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Non-Discrimination Provisions in International Investment Agreements: A First Attempt at Conceptualization

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Non-discrimination provisions in international investment agreements: a first attempt at conceptualization

Facundo Perez Aznar[1]

I. Introduction

The present work analyses the nature, scope and interaction of non-discrimination provisions in International Investment Agreements (IIAs), in particular concerning discrimination based on nationality.

Non-discrimination obligations appear in different provisions of IIAs. A first group of provisions deals expressly with non-discrimination, such as MFN and NT and non-impairment provisions. A second group of provisions deals indirectly with non-discrimination, such as the provisions on FET and expropriation. Some of these provisions are treaty based (as with NT and MFN clauses), others are based in customary international law (as is the case of non-discrimination in FET or expropriation), and others have elements both of treaty and customary law (this is the case of non-impairment provisions).

Besides similarities in the wording of some of these provisions (namely NT and MFN), tribunals have sometimes followed completely different approaches in applying them. At the same time, tribunals have followed similar patterns and methodologies in applying non-discrimination provisions, even though they come from different sources (e.g. custom in the case of FET and treaties in the case of NT and MFN).

II. The distinction between NT, MFN and other concepts in IIAs

A. MFN and NT clauses

There is a close relationship between MFN and NT clauses. MFN and NT provisions share many characteristics. However, the relationship between these two treaty provisions is not always easy to address and this is also the case in the area of international investment law.

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The similarities between NT and MFN made the Special Rapporteur Ustor in his fifth report to propose the inclusion of articles on NT in the Draft articles of the MFN clause.[2] In 1975, at its twenty-seventh session, the ILC considered the question of whether the draft articles on the MFN clause should also deal with NT. After a general discussion in which divergent views were expressed, the ILC agreed to concentrate its work on the MFN treatment only.[3] In 1976 the ILC decided to leave the draft articles without the inclusion of NT provisions, in view of the divergent opinions expressed in the ILC and in the General Assembly on the matter of extending their scope to NT clauses.[4]

There are many similarities between NT and MFN clauses. First, both are conventional, '[t]he validity of the general statement that neither most-favoured-nation treatment nor national treatment can be claimed from another State unless the latter has a legal obligation to extend it seems to be beyond dispute.'[5] Second, both cover discrimination based on nationality: 'Both national treatment, or 'inland parity', and most-favoured-nation treatment, or 'foreign parity', are anti-discriminatory, i.e., both guarantee equality.'[6] Third, both are relative standards that require a comparison between persons or things with some sort of 'likeness' (e.g. between 'goods', 'services', 'investments' or 'investors'). Fourth, one of the comparators (the beneficiary) has always a foreign aspect (e.g. foreign 'goods', 'services', 'nationals', 'investors' or 'investments'). Fifth, in both the *ejusdem generis* principle applies.[7] In this sense it has been noted that NT means 'that the nationals of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were nationals of the second contracting party. That is, it prevents discrimination against the nationals of the contracting parties in any way, in regard to the points stipulated in the treaty.'[8] Sixth, MFN and NT are usually limited with exceptions. Seventh, it

[2] The articles submitted included the following articles: National treatment clause (Article 9); National treatment (Article 10); Draft National treatment in federal States (Article 10 bis); Effect of an unconditional national treatment clause (Article 11); Effect of a national treatment clause conditional on material reciprocity (Article 12); The right of the beneficiary State under a most-favoured-nation clause to national treatment (Article 13); Cumulation of national treatment and most-favoured-nation treatment (Article 14).
[3] International Law Commission, 1330th meeting, 27 ILC Ybk, Vol. II p.118 (1975), §108.
[4] International Law Commission, 1377th meeting, 28 ILC Ybk, Vol. II, p. 91 (1976).
[5] Ustor, E. '*Sixth report on The Most Favoured Nation clause'*, 27 ILC Ybk, vol. II, p. 3 (1975).
[6] Ustor, E. '*Seventh report on The Most Favoured Nation clause'*, 28 ILC Ybk, vo. II, p. 124-125 (1976).
[7] International Law Commission, 1330th meeting, 27 ILC Ybk, Vol. II p.5 (1975), §1 ('The national treatment clause is just as much subject to the *ejusdem generis* rule as the most-favoured-nation clause')
[8] Ustor, E. '*Fifth report on The Most Favoured Nation clause'*, 26 ILC Ybk, vol. II, p. 124-125 (1974); quoting G. W. Wickershman, Report to the League of Nations Committee of Experts for the Progressive Codification of International Law (1927).

has been argued that their purpose is similar.[9] Eight, both obligations include rules of conduct whose breach produces a wrongful act.

On the other hand, there are two important differences between MFN and NT. First, the comparator is different. In NT the comparator can be 'goods', 'services', 'nationals', 'investments' or 'investors' of the host state; in MFN it can also be 'goods', 'services', 'nationals', 'investments' or 'investors', but from a third country. Second, as an effect of having a comparator from a third country, the treatment covered is not exactly the same: NT focuses on internal measures; MFN covers internal measures and international agreements (or international unilateral acts).[10] In this sense Ustor considered that the difference between MFN and NT 'lies in the choice of base upon which equality is to be measured. By granting inland parity, a nation places the citizens of a foreign country on an equal footing with *its own citizens*, not with those of any other foreign country.' [11] For these differences some authors have considered that these provisions could not be assimilated. Snyder argued that NT and MFN treatment are very similar but there could be material differences in treatment as a result of the different promises made.[12] Quentin-Baxter, noted that 'there was a considerable differences between the ways in which the two principles were applied' and that 'the difference between the two types of clause—the existence of a triangular relationship under the most-favoured-nation clause and a bilateral relationship under the national treatment clause—was not merely formal, but lay at the heart of the matter.'[13] He added that '[t]he national treatment clause did not give rise to the same problems. There was not, for example, the problem of applying a set of obligations to a complicated factual situation involving a relationship with a third State, and it was seldom necessary to strike a balance between the unfettered sovereignty of the granting State and its obligation to accord national treatment.'[14] For Pescatore 'the

[9] Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945), 119. ('..The Most Favoured Nation standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of Most Favoured Nation treatment in the same field').

[10] Ustor, E. '*Fifth report on The Most Favoured Nation clause'*, 26 ILC Ybk, vol. II, p. 124-125 (1974). (Cf. '(10). Technically the most-favoured-nation clause is a *renvoi* to another treaty, whereas the national treatment clause is a *renvoi* to municipal law.')

[11] Ustor, E. '*Fifth report on The Most Favoured Nation clause'*, 26 ILC Ybk, vol. II, p. 124-125 (1974).

[12] R. C, Snyder, *The most-favored-nation clause: an analysis with particular reference to recent treaty practice and tariffs* (New York: King's crown press, 1948) 11-12.

[13] International Law Commission, 1336th meeting, 27 ILC Ybk, vol. I p. 169 (1975).

[14] International Law Commission, 1336th meeting, 27 ILC Ybk, vol. I p. 169 (1975). Later he also stated. States entering into a most-favoured-nation treatment agreement did so on the basis not only of careful consideration of its foreseeable effects, but also of a belief that the clause would not be turned against them and applied to a situation wholly different from that which they had in mind. They undoubtedly recognized that there would be many situations in which automatic application of the clause would be impossible and it would be necessary to discuss on which of several possible bases the parallel could be drawn; but it was certainly not their intention to forgo, in important matters of State policy, their sovereign right to change their institutions. » 1338th meeting—26 June 1975, 179.

two standards of treatment are so different in nature that it cannot be said that the most-favoured-nation clause can, in relevant cases, enable the beneficiary State to benefit from national treatment as well.'[15]

Since both NT and MFN provisions are creatures of treaty, the degree of assimilation depends on the wording of these provisions and on the context where they are included in treaties. For these reasons, for example, the degree of assimilation is different in WTO law and in international investment law.

In GATT both MFN and NT 'prohibit discrimination on the basis of the 'national origin or destination' of a product.'[16] Besides the similarities there are important distinctions between MFN and NT in WTO. These distinctions are reflected in the different structure and wording of the NT and MFN provisions, both in the GATT and GATS Agreements. In GATT, MFN has a dual purpose: (1) it 'ensure[s] *equality of opportunity* to import from, or to export to, all WTO Members'[17] and (2) it 'serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.'[18] NT in GATT Article III has two objectives: (1) the avoidance of protectionism in the application of internal tax and regulatory measures[19] and (2), to a lesser extent, the compliance with tariff reduction commitments at the border under Article II.[20] The scope of measures covered by the MFN provision (border or internal restrictions) is broader than measures covered by NT (internal taxation and internal regulation). In addition, in WTO '"like products" has a different meaning in the different contexts in which it is used.'[21] In this connection it has been stated that the use of the case law on 'likeness' within the meaning of Article III of GATT 1994 when interpreting MFN 'should be considered carefully even though the scope of the concept may differ.'[22] Similarly, in the context of GATS, the NT provision is 'not necessarily relevant to the interpretation' of MFN in GATS but it is safer to compare MFN in GATS with MFN in GATT.[23]

In international investment law the assimilation MFN and NT seems to be easier. MFN and NT provisions coexist in most BITs. Generally NT and MFN are dealt with in two different ways. First, some treaties deal with NT and MFN in the same provision, thus both provisions have the same wording in most aspects (e.g. Article 10(7) of ETC). Second, other treaties include one provision for each clause, but with very similar wording (e.g. Article 1102 and 1103 of NAFTA).

