H. Beck 2008) 79; A. P. Newcombe and L. Paradell, *The Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009) 148-149.

¹⁷⁶ A. K. Bjorklund, ‘National Treatment’ in A. Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2009) 29, 37; R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (2nd edn,

90. In order to determine whether the foreign investor is ‘in like circumstances’ or ‘in a like situation’ as compared to a national investor, most tribunals have adopted a test requiring the identification of a comparator in the same business or economic sector.¹⁷⁷ Only exceptionally have tribunals broadened the notion of comparators, thus also considerably broadening the scope of the national treatment obligation. An example would be the *Occidental v. Ecuador* case,¹⁷⁸ where a tribunal looked at all exporting companies and not only at those in the oil sector.
91. Tribunals have clarified that less favorable treatment does not require an intent to discriminate,¹⁷⁹ although proven intent may show that discrimination has taken place. National treatment prohibits both *de jure* and *de facto* discrimination of foreign investors as compared to domestic investors in like circumstances.¹⁸⁰
92. Furthermore, investment tribunals have upheld the possibility of states offering justification for different treatment, even though IIAs usually do not expressly provide for it. In particular NAFTA tribunals appear to locate potential justifications in the determination of ‘like circumstances’¹⁸¹ and they have considered environmental, health, or other public interest grounds to serve as possible justifications for different treatment.¹⁸²

B. Relevant Practices

- a) “The national treatment standard, requiring contracting states to provide investors and investments from the other contracting parties with ‘treatment no less favourable’ than that accorded to their own investors and investments, primarily pursues the equality of treatment function of the rule of law.”
- b) “The assessment of compliance with national treatment is based on the identification of a

Cambridge University Press 2012) 199; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009) 159; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 337; Ch. F. Dugan, D. Wallace, N. Rubins and B. Sabahi, *Investor State Arbitration* (Oxford University Press 2008), 400; A. K. Bjorklund, ‘The National Treatment Obligation’ in K. Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to Key Issues* (Oxford University Press 2010) 411, 419.

¹⁷⁷ See e.g. *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 78; *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 250; *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 171; *Olin Holdings Limited v. Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 205.

¹⁷⁸ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004.

¹⁷⁹ See e.g. *Cargill, Incorporated v. Poland II*, UNCITRAL, Final Award, 5 March 2008, para. 345; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 390.

¹⁸⁰ See e.g. *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 78; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para. 193; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 426; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 249.

¹⁸¹ See e.g. *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 250; *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 78.

¹⁸² See e.g. *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 250; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 170; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.56; *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 563.

domestic comparator ‘in like circumstances’ against which to measure the allegedly discriminatory behaviour, an assessment whether the treatment accorded to a foreign investor was indeed less favourable than that received by a domestic comparator, and the absence of legitimate reasons justifying different treatment.”

C. Recommendations

- a) “Adjudicators should take into account the rule of law demands of the national treatment standard.”
- b) “When determining whether a foreign investor is ‘in like circumstances’ or ‘in like situations’ with a national investor, adjudicators should identify comparators on a reasonable basis. Identifying comparators in the same business or economic sector shall normally be presumed to be a reasonable approach and avoids imposing too high a burden on host states.”
- c) “The determination whether a foreign investor was treated less favorably than national comparators does not require proof of intent to discriminate on the part of the host state.”
- d) “When assessing ‘less favorable treatment’ adjudicators may take into account both *de jure* and *de facto* discrimination.”
- e) “When determining whether different treatment may be justified, adjudicators should take into account public interest grounds, including environmental and health reasons for differences in treatment.”

VIII. Most Favoured Nation Treatment

- 93. Most IIAs contain MFN clauses, usually requiring contracting parties to accord investors and investments from other contracting parties ‘treatment no less favourable’ than that accorded to investors and investments from third states.
- 94. The main purpose of MFN treatment lies in preventing measures by host states intended to favour investors of some third states over those of others and to ensure equal competitive conditions.¹⁸³ In addition, MFN clauses have a multilateralizing effect in so far as they ensure that investors automatically receive the most favourable treatment extended by a host state to any third-state investors.¹⁸⁴

A. Investment Law Practice

¹⁸³ *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, para. 162 [this case has the name amended in a different footnote; noted in FN 49] (‘The self-evident purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT. The purpose of such a clause is to ensure that there will be no discrimination between foreign investors.’). See also UNCTAD, *Most Favoured-Nation Treatment*, Series on International Investment Agreements II, UNCTAD/DIAE/IA/2010/1 XIII (2010) 13 et seq. (‘MFN treatment in IIAs is meant to ensure an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country. Foreign investors seek sufficient assurance that there will not be adverse discrimination which puts them at a competitive disadvantage.’).

¹⁸⁴ See S. W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009).

95. MFN treatment obligations are treaty-based and go beyond what is owed to investors on the basis of customary international law.¹⁸⁵
96. As in the case of national treatment, IIAs vary considerably in particular as to whether the application of MFN treatment is limited to the post-establishment phase or extends to the pre-establishment phase,¹⁸⁶ thereby implicitly providing for a right of access (i.e. a right to make investments) if such access has been granted to third party investors. Some IIAs link MFN to fair and equitable treatment or to full protection and security, whereas others contain various exceptions to and derogations from MFN obligations.
97. In its non-discrimination function, MFN treatment pursues the core rule of law aim of upholding equality before the law.
98. In investment arbitration practice, MFN treatment is sometimes invoked for allegedly less favourable actual or *de facto* treatment of investors.¹⁸⁷
99. In order to assess alleged factual discrimination, investment tribunals have relied on the three-step test used in national treatment cases,¹⁸⁸ first identifying a comparator ‘in like circumstances/situations’, second, ascertaining whether the treatment accorded to a foreign investor was indeed ‘less favourable’ than that received by the comparator, and third, examining whether legitimate reasons justified different treatment.¹⁸⁹
100. Most of the MFN debate centres around the so-called *Maffezini* approach, named after a leading decision on jurisdiction,¹⁹⁰ in which an ICSID tribunal found that a claimant was entitled to rely on an MFN clause in order to benefit from or ‘import’ more favourable procedural treatment available to investors under a third country BIT of the host state.¹⁹¹
101. Since then, numerous tribunals have espoused this approach, while a similar number

¹⁸⁵ See UNCTAD, *Most Favoured-Nation Treatment*, Series on International Investment Agreements II, UNCTAD/DIAE/IA/2010/1 (2010) 20 (‘Even though thousands of IIAs currently in force contain an MFN treatment clause, it remains a treaty-based obligation. It is a conventional obligation and not a principle of international law which applies to States as a matter of general legal obligation independent of specific treaty commitments.’); see also e.g. *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, para. 196 (‘[...] the Tribunal notes that the most-favoured nation principle is not, at least in its investment-treaty guise, a customary international law principle of nondiscrimination writ large that is implicitly applicable even if not expressly stated. It is, rather, a principle of treaty law that must be expressly stated and is amenable to limitation, whether expressly or implicitly, having regard to the terms in which the principle is expressed and its purpose in the context of the instrument in which it is found.’).

¹⁸⁶ See e.g. Article 1103 NAFTA (1992); Article 4 US Model BIT (2012); Article 4 Canadian Model FIPA (2004).

¹⁸⁷ See e.g., *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016; *Chemtura Corporation v. Government of Canada*, UNCITRAL (NAFTA), Award, 2 August 2010; *Içkale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016.

¹⁸⁸ See supra paras. 88-89.

¹⁸⁹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 366 (‘Most-favoured-nation (MFN) clauses are by essence very similar to “National Treatment” clauses. They have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties. Tribunals’ analyses of the *National Treatment* standard will therefore also be useful to discuss the alleged violation of the MFN standard.’).

¹⁹⁰ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

¹⁹¹ *Ibid.*, para. 54 (‘Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.’).

of tribunals have rejected it.¹⁹² This phenomenon in itself has created instability and a lack of predictability, which is problematic from a rule of law perspective. Treaty-makers have reacted to it by clarifying in more recent IIAs whether they want procedural treatment to be included in the scope of MFN clauses.¹⁹³

102. From a rule of law perspective, the ‘importation’ of procedural/jurisdictional advantages may be regarded as advancing access to justice because it also allows broader access to investment arbitration in cases where this has not been expressly provided for in an IIA, but merely results from the operation of an MFN clause.