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[15] *Annuaire de l'lnstitut de droit international*, vol. 58, Part. I (Athens, 1979), pp. 330-331.
[16] Van Den Bossche, *The Law and Policy of the World Trade Organization*, 32.
[17] Van Den Bossche, *The Law and Policy of the World Trade Organization*, 325.
[18] Appellate Body Report, *Canada* – Autos, §83.
[19] Appellate Body Report, *Japan — Alcoholic Beverages II*, 16.
[20] Panel Report, *Japan — Alcoholic Beverages II*, para. 6.13. Appellate Body Report, Japan — *Alcoholic Beverages II*, 16–17.
[21] Van Den Bossche, *The Law and Policy of the World Trade Organization*, 329.
[22] Van Den Bossche, *The Law and Policy of the World Trade Organization*, 331.
[23] Appellate Body Report, EC — *Bananas III*, §231.

There are many similarities between MFN and NT in IIL. The same similarities that generally apply between NT and MFN that we have just mentioned also apply here: both provisions are conventional, cover discrimination based on nationality, are relative standards that require a comparison in like circumstances, one of the comparators (the beneficiary) is always a foreigner (national, investor, or investment) and both cover treatment by internal measures (NT covers only this, while MFN covers this and international measures). In both the *ejusdem generis* principle should apply and both provisions are usually limited by exceptions.

The connection between both provisions is also reinforced by the fact that many BITs provide NT or MFN whichever is more favourable. For example, Article II(1) of the U.S.-Ecuador BIT establishes the obligation to treat investments and associated activities 'on a basis no less favorable than that accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable.' [24]

On the other hand, the two important differences we have just seen also apply between NT and MFN in IIL. First, the comparator is different: in NT the comparator can be 'nationals', 'investments' or 'investors' of the host state; in MFN it is 'nationals', 'investments' or 'investors' from a third country. Second, as an effect of having the comparator from a third country, the treatment covered is not exactly the same: NT covers only internal measures while MFN covers internal measures and international agreements (or international unilateral acts). The exceptions to NT are more frequent than exceptions to MFN because countries find it more difficult to treat foreign and domestic investors equally than to provide equal treatment to investors from different countries.[25]

These differences however, do not appear to be an impediment by investment tribunals to applying some common interpretative methodologies when implementing MFN and NT provisions, or to resorting to the principles applied in one provision to interpret the other.

Investment tribunals have recognised the similarities between MFN and NT clauses. In *Parkerings* the tribunal stated these two provisions 'are by essence very similar' and '[t]hey 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.' [26] The tribunal concluded that its 'analyses of the *National Treatment* standard will therefore also be useful to discuss the alleged violation of the *MFN* standard.'[27] In *Canadian Cattlemen for*

[24] U.S.-Ecuador BIT. Article II (1)
[25] UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD Series on issues in international investment agreements (New York: United Nations, 1999), 31.
[26] *Parkerings v Lithuania* (Award), §366.
[27] *Ibid.*

Fair Trade v United States a NAFTA tribunal stated that NT and MFN provisions in NAFTA Chapter 11 are 'in structure and substance, identical (except for the comparator class).'[28] In *Cargill v Mexico*, the tribunal considered that 'the requirement for MFN treatment tracks that of the national treatment requirement.'[29] In *Bayindir v Pakistan* the tribunal considered that both in MFN and NT the 'purpose is to provide a level playing field between foreign and local investors as well as between foreign investors from different countries.' [30]

In addition, many tribunals analyse whether there is a breach of a NT and a MFN provision jointly.[31] It is also common for parties and tribunals to resort to analysis under the other provision.[32] Furthermore NAFTA member states consider that the object and purpose of both Articles 1102 and 1103, is to prevent discriminatory treatment based on the nationality of an investor or its investment.

In investment law, there is no reason why a tribunal should not perform –while applying a MFN clause– the same detailed analysis undertaken by other tribunals in interpreting NT provisions and to regard all the elements of the clause (e.g. the treatment covered, the existence of like circumstances, less favourable treatment). However, the practice of international tribunals is far from this. The detailed analysis of NAFTA tribunals concerning NT and MFN contrast with that followed by most non-NAFTA tribunals applying the same clauses in other treaties. The analysis of all the elements of the clause is almost nonexistent in cases of tribunals following the *Maffezini* approach or in cases of tribunals that 'import' a new cause of action into the treaty through an MFN provision. Interestingly, in these two later situations no reference to NT or to case law dealing with NT is performed. One argument in favour of the disregard for some elements could be that for some reason when dealing with access to jurisdiction the analysis should be different. However, there does not appear to be any convincing reason to follow a different approach and to avoid an analysis of all the elements of the clause. As we have seen, the elements (apart from the comparator and the measures covered) are the same and the interaction between both provisions is seen in the practice of investment tribunals.

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[28] *Canadian Cattlemen v United States* (Award on jurisdiction), §135. See also, *Apotex v United States* (Award), §§8.5 ('It is not in issue that the requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator.') and 8.60 ('the Tribunal's legal analysis regarding NAFTA Article 1102 above which applies, mutatis mutandis, to NAFTA Article 1103').
[29] *Cargill v Mexico* (Award), §228.
[30] *Bayindir v Pakistan* (Award), §387.
[31] *Consortium RFCC v Morocco* (Award), §52-53; *Grand River v United States* (Award), §§158-172; *GEA v Ukraine* (Award), §§ 332-345; *Electrabel SA v Hungary* (Decision on jurisdiction, applicable law and liability), §§ 7.160-7-164.
[32] See e.g. *Parkerings v Lithuania* (Award), §368 (Using the 'like circumstances' applied in NT in a claim on MFN). See also *Total S.A v Argentina*, §213 (Applying to a NT provisions the analysis in *Parkerings v Lithuania* concerning a MFN provisions with no express reference to 'like circumstances').

B. Non-discrimination and expropriation

Discrimination plays an important role in the rules on expropriation.[33] However that role and its scope is not always easy to determine.[34] In the area of expropriation discrimination has been analysed as an element needed to be addressed in order to determine the existence of expropriation and to determine whether the state was acting under the legitimate use of the police powers of the state, and as an element to be addressed in order to determine whether the expropriation was lawful.

Non-discrimination in expropriation has both a customary character and a treaty character. Customary international law forbids discriminatory expropriations.[35] For example, the Restatement (Third) of Foreign Relations Law of the United States, § 712, in an attempt to condensate the customary rule, establishes that:

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation; [36]

In addition, expropriation provisions in AIIs generally include non-discrimination among its requirements as a condition for lawful expropriation. For example, Article VII(1) Canada-Argentina BIT establishes that investments shall not be expropriated 'except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.'[37]

In *Fireman's Fund Insurance Company v Mexico* it was observed that the non-discrimination aspect in expropriation covers two roles: 'discriminatory treatment is used to determine whether the expropriation was unlawful' and 'as one of the factors to distinguish between a compensable expropriation and a non-compensable regulation by a host State.'[38]

Tribunals usually first consider whether the challenged measures are expropriatory (and at that moment include an analysis on whether the measure is a

[33] On this topic, see: A.F.M. Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview' (8 Journal of Transnational Law and Policy, 1998), 57.
[34] N. Stephan Kinsella and Noah D. Rubins, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*, 177.
[35] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 372.
[36] *Restatement of the Law Third*, American Law Institute (1987), Vol. 2, Section 712, commentaries f and g.
[37] Canada-Argentina BIT (1991), Article VII (1).
[38] *Fireman's Fund Insurance Company v Mexico* (Award), §§ 204-205.

bona fide and non discriminatory application of the police powers) and only then they ask whether they can comply with certain conditions, such as public purpose, non–discrimination, due process of law and upon the payment of compensation.[39]

In *Libyan American Oil Co. (LIAMCO) v Libya* the tribunal regarded that 'clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization.'[40] It was noted by the *Fireman's Fund* tribunal that in the *Liamco* case 'the tribunal considered that 'a purely discriminatory nationalization is illegal and wrongful' under international law. However, it presupposes the presence of a nationalisation (or expropriation). In the present case, the question is whether there was expropriation. It cannot be argued that because there is discrimination, there is expropriation.'[41]

In *Feldman v Mexico*, the tribunal distinguished NT from expropriation. The tribunal noted that the *S.D. Myers* tribunal, had found no violation of the expropriation provision in Article 1110, nevertheless it found Canada in violation of its obligations under Article 1102 and Article 1105. [42]

There are different views on what kind of discrimination is covered under the rules on expropriation. Some authors argue that it would cover discrimination other than on the basis of nationality.[43] In the Restatement (Third) of Foreign Relations Law of the United States it is stated:

> *f. Discriminatory takings.* Formulations of the rules on expropriation generally include a prohibition of discrimination, implying that a program of taking that singles out aliens generally, or aliens of a particular

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[39] *Ibid*, §174. ('That would indeed be putting the cart before the horse ("*poner la carreta delante de los caballos*"). Paragraphs (a) through (d) do not bear on the question as whether an expropriation has occurred. Rather, the conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110.'). *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* (Award), §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.'); *Parkerings v Lithuania* (Award on jurisdiction and merits), §§452-456. ('It can be concluded that Parkerings has not been expropriated within the meaning of Article VI of the Treaty. Accordingly, the question whether the expropriation was legitimate is not relevant and does not need to be discussed here'). *Chemtura v Mexico* (Counter-Memorial of Canada, 20 October 2008), §242, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-07.pdf ('… in assessing an expropriation claim, the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)–(d) have been satisfied...').