103. The debate, however, appears to focus on what the treaty parties had in fact intended. Two irreconcilable positions have been voiced in this regard.¹⁹⁴ One argues that a specifically negotiated and thus specifically worded dispute settlement clause that limits access to ISDS should be regarded as an expression of the will of the parties that in some situations investors should not be able to access ISDS.¹⁹⁵ The other view considers an MFN clause to be an

¹⁹² See the overview in Reinisch/Schreuer, *International Protection of Investments* (Cambridge University Press 2020) 759-799.

¹⁹³ See Article 8.7 (Treatment of investors and of covered investments) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016 (‘4. For greater certainty, the “treatment” referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.’); Article 10.4.3 Regional Comprehensive Economic Partnership (‘For greater certainty, the treatment referred to in paragraphs 1 and 2 does not encompass any international dispute resolution procedures or mechanisms under other existing or future international agreements.’); Article 9.5.3 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (‘For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).’).

¹⁹⁴ See Zachary Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2011) 2 *Journal of International Dispute Settlement* 97-113; Stephan W. Schill, ‘Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas’ (2011) 2 *Journal of International Dispute Settlement* 353-371.

¹⁹⁵ See, e.g., *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, para. 118 (‘[...] Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement”. Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. [...]’); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 92 (‘It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.’); *Austrian Airlines AG v. The Slovak Republic*, Final Award, 9 October 2009, para. 135 (‘Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.’); *Sanum Investments Limited v. The Government of Lao People’s Democratic Republic [I]*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, para. 358 (‘In addition, to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial rewrite of the Treaty and an extension of the States Parties’ consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses.’).

indication that the parties intended to overcome such limitations by ensuring that investors are treated no less favourably than investors from third states who may not be subject to the limitations in the IIA whose MFN clause is to be interpreted.¹⁹⁶

104. In more recent practice, even the ‘importation’ of more favourable substantive standards from other IIAs has become controversial, though in older cases the idea that substantive protections in other IIAs constituted treatment covered by the MFN clause had been treated as a relatively straightforward matter.¹⁹⁷ Treaty-makers have also followed suit by sometimes clarifying that MFN clauses should not be relied upon to invoke better substantive treatment promised in third-party treaties.¹⁹⁸

B. Relevant Practices

- a) “The MFN standard, requiring contracting states to provide investors and investments from the other contracting parties ‘treatment no less favourable’ than that accorded to the investors and investments from third states, pursues the equality of treatment function of the rule of law.”
- b) “MFN clauses usually require host states to accord investors and investments no less favourable actual or *de facto* treatment.”
- c) “In this context, the assessment of compliance with MFN treatment requires the identification of a third party comparator ‘in like circumstances’ against which to measure the allegedly discriminatory behaviour, an assessment whether the treatment accorded to a foreign investor was indeed less favourable than that received by a third party comparator,

¹⁹⁶ *Austrian Airlines AG v. The Slovak Republic*, Final Award, 9 October 2009, Separate Opinion Judge Brower, para. 7 (‘If every time an MFN clause were invoked it were to be read together with the treaty provisions which the MFN clause is alleged to circumvent, such a clause might never be given any effect.’); *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, para. 194 (‘The final question is whether the right to resort to arbitration is “more advantageous” treatment than the right to resort to dispute settlement under domestic law. Delocalised dispute settlement is at the very heart of the Treaty edifice concerning conditions of investment. Excluding the right to resort to arbitration for investors under one BIT while allowing it for investors under another BIT is self-evidently differential treatment. Differential treatment is discriminatory when it treats comparable circumstances and/or persons differently. Whether or not arbitration is in fact more advantageous than domestic processes in any particular case is beside the point. The MFN clause is engaged by the fact that qualifying investors are denied treatment afforded to comparable investors under another BIT.’); see also the case overview Reinisch/Schreuer, *International Protection of Investments* (Cambridge University Press 2020) 767-779.

¹⁹⁷ *Içkale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, para. 329 (‘[...] given the limitation of the scope of application of the MFN clause to “similar situations,” it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State.’); *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, para. 793 (‘The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to de facto discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.’). See also Simon Batifort and J. Benton Heath, ‘The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization’ (2017) 111 *American Journal of International Law* 873-913; Stephan W. Schill, ‘MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath’ (2017) 111 *American Journal of International Law* 914-935.

¹⁹⁸ See Article 8.7 (Treatment of investors and of covered investments) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016 (‘4. [...] Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.’).

and the absence of legitimate reasons justifying different treatment.”

- d) “MFN clauses in IIAs have also been interpreted to permit investors and investments to rely on more favourable substantive treatment standards and, pursuant to the controversial *Maffezini* approach, even on procedural and/or jurisdictional advantages contained in third-party IIAs.”
- e) “Reliance on more advantageous jurisdictional and procedural provisions contained in third party IIAs has given rise to inconsistent investment jurisprudence and has led treaty-makers to clarify the issue expressly in more recent IIAs.”

C. Recommendations

- a) “Adjudicators should take into account the rule of law demands of the MFN standard, in particular non-discrimination/equal treatment.”
- b) “When determining whether a foreign investor is *de facto* discriminated against compared to third-party investors, adjudicators should rely on the three-step test developed in national treatment cases.”
- c) “When assessing whether MFN treatment should be regarded as allowing reliance on more favourable substantive treatment standards, procedural, and/or jurisdictional provisions contained in third-party IIAs, adjudicators should pay attention to the text of the applicable MFN clause and engage in careful treaty interpretation. They should also pay regard to considerations of predictability, equality and access to justice.”

IX. Umbrella Clauses

105. Many IIAs contain so-called umbrella or observance-of-undertakings clauses, usually requiring the observance of obligations of contracting states vis-à-vis the investors (or their investments) of other contracting states.¹⁹⁹ Obligations typically range from contractual undertakings to unilateral obligations contained in host state legislation and/or regulation. The exact wording of such clauses varies and their interpretation has also given rise to controversy in investment jurisprudence.

106. The main purpose of such treaty clauses lies in reaffirming the binding character of obligations, i.e. the sanctity of contracts/*pacta sunt servanda* and legal certainty and predictability, by enhancing the reliability of host state undertakings. In this sense, umbrella clauses serve rule of law purposes.²⁰⁰ In addition, umbrella clauses provide access to treaty arbitration in case of contract breaches.²⁰¹

¹⁹⁹ See Anthony Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 *Arbitration International* 411-434; Thomas W. Wälde, ‘The “Umbrella” Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases’ (2005) 6 *Journal of World Investment & Trade* vii-236.

²⁰⁰ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 126 (‘It is a conceivable function of a provision such as Article X(2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection.’).

²⁰¹ *Abaclat and others (Case formerly known as Giovanna A Beccara and others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 317 (‘[...] a State’s breach of contract with a foreign investor or breach of an obligation under another treaty or law becomes, by virtue of an Umbrella Clause contained in the relevant BIT, a breach of the BIT actionable through the mechanism provided in such treaty, i.e., through ICSID arbitration.’).

A. Investment Law Practice

107. Although there is a recent decline in inserting umbrella clauses in IIAs, many existing IIAs contain such clauses, often as stand-alone provisions. Many of them explicitly oblige the contracting parties to observe any obligations ‘entered into’ with an investor or investment of the other contracting party.²⁰² Others contain language referring to any commitments or obligations ‘assumed’ by host states.²⁰³ In other IIAs, the level of observance appears to be lowered by merely ‘guaranteeing the observance’ of commitments.²⁰⁴ A few umbrella clauses clarify their reach by stating that the breach of a specific type of commitment referred to in the clause will amount to a breach of the IIA.²⁰⁵
108. Investment tribunals often use these differences in treaty language in order to distinguish the effect of umbrella clauses and to justify divergent outcomes.²⁰⁶
109. Whether umbrella clauses extend to unilateral commitments of host states, such as legislation and regulation or even unilateral assurances given to foreign investors, has been controversial. While some tribunals have accepted this possibility,²⁰⁷ others have rejected it,²⁰⁸

²⁰² Article 10(1) Energy Charter Treaty (1994) (‘Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.’); Article 7 Germany-Pakistan BIT (1959) (‘Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.’); Article II(2)(c) Argentina-US BIT (1991) (‘Each Party shall observe any obligation it may have entered into with regard to investments.’).

²⁰³ Article X(2) Switzerland-Philippines BIT (1997) (‘Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.’).

²⁰⁴ Article 11 Switzerland-Pakistan BIT (1995) (‘Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.’); Article 2(4) Italy-Jordan BIT (1996) (‘Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.’).

²⁰⁵ Article 11(1) second sentence Austrian Model BIT (2008) (‘This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.’).