[40] *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic, Sole Arbitrator (Mahmassani)* (Award, 12 April 1977) 1982 62 ILR 140.

[41] *Fireman's Fund Insurance Company v Mexico* (Award), §205.

[42] *Feldman v Mexico* (Award), §137.

[43] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn 2009), 372.

> nationality, or particular aliens, would violate international law....
>
> Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be unreasonable. Discrimination may be difficult to determine where there is no comparable enterprise owned by local nationals or by nationals of other countries, or where nationals of the taking state are treated equally with aliens but by discrete actions separated in time.[44]

Concerning the type of discrimination covered by the rules on expropriation, pre-investment tribunals have focused on the intention[45] and have been reluctant to apply a test implying a comparator.[46] It has been argued that '[a] discriminatory taking is one that singles out a particular person or group of people without a reasonable basis.'[47] Most investment tribunals have followed this approach.

In *Eureko v Poland* the tribunal focused on the intention of the government to find that the challenged measure was expropriatory. The tribunal considered that the

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[44] *Restatement of the Law Third*, American Law Institute (1987), Vol. 2, Section 712, commentaries f and g.

[45] *British Petroleum v Libya* (Award) 2 ICSID Rep 343, §329 ('the taking of the property by the Respondent of the property . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.'); *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic, Sole Arbitrator (Mahmassani)* (Award, 12 April 1977) 1982 62 ILR 140 ('the political motive was not the predominant motive for nationalization, and that such motive per se does not constitute a sufficient proof of a purely discriminatory measure.'); *American Independent Oil Company (Aminoil) v The Government of Kuwait* (Arbitral Tribunal, Award,24 March 1982) 1982 21 ILM, 976 ('nationalisation of Aminoil was not thereby tainted with discrimination [. . .]. First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's Concession. Next, and above all, there were adequate reasons for not nationalising Arabian Oil.'). But see *LETCO v Government of Republic of Liberia* (Final Award), 366-367('areas of the concession taken away from LETCO were granted to other foreign-owned companies . . . these foreign companies were run by people who were 'good friends' of the Liberian authorities.'..[the expropriatory revocation of a concession] 'was not for a bona fide public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation').

[46] *American Independent Oil Company (Aminoil) v The Government of Kuwait* (Arbitral Tribunal, Award,24 March 1982) 1982 21 ILM, 976. ('There were adequate reasons for not nationalising Arabian Oil'); *Amoco International Finance v Iran* , 15 Iran-US Claims Tribunal Reports 189 (1987) (' 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.').

[47] A.F.M Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview' (8 Journal of Transactional Law and Policy, 1998), 57. N. Stephan Kinsella and Noah D. Rubins, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*, 177.

measures taken by Poland in refusing to conduct a initial public offering were discriminatory because 'these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep PZA [the company where the investor had shares] under majority Polish control' and that such 'discriminatory conduct by the Polish Government is blunt violation of the expectations of the Parties in concluding the SPA [Share Purchase Agreement] and the First Addendum.'[48]

The *Feldman* tribunal established that 'under international law, there is considerable doubt whether the discrimination provision of Article 1110 covers discrimination other than that between nationals and foreign investors, i.e., it is not applicable to discrimination among different classes of investors, such as between producers and resellers of tobacco products, at least unless all producers are nationals and all resellers are aliens.'[49]

In *RosInvest v Russia* however, the tribunal determined that the term discrimination in the non-impairment provision and in the expropriation provision of the treaty 'focuses on a discrimination between nationals and foreigners.'[50] The tribunal found no evidence that the measures disputed in the proceedings included such discrimination: 'The focus of Respondent's measures was clearly on Yukos irrespective of its domestic or foreign shareholders.'[51] In *Kardassopoulos v Georgia* the tribunal reasoned that the claim was a classic case of direct expropriation, being a decree that has deprived GTI (the company where the investor had interest) of its rights in an oil pipeline and Mr. Kardassopoulos' interest therein. The tribunal considered that although the rights of GTI were taken away and handed to GIOC (a Georgian state-owned oil company), GIOC subsequently struck up a partnership with AIOC, another foreign entity. Based on this the tribunal did not find that the expropriation was carried out in a discriminatory manner: 'this was not a case in which the Georgian government discriminated against Tramex or Mr. Kardassopoulos *qua* foreign investor, but rather a case in which it determined that there was a better deal to be had with a different foreign investor.'[52] The tribunal added that '[w]hile it may, in certain circumstances, be the case that a taking can be considered discriminatory absent an intention to discriminate against an investor on the basis of nationality, the Tribunal is not convinced that this is such a case.'[53]

In *ADC v Hungary* the tribunal rejected the respondent's argument that claimants were not in a position to raise any claims of discriminatory treatment as they were the only foreign parties involved in the operation of the Budapest-Ferihegy

[48] *Eureko v Poland* (Partial award), §242.
[49] *Feldman v Mexico* (Award), §26.
[50] *RosInvest v Russia* (Final award), §555.
[51] *Ibid*.
[52] *Kardassopoulos v Georgia* (Award), §393.
[53] *Ibid*.

International Airport.[54] The tribunal considered that 'in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties.'[55] The tribunal proceed to make a comparison between the treatments 'received by the Respondent-appointed operator and that received by foreign investors as a whole'[56] and concluded that the actions taken by the respondent against the claimants were discriminatory. The decision has been the object of criticism. It has been argued that the reasoning 'suggests that whenever there is a nationalization of a unique foreign-held business, the nationalization is by definition discriminatory because other foreign businesses were not nationalized.'[57] It has also been stated that 'Any expropriation—short of a general nationalization—will target specific groups of property owners or investors, ... The fact that there may be only one affected entity, and that this one entity may be a foreign investor, is usually not enough to constitute a discriminatory taking which singles out particular persons without a reasonable basis. The fact that only foreigners are affected by an expropriatory measure as such may be incidental. Illegal discrimination usually requires the targeting of foreign investors as a result of unreasonable policies or motives such as racism or political retaliation against nationals of certain States...' [58]

In *Siag and Vecchi v Egypt* the tribunal focused on the discriminatory effect of the measure. It was not disputed that the claimants' investment had been expropriated. Claimants argued that other foreign-owned investors had not been expropriated while the respondents' hotel had. The tribunal noted that the Ministerial Resolution No. 279 purported to cancel the contracts entered into with both Siag and with another hotel company. The tribunal regarded that 'the expropriation of two foreign-owned investments may constitute discrimination as much as the expropriation of a single investment.' [59] It added that 'a discriminatory effect must be shown, and the Tribunal does not consider that it has sufficient evidence before it to determine that issue.'[60]

In sum, a discriminatory treatment under the rules on expropriation appears to be one that singles out a foreign investor. Also, a measure can be discriminatory without being expropriatory and vice versa. The better way approach concerning non-discrimination and expropriation appears to be not to equalise it as the non-discrimination under NT and MFN provisions.

[54] *ADC v Hungary* (Final award), §441.
[55] *Ibid*, §442.
[56] *Ibid*, §443.
[57] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn 2009).
[58] A.Reinisch, *Legality of Expropiations*, 190.
[59] *Siag and Vecchi v Egypt* (Award), §439.
[60] *Ibid*.

C. Non-discrimination and the regulatory power of states

As it was already noted, discrimination plays a role also with respect to the use of regulatory or police power by states. Many tribunals have recognised the police power of states. For example the tribunal in *Saluka* noted that 'the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.'[61] The police power of states is also recognised in the 1961 Harvard Draft[62] and in the 1967 OECD Draft Convention.[63]

Investment tribunals have recognised the implications of discrimination under the police powers. Investment tribunals have often resorted to the United States Third Restatement of the Law of Foreign Relations in 1987 which reads that 'A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.'[64]

Authors broadly accept that a general regulation adopted in good faith and non-discriminatory is not expropiatory.[65] Tribunals have also recognised that a State is

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[61] *Saluka v Czech Republic* (Partial Award), §262.

[62] The Harvard Draft articles stated the following ('An uncompensated taking of property of an alien or deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided: (a) it is not a *clear and discriminatory violation* of the law of the State concerned; (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention [relating to 'Denial of Access to a Tribunal or an Administrative Authority' 'Denial of a Fair Hearing' and 'Adverse Decisions and Judgments']; (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.') Harvard Research in International Law, Draft Convention on the Law of Treaties 1935

[63] The 1967 OECD Draft Convention on the Protection of Foreign Property recognised 'the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be to attempt to interfere with its powers to regulate - by virtue of its independence and autonomy, equally recognised by international law - its political and social existence.' OECD, *Draft convention on the protection of foreign property and resolution of the Council* (Paris : Organisation for Economic Cooperation and Development, 1967)

[64] American Law Institute, *Restatement of the Law Third* (Vol. 2, Section 712, 1987), commentary g, quoted with approval in *Feldman Karpa v Mexico* (Award), §135; *Saluka v Czech Republic* (Partial Award), §260; *LG&E v Argentina* (Decision on Liability), §196; *Glamis v United States* (Award), §354; *Suez v Argentina* (Decision on Liability), §128, *Suez v Argentina* (Decision on Liability), §139; *El Paso v Argentina* (Award), §238.

[65] Aldrich, George H., What Constitutes a Compensable Taking of Property? The Decisions of the Iran- United States Claims Tribunal (1994) 88 AM.1. INT'LL. 585 at 609. ('[l]iability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and

not responsible for loss of property resulting from the police power of States, providing that it complies with certain requirement among which is the requirement of not being discriminatory.[66]

Concerning how tribunals deal with non-discrimination in analysing regulatory measures, tribunals have assimilated the non-discriminatory character with the analysis under the minimum standard as in *Chemtura v Canada*[67], NT as in *Methanex v US*[68] or under both as in *Fireman's Fund.* In that later case the tribunal

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police powers of states') Christie, G.C., What Constitutes a Taking of Property Under International Law? (1962) 38 BRIT YB. INT'L. L. 307 at 331 ('[l]iability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers of states. Liability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its laws.') See also A. Newcombe, Andrew, *The Boundaries of Regulatory Expropriation in International Law* (2005), 22.

[66] *Emmanuel Too v Greater Modesto Insurance Associates and the United States of America* (1989) 23 Iran-USCTR 378 26 ('… a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.') *Sea–Land Services Inc v Ports and Shipping Organisation of the Islamic Republic of Iran 6 Iran–US CTR* 149 (1984) ('The Majority considers that Bank Markazi was 'invested with a certain margin of discretion' in foreign exchange matters; in the Majority's opinion, there is insufficient evidence to indicate that the Bank exercised its discretion unreasonably or discriminatorily.'), *Methanex v United States* (Final award on jurisdiction and merits), §7 ('.. An intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But 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.'); *Saluka v Czech Republic* (Partial Award), §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.'[the tribunal did no find expropriation, it did not embarked in a discrimination analysis in the part devoted to expropriation.]); *Suez v Argentina*, (Decision on Liability), §128 ('As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.'); *Chemtura v Canada* (Award), §266 ('Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers.'); *SAUR v Argentina* (Decision on jurisdiction and liability), §401 ('L'exercice des pouvoirs de police est légitime s'il est réalisé conformément aux norms d'application générale, de manière non discriminatoire, de bonne foi et en défense de l'intérêt général, et sans que l'État ne se soit préalablement soustrait à ses obligations.').

[67] *Chemtura Corporation v Canada,* (Award), §266 ('Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.')

[68] *Methanex v United States* (Final Award). §15 ('For reasons elaborated here and earlier in this Award [the tribunal had already analysed the issue of discrimination under NAFTA Article 1102],

considered that '[t]o distinguish between a compensable expropriation and a non-compensable 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.'[69] The tribunal observed that the 'haircut' only for some holders of debentures constituted 'a clear case of discriminatory treatment of a foreign investor.'[70] And that such treatment might have given rise to claim by an investor under the NT, the Minimum Standard of Treatment of the NAFTA, or under two or all of them.[71] However, the tribunal had already ruled that it lacked competence over claims under the NT and minimum standard provisions, thus the question before it was whether it could also give rise to a claim under the expropriation provision. The tribunal concluded that it did not give rise to a claim under the expropriation provision. It determined that '[a] discriminatory lack of effort by a host State to rescue an investment that has become virtually worthless, is not a taking of that investment.'[72]

Now moving to the standard of FET, when analysing that standard tribunals have recognised that international law allows for a 'high measure of deference…to the right of domestic authorities to regulate matters within their own borders.'[73] However, under FET tribunals have focused more on arbitrariness, the existence of stabilisation clauses or the existence of legitimate expectations rather than on the non-discriminatory character of the measure undertaken. The tribunal in *Saluka* considered that '[i]n order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.'[74] In *Parkerings-Compagniet AS v Lithuania*, the tribunal recognised the right of States 'to exercise its sovereign legislative power...What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.'[75] Similarly the tribunal in *Ulysseas v Ecuador* proposed that '[a] violation of the standard cannot be determined in the abstract, what is fair and reasonable depending on a confrontation of the objective expectations of the investor and the regulatory power of the State in the light of the circumstances of the case.'[76]

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the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process.'),

[69] *Fireman v Mexico* (Award), §176 (footnotes omitted).

[70] *Ibid*, §203.

[71] *Ibid*.

[72] *Ibid*, §207.

[73] *SD Myers v Canada* (First partial award), §263. *Saluka v Czech Republic* (Partial Award), §305. *Total SA v Argentina* (Decision on Liability), §115. *Roussalis v Romania* (Award), §317; *Lemire v Ukraine* (Award), §505.

[74] *Saluka v Czech Republic* (Partial Award), §305.

[75] *Parkerings v Lithuania* (Award), §332.

[76] *Ulysseas v Ecuador* (Final award), §249 and §217 ('The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated

This type of discrimination covered by customary international law appears to be more demanding that the discrimination provided in NT or MFN treatment. This is natural given the flexibility that a state should have when regulating in the public interests. However, tribunals do not always make that fine distinction between the two types of discrimination.

D. Non-discrimination and denial of justice

Non-discrimination is also part of the denial of justice concept. Severe discrimination directed to a foreigner should exist in order for denial of justice to take place. In the *Salem* case, the tribunal observed that 'obvious discrimination of foreigners against natives; palpable and malicious inequity of a judgment – these are the cases which, one after another, have been included under the notion of "denial of justice".'[77] In the *Cotesworth* case the tribunal stated that '[i]t is only in cases where justice is refused, or … violated, or when odious distinctions have been made against its subjects, that the government and foreigner can interfere.'[78] In the *Bullis Case (United States v Venezuela)* the tribunal considered that an 'undue discrimination against him as a citizen of the United States' would have amounted to a denial of justice.[79] Professor Greenwood has explained that '[s]o far as the content of the primary norm is concerned, international tribunals are understandably cautious in concluding that the judicial system of a State has fallen so far short of international standards that it has perpetrated a denial of justice. Only if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law.'[80]

Another case where the tribunal regarded discrimination as giving rise to denial of justice came in the *Loewen* case. The case arose out of proceedings before Mississippi courts, in which counsel for the U.S. claimant had made 'extensive irrelevant and highly prejudicial references' to Loewen's foreign nationality, as well as class- and race-based distinctions between Loewen and the U.S. plaintiff. The tribunal stated that '[a] decision which is in breach of municipal law and is

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in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable').

[77] *Salem Case (U.S. v Egypt)*, June 8, 1932, 6 ILR. 188, 197 (1945).

[78] *Case of Cotesworth and Powell* (Award) *in* II John Bassett Moore, *History and digest of the International Arbitrations to which the United States has been party* (1898), 2050, 2081 Section VII.(3).

[79] Bullis Case (United States v Venezuela) (1959) 9 RIAA 231, at 232.

[80] Christopher Greenwood, 'State Responsibility for the Decisions of National Courts' in *Issues of State responsibility before Internacional Judicial Institutions,* 58 (M. Fitzmaurice and D. Sarooshi, 2004).

discriminatory against the foreign litigant amounts to manifest injustice according to international law.'[81] The tribunal concluded that there was 'strong reason for thinking that the jury were affected by the persistent and extravagant O'Keefe appeals to prejudice,' and that the judge 'failed to discharge his paramount duty to ensure that Loewen received a fair trial.'[82] The *Loewen* tribunal held that it is 'the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.' [83]

In *Waste Management* the tribunal ascertained that some Mexican court decisions were 'not, either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process. The decisions were reasoned and were promptly arrived at. Acaverde won on key procedural points, and the dismissal in the second proceedings, in particular, was without prejudice to Acaverde's rights in the appropriate forum.'[84] The same tribunal stated that 'neither the decisions themselves nor other evidence before the Tribunal suggest that these proceedings involved discrimination, bias on grounds of sectional or local prejudice, or a clear failure of due process.'[85]

In *Jan de Nul v Egipt* the tribunal noted that '[t]here is no evidence on record of any discrimination, bias or malicious application of the law based on a sectional prejudice.'[86] In *Consortium RFCC v Morocco* the tribunal considered that '[i]l n'est ni allégué ni établi que le Président d'ADM et Ministre de l'Equipement aurait traité le Consortium de façon discriminatoire par rapport à d'autres investisseurs marocains ou étrangers, en ne fournissant pas de réponse à son mémoire de réclamation....Dans ces circonstances, le Tribunal retient que le demandeur n'a pas rapporté la preuve d'un déni de justice, d'un comportement abusif ou d'une mesure discriminatoire dont aurait fait preuve l'administration marocaine dans le traitement de ses réclamations et, partant, a échoué dans la démonstration d'une violation des articles 2 ou 3 de l'Accord bilatéral.'[87]

In sum, discrimination in denial of justice covers only serious discriminations directed against a foreign investor. There are not many cases that refer to this aspect of denial of justice. Tribunals normally did not make a 'like circumstances'

[81] *Loewen v United States* (Award), §135.
[82] *Ibid*, §128.
[83] *Ibid*, §123.
[84] *Waste Management v Mexico* (Award), §130.
[85] *Ibid*, §132.
[86] *Jan de Nul v Egypt* (Award), §209. See also *Frontier v Czech Republic* (Final Award), §294.
[87] *Consortium RFCC v Morocco* (Award), §94.

analysis. It must be recalled that it is usually recognised that denial of justice is a part of the international minimum standard.