²⁰⁶ See *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 141 (‘We recognise in particular that there is no *jurisprudence constante* on the effect of umbrella clauses, that the subject is one on which legal opinion is divided, that the relationship between commercial and sovereign acts of government is not free from difficulty, and that each particular clause falls to be interpreted and applied according to its precise wording and the context in which it is included in a BIT.’).

²⁰⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 166 (‘The “commitments” the observance of which a Contracting Party is to “constantly guarantee” are not limited to *contractual* commitments. The commitments referred to may be embedded in, e.g., the municipal legislative or administrative or other unilateral measures of a Contracting Party.’); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 175 (‘Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause.’).

²⁰⁸ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 51 (‘The employment of the notion “entered into” indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II(2)(c) would be very much an empty base unless understood as referring to contracts.’); *Novenergia II - Energy & Environment (SCA), SICAR v. The Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, para. 715 (‘[...] Article 10(1) of the ECT does indeed provide for a duty of each Contracting Party to “observe any obligations it has entered into with an Investor”, a provision that recalls the “umbrella clause” contained in several investment treaties. However, the application of the umbrella clauses requires that the host State either concluded with the investor a specific contract or made to the investor a specific personal promise.’); see also

often on the basis of the specific formulation of umbrella clauses.

110. Further controversies in investment jurisprudence concern, on the one hand, the question whether umbrella clauses should be regarded as only applying to obligations entered into by a state in its sovereign or governmental capacity, as opposed to its ‘ordinary’ commercial capacity,²⁰⁹ and, on the other hand, whether they should only apply in cases of sovereign or governmental breaches,²¹⁰ as opposed to ‘ordinary’ commercial breaches. While such approaches are motivated by the perceived need to reduce the potential scope of non-observances of commitments amounting to treaty breaches, they are rarely based on the wording of umbrella clauses themselves.²¹¹
111. Another divergence in the jurisprudence concerning umbrella clauses is more directly linked to their specific wording and concerns the question whether a direct (contractual) relationship must exist between an investor and a host state in order to be covered by an umbrella clause, or whether commitments made by sub-state entities or constituent parts of the host state, as well as commitments made in relation to a party on the investor’s side other than the claimant, are covered. These questions are sometimes referred to as the issue whether ‘privity’ in respect of covered commitments is needed and relates to the question whether only obligations of host states or also of entities such as state-owned enterprises are covered, on the one side, and whether, on the other side, it is limited to commitments vis-à-vis investors or also extends to those made toward its subsidiaries or other affiliates.
112. In regard to the first privity problem, some tribunals require a direct contractual link with the state entering into commitments vis-à-vis investors, while others use the general rules on attribution derived from the law of state responsibility enshrined in the ILC Articles on State Responsibility²¹² in order to broaden the scope of entities that may be regarded as committing an act attributable a host state.²¹³

Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria, ICSID Case No. ARB/17/1, Award, 29 April 2020, paras. 422-425.

²⁰⁹ *Pan American Energy LLC and others v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP America Production Company and others v. The Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 109; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 85.

²¹⁰ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310 (‘The Tribunal fully shares the view that ordinary commercial breaches of a contract are not the same as Treaty breaches, as was well explained by the tribunal in *SGS v. Philippines* when distinguishing a contractual dispute over payment from a Treaty dispute. So too, the Tribunal can only agree with the view adopted in *SGS v. Pakistan* that such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause. The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.’).

²¹¹ See e.g. *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 164 (‘(‘In a different vein, Respondent argues that Article 8(1) of the Treaty can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority – *puissance publique* – or that it can only apply to conduct involving breaches of international law. Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent’s contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of *puissance publique*, for example, has no foundation in the text of the article. Similarly, the argument that Article 8 can only apply where there is a claimed breach of international law – one arising on some basis other than Article 8(1) – has no basis in the text. Such arguments would limit Article 8(1) in ways that have no foundation in its text and would, indeed, appear to deprive the provision of effectiveness in all but rare situations.’).