E. FET and non-discrimination

There is a strong link between FET and non-discrimination. Most doctrine and tribunals consider that the FET standard share with the standards on non-impairment, NT and MFN treatment that in the four there is an aspect of non-discrimination. The difficult question is determining the scope of that relationship. In this part we will analyse first, whether and if so to what extent, FET includes non-discrimination. Second, we will see whether FET also covers NT and MFN as suggested by Mann and followed by some tribunals. Third, we will see whether dispute settlement provision is part of FET standard, as it was suggested by some arbitrators.

The first question is the relationship between the minimum standard of FET and non-discrimination. The FET standard is one of the more dynamic protections included in IIAs. Tribunals still discuss if it reflects customary international or whether it is an independent standard.[88] Irrespectively of the position taken, there is disagreement as to the exact content of the standard. Within that disagreement is the question of whether it covers discrimination and, if it covers it, what is the exact scope of that discrimination covered by the standard. FET is essentially customary in character and is an absolute standard in the sense that as a rule it does not require a comparison. Newcombe and Paradell consider that '[w]ith the exception of the prohibition on discriminatory measures, which involves a comparative analysis, minimum standards of treatment measure state conduct against non-contingent, objective standards.' [89] On the other hand non-discrimination provision as a rule are relative standards, they require a comparison. NT and MFN are conventional standards, but non-discrimination is covered in part by custom. NT and MFN normally include exceptions in the treaty, while non-discrimination (as FET) normally does not include such exceptions. Judge Higgins noted in her separate opinion in the *Oil Platforms Case* that 'the key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection.'[90]

It is almost undisputed that the minimum standard of treatment covers some sort of discrimination. Already Hugo Grotius asserted a norm of non-discrimination in

[88] On this topic see M.Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013).
[89] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn 2009), 233.
[90] *Oil Platforms (Iran v USA)* (Preliminary Objections, 12 December 1996) 1996 ICJ Rep 803.

the treatment of foreigners.[91] In *Spanish Zone of Morocco Claims (Great Britain v Spain)* the Rapporteur Huber stated that '[i]f a Government, by virtue of a law or of a general decree, grants, as a matter of grace, indemnities or other favours from public funds, an obviously arbitrary discrimination against aliens may possibly justify a claim under international law.'[92] In the 1967 Draft OECD Convention, when defining the minimum standard of treatment it was stated that states 'shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.'[93] The Restatement (Third) of the Foreign Relations Law of the United States provides that a state is responsible under international law for injury resulting from … 'other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.' [94]

It is useful to contrast the analysis performed by NAFTA and non-NAFTA tribunals concerning the relationship between FET and non-discrimination. NAFTA tribunals have taken opposing views on whether discrimination is covered by the international minimum standard and if it is covered, to what extent. Three lines of decisions can be identified on this matter. The first tribunals appear to recognise that non-discrimination was covered by the minimum standard. In *Mondev v United States*[95] the tribunal considered that a discriminatory act 'might be characterised as in itself a breach of Article 1105(1) [the minimum standard].'[96] In *Myers*, the tribunal after quoting Mann's statement on FET, asserted that it 'does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the

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[91] Newcombe and Paradell note that 'Grotius refers to most-favoured-nation treatment, but actually is non-discrimination in customary law': 'A common right by supposition relates to the acts which any people permits without distinction to foreigners; for if under such circumstances a single people is excluded, a wrong is done to it. Thus if foreigners are anywhere permitted to hunt, fish, snare birds, or gather pearls, to inherit by will, or sell property, and even to contract marriages in case there is no scarcity of women, such rights cannot be denied to one people alone, except on account of previous wrong-doing.') (A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), quoting H. Grotius, De Jure Belli Ac Pacis Libri Tres (1625), J. B. Scott, ed., F.W. Kelsey, trans. (Oxford: Clarendon Press, 1925), Book II, Chapter II, XXII, p. 204-205.

[92] Case No. 150 *Spanish Zone of Morocco Claims*. *Great Britain* v *Spain (Spanish Zone of Morocco)* (UN RIAA, 1924).

[93] 1967 Draft OECD convention. Resolution of the OECD Council, 12 Oct. 1967, (1968) 7 ILM 117, Art. 1(a), at 119.

[94] The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (Washington: American Law Institute Publishers, 1987), §712.

[95] *Mondev v United States* (Award).

[96] *Ibid*, §156.

breach of Article 1102 essentially establishes a breach of Article 1105 as well.'[97] In *Loewen* the tribunal stated that international law does, 'attach special importance to discriminatory violations of municipal law' and that '[a] decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.'[98] In *Waste Management Inc v Mexico,*[99] the tribunal determined that previous NAFTA decisions 'suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety….'[100]

Other NAFTA tribunals rejected any coverage of the international minimum standard on discrimination matters. In *Methanex v United States*[101] the tribunal performed a literal interpretation of Article 1105 and noted the lack of any reference to 'discrimination' in that provision and refused any customary rule prohibiting discrimination.[102] In *Grand River* claimants maintained that Article 1105 of NAFTA included an obligation of non-discrimination against special or disadvantaged groups such as First Nations investors. The tribunal following the *Methanex* award (but apparently with a nuanced position) rejected the claimant's arguments:

> ... The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection. .... neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments. Further, it has not been shown that either the text of Article 1105 or the customary minimum standard includes the more specialized prohibitions and requirements involving indigenous peoples invoked here...[103]

[97] *SD Myers v Canada* (First partial), §266.
[98] *Loewen v United States* (Award), §135.
[99] *Waste Management v Mexico* (Award).
[100] *Ibid*, §98.
[101] *Methanex v United States*, (Final Award), §§ 14-16 and 25.
[102] *Ibid*.
[103] *Grand River v United States* (Award), § 207 and 209.

This position appears to go against the customary content of the minimum standard which undoubtedly includes non-discrimination, albeit not all the types of discrimination, and is based on the textual interpretation of a reference to a customary rule, as it is the case of the minimum standard in the NAFTA agreement.[104]

Other NAFTA tribunals appear to follow a more balanced approach and distinguish the function of non-discrimination both in the minimum standard of treatment and in the NT and MFN provision. In *UPS* the tribunal distinguished NT and MFN from the minimum standard. The two former 'depend simply and solely on the specifics of the treatment the Party accords to its own investors or investors of third States' while the later 'by contrast, states a generally applicable, minimum standard which, depending on the circumstances, may require more than the relative obligations of [NT and MFN].'[105]

In the same line in *Glamis v USA*[106] the tribunal made the distinction between the minimum standard and NT. It considered that the customary international law minimum standard of treatment 'is meant to serve as a floor, ... is not meant to vary from state to state or investor to investor. ... is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.'[107] It reasoned that the fundamentals of the *Neer* standard still apply today and the concept that to violate the customary international law minimum standard of treatment an act must be sufficiently egregious and shocking so as to fall below accepted international standards including 'evident discrimination.'[108] The treatment of investors under the NT obligation in NAFTA Article 1102 'is compared to the treatment the State's own investors receive and thus can vary greatly depending on each State and its practices.'[109] For the tribunal 'there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment. The former falls under the purview of Article 1102 ...'[110]

Non-NAFTA tribunals have also followed different approaches concerning the relation between FET and non-discrimination but they have shown a tendency to equate the analysis on discrimination in the different non-discrimination provisions (FET, non-impairment, NT and MFN). First, concerning the *relationship between non-discrimination and FET*, various non-NAFTA tribunals applying non-impairment provisions have held that a discriminatory conduct is

[104] For a criticism to *Methanex v United States* and *Grand River v United States*, see M.Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), 246-247.
[105] *United Parcel v Canada* (Award on Jurisdiction).
[106] *Glamis v United States* (Award).
[107] *Ibid*, §615.
[108] *Ibid*, §616.
[109] *Ibid*, §615.
[110] *Ibid*, §1087.

contrary to the standard of the fair and equitable treatment. Various tribunals have followed the statement of the *CMS*, where the tribunal considered:

> The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.[111]

In *El Paso* the tribunal followed *CMS* but it acknowledged that 'the reverse might not necessarily be, as violations of the fair and equitable treatment standard could result from types of situations other than arbitrariness or discrimination. The difference should be sufficient to prevent an assimilation of the two categories of violations. It is, in fact, the Tribunal's view that FET is designed to guarantee that, in situations where the other more precise standards are not violated, but where there is an unreasonable interference bringing about an unjust result regarding an investor's expectations, that investor can claim a violation of the FET and obtain reparation therefore.'[112] The tribunal was of the view that '[t]he distinction seems also often difficult between arbitrary or discriminatory treatment and violation of the FET.' [113]

In *Al-Bahloul v Tajikistan*, the tribunal regarded that FET and the non-impairment provision in the ECT 'are highly overlapping.'[114] In *Bogdanov v Moldova*, the one member tribunal analysed discriminatory measures together with the claims under the FET and non-impairment provisions and found a breach of both provisions.[115] In *Unglaube v Costa Rica* the tribunal analysed discrimination in the framework of FET.[116] In *Rumeli* the tribunal considered the measures challenged by the claimants to be unreasonable, arbitrary or discriminatory and as a breach of the FET standard were better qualified under the FET standard.[117] In *GEA v Ukraine* the tribunal noted that parties had agreed that the standard of protection against arbitrariness or discrimination is related to that of FET.[118] It therefore rejected the claimant's claims under this heading for the same reasons as the claimant's claims in respect of the FET standard were rejected.[119] In *Impregilo v Argentina* the tribunal determined that the non-impairment provision in the Italy-Argentina BIT

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[111] *CMS v Argentina* (Award), §290. The statement was followed in *Parkerings v Lithuania* (Award), §287, *Biwater v Tanzania* (Award), §694, *Rumeli v Kazakhstan* (Award), §680, *Roussalis v Romania* (Award), §325, *GEA v Ukraine* (Award), §329; *Pey Casado v Chile* (Award), §672; *El Paso v Argentina* (Award), §230.
[112] *El Paso v Argentina* (Award), §230.
[113] *Ibid*.
[114] *Al-Bahloul v Tajikistan* (Partial Award), §248 quoting *Plama v Bulgaria*, (Decision on Jurisdiction), §184.
[115] *Yury Bogdanov v Moldova* (Final Award).
[116] *Unglaube v Costa Rica* (Award).
[117] *Rumeli v Kazakhstan* (Award).
[118] *GEA v Ukraine* (Award), §329.
[119] *GEA v Ukraine* (Award), §331.

was ‘a specification of the general requirement of fair and equitable treatment dealt with in the first sentence’, and considered that once a breach of the obligations in the first sentence is found a further examination based on the second sentence is not required. [120] In *SAUR v Argentina* the tribunal contemplated that FET and full protection and security ‘sont intimement liés aux interdictions de discrimination et de caractère arbitraire.’[121]

In *Saluka v Czech Republic* the tribunal, when analysing the FET standard, considered that ‘[t]he expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.’[122] Under the FET standard the tribunal performed a three fall test of discrimination: (i) whether there was an investment in comparable position, (ii) whether there was a differential treatment, (iii) whether there was a reasonable justification. Later the tribunal reasoned that by violating the FET standard, the respondent ‘at the same time violated’ the non-impairment provision.[123] It considered that the ‘non-impairment requirement merely identifies more specific effects of any such violation’[124]

The second issue the *relationship between FET and NT and MFN treatment*. As we have seen, NAFTA tribunals have followed different approaches concerning this issue: some tribunals consider that the minimum standard does not cover any aspect of discrimination, while other tribunals consider that the minimum standard covers the most egregious forms of discrimination and the MFN and NT standards are relative standards that cover discrimination that requires a comparison. In order to analyse the position of non-NAFTA tribunals concerning this matter it is useful to recall the view of FA Mann. Mann suggested that NT and MFN overlap with FET, and that FET is broader than these clauses and broader than the minimum standard:

> Thus, while it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary international law , unfair and inequitable treatment is a much wider conception which may readily include such administrative measures in the field of taxation, licences and so forth, as are not plainly illegal in the accepted sense of international law. In particular it is submitted that the right to fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment, even if in the latter case the foreigner's rights are greatly extended and underlined by the duty not to subject the foreigner to

[120] *Impregilo v Argentina*, (Award), §333.
[121] *SAUR v Argentina* (Decision on jurisdiction and liability), §485.
[122] *Saluka v Czech Republic* (Partial Award), §303.
[123] *Ibid*, §465.
[124] *Ibid*, §461.

> 'unreasonable measures.'3 Thus if a British national erects a factory to produce cement in the Philippines and the government introduces a maximum price order, a tribunal may be able and compelled to investigate whether the prices so fixed are fair, equitable or reasonable. So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty.[125]

Then Mann added:

> If a foreigner is entitled to national treatment he must in both cases have the same rights as nationals. But suppose he were entitled merely to fair and equitable or reasonable treatment. Would the result not be the same? Would it not be unfair, inequitable or unreasonable to deny to him the rights which a national enjoys? Nobody will object to most-favoured-nation and national treatment rights being expressly assured. But the cases in which these rights will have independent significance are probably rare.[126]

In *Parkerings* the tribunal considered that NT and MFN were covered under the minimum standard. For the tribunal these two provisions:

> ...are treaty clauses that have the same substantive effect as the international treatment standard: foreigners should be afforded treatment no less favourable than the one granted to local citizens. The international law requirement in fact acts as a minimum requirement as it would be useless for the States party to a treaty to grant benefits less sweeping than customary law. In other words, all the requirements, be they national treatment, most favoured nation-treatment or non-discrimination at large, will in effect bar discrimination against foreign national investing in the country concerned. All investors benefiting from a treaty will benefit of a treatment identical or better than nationals or third countries persons. There is, thus, no reason discretely to address the issue of non-discrimination: the two aspects, under most-favoured-nation requirements ... on the one hand and under

[125] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (52 BYIL 241–54, 1981), 243 (original footnotes omitted).
[126] *Ibid.*, 245.

international customary law on the other.[127]

The tribunal further added that '[i]n certain situations where an MFN clause has been incorporated within a BIT, establishing a discrimination under the standard of *fair and equitable/reasonable treatment* is not necessary.'[128] The problem with that approach is that if NT and MFN are part of the minimum standard then NT and MFN provision would not play any role in a treaty.

In *Paushok v Mongolia*, the tribunal did not distinguish between non-impairment, FET and MFN in its analysis on discrimination.[129] The non-discrimination analysis in *Paushok v Mongolia* is a typical NT analysis where the tribunal even resorted to the like products analysis under WTO law.[130]

In *Lemire v Ukraine* the claimant argued, inter alia that Ukraine had violated the FET standard and the non-impairment provision in the US-Ukraine BIT by denying nearly 300 applications for frequencies submitted by Gala or Energy (companies owned by the claimant). In this case the investor did not claim NT, but claimed 'discriminatory treatment' perhaps because NT obligations contained in the BIT were subject to certain exceptions in an annex to the treaty, including that broadcasting operators may not be entitled to the same treatment as locals. The tribunal analysed the allegation of discrimination together with that of FET. First, the tribunal distinguished FET from discrimination and arbitrariness. For the tribunal, the BIT included a positive obligation, e.g to accord FET to the protected foreign investment and a negative obligation: to abstain from arbitrary or discriminatory measures such investments.[131] It added that any arbitrary or discriminatory measure, by definition, fails to be fair and equitable.[132]The prohibition of arbitrary or discriminatory measures is thus an example of possible violations of the FET standard, but the reverse is not true: an action or inaction of State may fall short of fairness and equity without being discriminatory or arbitrary.[133]

The assimilation between FET, non-discrimination and even MFN and NT is clearly shown by the practice of some tribunals when analysing the 'like circumstances' which is common to a NT or MFN analysis. The *Saluka* in the FET analysis considered that 'State conduct is discriminatory, if (i) similar cases

[127] *Parkerings v Lithuania* (Award), §367.
[128] *Ibid*, §291.
[129] *Paushok v Mongolia* (Award), §266 (.'..Claimants' discrimination claims ...if founded, would amount to a violation of several treaty obligations, including the FET and 'non-impairment' standards as well as the national and MFN treatments...'). The tribunal analyses the issues on discrimination under the heading 'The non-impairment standard.'
[130] *Ibid*, § 315.
[131] *Lemire v Ukraine* (Award), §259.
[132] *Ibid.*
[133] *Ibid.*

are (ii) treated differently (iii) and without reasonable justification.'[134] The tribunal in *Parkerings* agreed with *CMS* that FET covered non-discrimination and applied the 'like circumstances' test to the analysis of no-discrimination under FET.[135]

Other tribunals or annulment committees have keept the distinction between MFN and FET. For example, the annulment committee in *MTD v Chile* regarded that the tribunal 'appears to confuse' the notion of FET with MFN treatment in the Malaysia–Chile BIT.[136] For the committee the MFN provision 'is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. [The MFN provision] attracts any more favourable treatment extended to third State investments and does so unconditionally.'[137]

Newcombe and Paradell distinguish five types of discrimination that may arise with respect to the treatment of foreign investors and investment: (i)discrimination contrary to international human rights, such as discrimination based on race or sex; (ii) unjustifiable or arbitrary regulatory distinctions made between things that are alike or treating unlike things in the same way; (iii) conduct targeted at specific persons or things motivated by bad faith or with an intent to injure or harass; (iv) discrimination in the application of domestic law; (v) and nationality-based discrimination.[138] They consider that '[t]he first four forms of discrimination described above would violate the minimum standard of treatment and fair and equitable treatment. The more difficult issue is whether nationality based discrimination is contrary to fair and equitable treatment. If so, then arguably fair and equitable treatment provisions subsume national and MFN treatment clauses.'[139]

There have been different attempts to coordinate all these decisions. Howse, for instance argues that 'Fair and equitable treatment includes a non-discrimination obligation that may be broader or narrower than National Treatment, but which clearly protects investors to some extent against discriminatory treatment in relation to domestic actors, regardless of whether a competitive relationship exists.'[140] However, arbitral decisions show that tribunals entered in a comparison analysis under non-impairment and even FET provisions.

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[134] *Saluka v Czech Republic* (Partial Award), §313.
[135] *Parkerings v Lithuania* (Award), §288.
[136] *MTD Equity v Chile* (Decision on Annulment), §64.
[137] *Ibid.*
[138] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 288.
[139] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 289.
[140] R.Howse and E. Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (The European Journal of International Law, vol. 20 no. 4, 2009), 1090.