²¹² Articles on Responsibility of States for Internationally Wrongful Acts, in ‘Report of the International Law Commission on the Work of Its Fifty-third Session’, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

²¹³ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005; *Gustav F W*

113. In regard to the second privity problem, tribunals have tended to limit the effect to investors where the applicable umbrella clause speaks of obligations vis-à-vis investors²¹⁴ and to extend it to subsidiaries where a clause speaks of obligations vis-à-vis investments.²¹⁵
114. Even where tribunals accept that an umbrella clause has the effect that a breach of a covered obligation will amount to a breach of the IIA containing the clause, they often add that this '[...] does not convert the issue of the extent or content of such obligations into an issue of international law.'²¹⁶ This implies that the determination of whether a breach of (contractual) obligations had occurred must be made on the basis of the applicable (often national) law.²¹⁷

B. Relevant Practice

- a) "Umbrella clauses, which require contracting states to observe obligations towards investors and investments from other contracting parties, pursue the principle of sanctity of contracts/*pacta sunt servanda*. In this sense, umbrella clauses serve the legal certainty and predictability aspects of the rule of law."
- b) "Depending upon the specific formulation of umbrella clauses, they have been interpreted to extend not only to contractual obligations, but also to unilateral commitments in the form of legislation and regulations of host states."
- c) "In investment jurisprudence, tribunals have attempted to limit the effect of umbrella clauses by holding that they apply only to obligations entered into by states in their sovereign or governmental capacity, as opposed to their 'ordinary' commercial capacity, and only in cases of sovereign or governmental breaches, as opposed to 'ordinary' commercial breaches."
- d) "Depending upon the specific formulation of umbrella clauses, tribunals tend to require that obligations have been entered into by host states themselves or entities whose acts can be attributed to them. Similarly, they usually require that such obligations have been incurred either to investors directly or to their subsidiaries where they can be regarded as their investments."
- e) "While the existence and extent of a breach of obligations will be determined on the basis of the governing (mostly host state) law, umbrella clauses have the effect of turning such breaches into breaches of the applicable investment agreement, thereby usually allowing

Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010.

²¹⁴ *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, para. 320 ('BIT uses quite precise language: it refers to "specific agreements" which are to be concluded between a Contracting Party and an investor of the other Contracting Party.').

²¹⁵ *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 80/2005, Final Award, 26 March 2008, para. 110 ('[...] so-called "umbrella clause" of the ECT is of a wide character in that it imposes a duty on the Contracting Parties to "observe any obligations it has entered into with an Investor or an Investment of an Investor of the other Contracting Party". This means that the ECT imposes a duty not only in respect of the investor which is otherwise customary in an investment treaty context, but also vis-a-vis a subsidiary company, established in the host state. [...]').

²¹⁶ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 128.

²¹⁷ *Ibid.*, para. 117 ('[...] Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State.'). *Ioan Micula, Viorel Micula, S.C. European Food S.A. S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, No. ARB/05/20, Final Award, 11 December 2013, para. 417.

investors to bring such disputes before a treaty-based arbitral tribunal.”

C. Recommendations

- a) “Adjudicators should take into account the rule of law demands of the umbrella clauses.”
- b) “When applying umbrella clauses, adjudicators should take into account their rule of law aspect of securing the sanctity of contracts/*pacta sunt servanda* and ensuring the binding force of commitments made by the host state.”
- c) “When applying umbrella clauses, adjudicators should further take into account the rule of law effect of such clauses in offering access to treaty-based dispute settlement.”
- d) “When interpreting umbrella clauses adjudicators should take into account the specific wording of such clauses in order to enhance the rule of law aspect of securing the sanctity of contracts/*pacta sunt servanda* and ensuring the binding force of obligations.

X. Conclusion

115. This interim report has focused on the rule of law aspects of the most widely used investment protection standards in IIAs. The Committee has tried to find balanced formulations resulting from often very controversial discussions. The ‘Relevant practices’ offer short descriptive summaries of how investment tribunals have identified rule of law aspects and criteria in IIA standards and how they have applied them. On a normative level, the Committee has endeavoured to formulate concise prescriptive sections entitled ‘Recommendations,’ which are addressed to adjudicators for the purpose of upholding rule of law criteria in deciding investment disputes.

116. For the final two years of its mandate, the Committee will turn to rule of law in the ISDS system. It will analyse to what extent such rule of law standards are found in current ISDS practice. Based on these practices it will also formulate recommendations for adjudicators of investment disputes to adhere to rule of law demands when deciding investment disputes. This analysis will be undertaken in the next Committee report due at the 2024 Conference.