Newcombe and Paradell consider 'The argument against interpreting fair and equitable treatment as including nationality-based discrimination is that it would make national and MFN treatment provisions redundant, contrary to an *effet utile* interpretation. Second, the prevailing view is that national and MFN treatment are treaty-based obligations that do not arise under customary international law. If fair and equitable treatment is viewed as synonymous with the minimum standard of treatment, national treatment and MFN treatment would have become customary international law obligations. Third, national and MFN treatment obligations are often subject to a number of exceptions and reservations. These reservations typically do not apply to fair and equitable treatment. Since the overwhelming IIA treaty practice is to prohibit nationality-based discrimination through specific national and MFN treatment provisions, the intent to do so through general fair and equitable treatment provisions should not lightly be inferred without specific evidence of the parties' intentions. Accordingly, the better view is that a general fair and equitable treatment clause does not encompass relative standard of treatment guarantees..'[141] In addition, it must be noted that the right to distinguish between nationals and foreigners or between foreigners is recognised by doctrine and tribunals and must be preserved. Doctrine and tribunals appear to recognise this. Furthermore the same measure could be breached by both NT and FET. Tribunals should give a difference otherwise the clause would lack any sense.

The better approach seems to be to reserve the minimum standard for evident or egregious discriminations without the need to establish a comparison and to use NT and MFN for more subtle discriminations that requires the need to establish a comparison. In addition, the link between FET and non-impairment provisions is undisputed. Both are customary rules. However, unlike FET, non-impairment provisions have the particularity that they include a customary rule element (the obligation not to 'discriminate') embodied in a treaty clause with different qualifiers that are not customary (e.g. not to impair, 'the management, use', etc.). Investment tribunals should take care of these distinctions.[142] Taking non-discrimination as a non-relative standard (as it occurred in the draft MAI) appears to be more appropriate. It is important to note that the customary rule of non-discrimination is not dynamic, it has the same scope for all states. Considering that FET covers NT and MFN would nullify the general understanding that it is possible to discriminate under general international law. This does not imply denying that in certain circumstances the same measures could be covered by both standards.

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[141] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 289-290.

[142] Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 198. ('In many of the cases, the standard of protection against arbitrary or discriminatory measures has been overshadowed the standard of fair and equitable treatment. But there are indications of its separate and independent application.')

Another issue that has been discussed by some arbitral tribunals is *whether ISDS provisions are part of the FET standard*. This has been relevant particularly when determining the scope of MFN provision in treaties where the MFN provision is limited to the FET provision, such as the Argentina-Spain BIT and the Soviet Union-Spain BIT.[143]

In *Maffezini* the tribunal asserted that one of the major issues was 'whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies... can be regarded as a subject matter covered by the clause.'[144] However, the tribunal focused on the 'treatment' in general without analysing the issue on fair and equitable treatment. In *Telefónica* the tribunal refused that investor-state dispute settlement 'is in itself part of the 'fair and equitable treatment' that that the parties shall grant 'in its territory' as provided for by the FET provision in Article IV.1 of the Argentina-Spain BIT. [145]

The MFN clause in Article 5(2) of the Soviet Union-Spain BIT covers only 'treatment referred to in paragraph 1 above' and paragraph 1 referred exclusively to FET. In *Renta 4* Russia contended that access to international arbitration was not an inherent part of FET therefore cannot widen the scope of arbitral jurisdiction.[146] The majority wondered whether access to international arbitration was a necessary part of FET and whether a BIT which does not give access to international arbitration provides for less FET than one that does.[147] The tribunal regarded that not having access to international arbitration does not violate the FET provision in a treaty.[148] In the own words of the tribunal:

> … Instances of denial of justice by such courts may assuredly trigger the State's international responsibility. Yet that possibility does not mean that access to international arbitration *per se* implies a higher level of FET. The neutrality of an international tribunal may legitimately be said to enhance investor protection. Access to it may be more *favourable* than lack of access. But that does not mean that failure to give access to such a tribunal is *unfair* or *inequitable*. The implications of a contrary inference would be extraordinary.[149]

[143] This is the case of the Spain-Argentina BIT applied in *Maffezini v Argetnina* and the Soviet Union-Spain BIT applied in *Renta 4 v Russian Federation*.
[144] *Maffezini v Spain* (Decision on jurisdiction), §46.
[145] *Telefónica v Argentina* (Decision on Jurisdiction), §62.
[146] *Renta 4 v Russia* (Award), §103.
[147] *Ibid*, §105.
[148] *Ibid*, §106.
[149] *Ibid*.

Arbitrator Brower in *Renta 4* considered that the respondent's broader consent to arbitration under another IIA is an aspect of the FET standard, hence MFN provision in the basic treaty, even if limited to FET enlarged the jurisdiction of the tribunal.[150] For him, not providing international arbitration would be contrary to the prohibition against denial of justice and ultimately of the fair and equitable treatment provision when the state does not provide to a foreign investor dispute settlement procedures at all by setting up a domestic court system or by providing dispute settlement by consenting to arbitration.[151]

The position that ISDS provisions are part of the FET standard is difficult to follow. It would go against the nature of international dispute settlement, in particular its consensual nature. It would imply that an IIA not including investor-state dispute settlement would be an unfair and inequitable treaty.

III. Different types of non-discrimination clauses in IIAs

A. Introduction

It is very common to find different types of non-discrimination provisions in IIAs, apart from other provisions that indirectly also deal with discrimination such as FET and expropriation provisions. This shows the flexibility of non-discrimination provisions and the fact that such clauses can be adjusted to the needs of the contracting parties when negotiating a treaty. Treaty drafters of treaties know how to provide for broad or narrow application of non-discrimination treatment, as fits the circumstances, and that they have in fact specifically negotiated a differential application, in some cases broadly, and in other cases more narrowly and more specifically to the desired subject matter they had in mind. For example in the ECT we can find different non-discrimination provisions:

- access to capital market on NT and MFN basis (Article 9(1));
- Non-impairment provision (Article 10(1));
- NT and MFN to 'investors' on the 'making of investments' (Article 10(2)-(6))
- Treatment on NT and MFN basis (Article 10(3));
- NT and MFN to 'investments' in the area and their related activities (Article 10(7));

[150] *Renta 4 v Russia* (Award on Preliminary Objections), Separate Opinion by C.N Brower, §21.
[151] *Ibid*, §23. (footnotes omitted).

- NT and MFN to 'investors' on the compensation for losses due to national emergency (Article 12(1));
- interaction with other international agreement on MFN basis (Article 16).

In the following part we will attempt to classify the main kind of non-discrimination, NT and MFN provisions that appear in IIAs.

B. Non-impairment provisions

The so called non-impairment provision appears in many IIAs and has been applied by many investment tribunals.[152] Non-impairment provisions normally prohibit states to impair by arbitrary or discriminatory measures foreign investments. The most applied non-impairment provision by tribunals is the one appearing in Article II(1)(b), of the Argentina-US BIT (1991), which provides:

> Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.

Similarly, Article 10(1) of the ECT provides:

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[152] See *Genin v Estonia* (Award), §§316-373; *Lauder v Czech Republic* (Final Award) §§213-221, *CME v Czech Republic* (Partial award) §612; *Nykomb v Latvia* (Award), §§126-128; *Consortium v Morocco* (Award), §§74-75; *MTD v Chile* (Award), §§190-192; *Occidental v Ecuador* (Final Award), §§159-166; *Impregilo v Pakistan* (Decision on Jurisdiction), §§264-270; *CMS v Argentina* (Award), §§286-295; *Noble Ventures Inc v Romania* (Award), §§175-180; *Eureko v Poland* (Partial Award), §§231-235 and 242*; Saluka v Czech Republic* (Partial Award), §§457-481; *Azurix v Argentina* (Award), §§390-393; *LG&E v Argentina* (Decision on Liability), §§146-148; *PSEG Global v Turkey* (Award), §§260-262; *Siemens v Argentina* (Award), §§318-321; *Eastern v Czech Republic* (Partial award), §§330 and 338; *Enron v Argentina* (Award), §§278-283; *MCI v Ecuador* (Award), §§366, 367, 369, 371; *Sempra v Argentina* (Award), §§315-320; *BG Group v Argentina* (Final award), §§354-360; *Helnan v Egypt* (Award), §§137 and 152; *Italy v Cuba* (Final Award), §§232-240; *Metalpar v Argentina*, (Award on the Merits), §§160-164; *Biwater v Tanzania* (Award), §§691-710; *Rumeli v Kazakhstan* (Award), §§ 679-681; *Plama v Bulgaria* (Award), §§22-223 and 265-282; *National Grid v Argentina* (Award), §§196-201; *Al-Bahloul v Tajikistan* (Partial Award), §§248-253; *EDF v Romania* (Award), §§ 302-306; *Lemire v Ukraine* (Decision on Jurisdiction and Liability), §§256-267, 328, 356, 357, 369, 372, 384-393, 418-422 and 505-506; *Yury Bogdanov v Moldova* (Award), §§86-91; *RosInvest v Russia* (Final Award), §§54-557, 612-620, and 632-633; *AES v Hungary* (Award), §§10.3.1 and ff; *GEA v Ukraine* (Award), §§329-331; *Paushok v Mongolia* (Award on Jurisdiction and Liability), §§306-321; *Impregilo v Argentina* (Award), §333; *El Paso v Argentina* (Award), §§305-316; *Roussalis v Romania* (Award), §§323-325, 358, 362, 434, 521; *Unglaube v Costa Rica* (Award), §§260-267; *Ulysseas v Ecuador* (Final award), §§288-292; *SAUR v Argentina* (Decision on jurisdiction and liability), §§ 485-486; *EDF v Argentina* (Final award), §§1101-1107; *Electrabel v Hungary* (Decision on jurisdiction, applicable law and liability), §§7.148-7.154; *Alps Finance v Slovakia*, (Award), §§175-178; *Swisslion v Macedonia* (Final award), §§ 326-329; *Mamidoil v Albania* (Award) §§ 786-796.

> ....no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.

It has been noted that

> Despite differences in drafting, most provisions share three common elements. First, the standard typically applies to investments and not to investors. Thus, in common with most fair and equitable treatment provisions, the protection afforded by the clause does not extend to protect individual investors. Second, the standard applies to measures rather than to treatment. Third, the standard is breached by measures that 'impair' the investment..[153](footnotes omitted)

Often non-impairment provisions appear together with the FET standard, others theyappears in an independent fashion. Apart from including discrimination, it can refer to arbitrary, unreasonable and unjustifiable measures. Some tribunals have focused only in the arbitrary, unreasonable, or unjustifiable character of the measures under analysis.[154] Some tribunals analysed both the unreasonable and discriminatory aspect.[155] In *Lauder*, based on the wording of the treaty that referred to 'arbitrary *and* discriminatory' the tribunal contended that both aspects should be complied with in order to find a breach to the provision.[156] Most tribunals consider that it is enough for a treatment to be unjustifiable or discriminatory in order to breach the provision.

The first investment case dealing with a non-impairment provision was *Genin v Estonia*. The tribunal analysed whether the conduct of the Bank of Estonia as regards the sale of the branch of another bank to Estonian Innovation Bank (EIB, the bank indirectly owned by Genin) and the revocation of EIB's license, and of the Estonian police as regards their treatment of Messrs. Genin and Dashkovsky (President of EIB) were contrary to that provision. The tribunal concluded that

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[153] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 299.
[154] See *Azurix* (*Azurix v Argentina* (Award), §§390-393); *MCI Power v Ecuador* (*MCI Power v Ecuador* (Award), §§366, 367, 369, 371; *Biwater v Tanzania v Tanzania* (Award), §§691-710); *EDF v Romania* (Award), §§ 302-306; *Lemire v Ukraine* (Decision on Jurisdiction), §§256-267, 328, 356, 357, 369, 372, 384-393, 418-422 and 505-506; *Occidental Exploration v Ecuador* (Final Award), §§159-166; *Swisslion v Macedonia* (Final award), §§ 326-329); *Al-Bahloul v Tajikistan* (Partial Award), §§248-253.
[155] *Enron v Argentina* (Award), §§278-283; *Sempra v Argentina* (Award), §§315-320; *LG&E v Argentina* (Decision on Liability), §§146-148; *Siemens v Argentina* (Award), §§318-321.
[156] *Lauder v Czech Republic* (Final Award) §§213-221.

'while the Central Bank's decision to revoke EIB's license invites criticism, it does not rise to the level of a violation of any provision of the BIT.'[157] The tribunal added that '[c]ustomary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals. Indeed, "even unjustifiable differentiation may not be actionable".'[158] The tribunal distinguished the non-imparmen from the NT provision, considering that 'of course, any such discriminatory treatment would not be permitted by Article II(1) of the BIT [the NT provision], which requires treatment of foreign investment on a basis no less favourable than treatment of nationals.'[159] The tribunal also considered that 'there is no indication that the Bank of Estonia specifically targeted EIB in a discriminatory way, or treated it less favourably than banks owned by Estonian nationals. Moreover, Claimants have failed to prove that the withdrawal of EIB's license was done with the intention to harm the Bank or any of the Claimants in this arbitration, or to treat them in a discriminatory way.'[160] The tribunal further stated that '[i]t is also relevant that the Tribunal, having regard to the totality of the evidence, regards the decision by the Bank of Estonia to withdraw the license as justified.'[161]

Future tribunals would assimilate the analysis under the non-impairment provision with that under NT and MFN clauses. In *Nykom* the tribunal focused on a like circumstances analysis and there is no reference to the intention of the respondent party. According to the tribunal in that case 'in evaluating whether there is discrimination in the sense of the Treaty one should only 'compare like with like.''[162] The tribunal also considered that when there is a comparator the 'burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place.'[163] In *Consortium* the tribunal analysed the violation of the obligation of non-impairment and NT analysis together and it stated that intention is not necessary.[164] The shift in the analysis by tribunals appears to consolidate with *CMS* where the claimant invoked the test defined in the *Pope & Talbot* case concerning NT and the tribunal apart from stating that the 'standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment', performed a 'like situation' analysis similar to that of a NT claim.[165] Future tribunals will follow this later analysis.

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[157] *Genin v Estonia* (Award), §365.
[158] *Ibid*, §368, quoting R.Dolzer and M.Stevens, *Bilateral Investment Treaties* (Nijhoff The Hague 1995), 61-62 and Oppenheim's International Law, Volume 1 'Peace' (Vol.1, 9th edition), 933.
[159] *Genin v Estonia* (Award), §368.
[160] *Ibid*, §369 quoting I. Brownlie, *Principles of Public International Law* (5th ed.), 541, footnote 96, ('[t]he test of discrimination is the intention of the government').
[161] *Ibid*, §371
[162] *Nykomb v Latvia* (Award), §128.
[163] *Ibid*.
[164] *Consortium v Morocco* (Award), §§74-75.
[165] *CMS v Argentina* (Award), §290.

Tribunals generally regard that the non-impairment provision is linked with that of FET. Various tribunals have followed the statement of the *CMS*, where the tribunal considered:

> The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.[166]

In *Saluka v Czech Republic* the tribunal asserted that the respondent, by violating the FET standard 'at the same time violated' the non-impairment' provision.[167] In *Al-Bahloul v Tajikistan*, the tribunal considered that the FET and the non-impairment provision in the ECT 'are highly overlapping.'[168] In *Bogdanov v Moldova*, the one member tribunal analysed the discriminatory measures together under the FET and non-impairment provisions and found a breach of both provisions.[169] On the other hand, the tribunal in *Paushok*, expressed that it 'does not agree that Article 3(1) contains a single standard of protection, i.e. fair and equitable treatment limited to non-impairment by discriminatory measures.'[170]

It is undisputed that non-impartment provisions have a customary element when it refers to 'discrimination' or 'arbitrariness.' However, the reference to 'impairment' and the types of measures that are covered (e.g. 'the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments') suggest also the use of terms that need to be interpreted not by resorting to the customary meaning of the term but to the textual interpretation of the provision.

Generally tribunals have undertaken or have shown themselves ready to undertake a comparative analysis similar to that under NT or MFN provisions.[171] Tribunals

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[166] *CMS v Argentina* (Award), §290. The statement was followed in *Parkerings v Lithuania* (Award), §287; *Biwater v Tanzania* (Award), §694, *Rumeli v Kazakhstan* (Award), §680, *Roussalis v Romania* (Award), §325, *GEA v Ukraine* (Award), §329; *Pey Casado v Chile* (Award), §672, *El Paso v Argentina* (Award), §230.

[167] *Saluka v Czech Republic* (Partial Award), §465.

[168] *Al-Bahloul v Tajikistan* (Partial Award), §248 quoting *Plama v Bulgaria* (Award), §184.

[169] *Yury Bogdanov v Moldova* (Final Award).

[170] *Paushok v Mongolia* (Award), §252.

[171] *Lauder v Czech Republic* (Final Award) §§213-221; *Nykomb v Latvia* (Award), §§126-128; *Consortium v Morocco* (Award), §§74-75; *MTD v Chile* (Award), §§190-192; *CMS v Argentina* (Award), §§286-295; *LG&E v Argentina* (Decision on Liability), §§146-148; *PSEG Global v Turkey* (Award), §§260-262; *Siemens v Argentina* (Award), §§318-321; *Enron v Argentina* (Award), §§278-283 *Sempra v Argentina* (Award), §§315-320; *Helnan v Egypt* (Award), §§137 and 152; *Italy v Cuba* (Final Award), §§232-240; *Metalpar v Argentina* (Award on the Merits), §§160-164; *Rumeli v Kazakhstan* (Award), §§ 679-681; *Plama v Bulgaria* (Award), §§22-223 and 265-282; *National Grid v Argentina* (Award), §§196-201; *AES v Hungary* (Award), §§10.3.1 and ff;; *Paushok v Mongolia* (Award on Jurisdiction), §§306-321; *El Paso v Argentina* (Award),

go even to assimilate the non-impairment and NT provisions.[172] They quote case law from other tribunals applying NT analysis. This shows a strong position by tribunals to assimilate non-impartment with NT and MFN clauses. However, these provisions cover different situations, even if there is some overlap. It is useful to recall that the chamber of the ICJ in the *ELSI* case was faced with a non-impairment provision and a NT provision and it interpreted them differently. Article I of the Supplementary Agreement to the US-Italy FCN Treaty provided that nationals of contracting parties 'shall not be subjected to arbitrary or discriminatory measures.'[173] The chamber proceeded to analyse the wording of the article and it considered that it prohibited arbitrary or discriminatory measures 'whether or not they produce such results' (e.g discrimination or arbitrariness) and it was 'necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.'[174] The tribunal scrutinised whether the treatment was made (i) because of the nationality, (ii) in similar circumstances and (iii) if there was intention.[175] Concerning the NT provision in Article VII of the FCN Treaty, the chamber proceeded to a detailed analysis of the wording of the text and focused on whether the treatment was (i) no less favourable and (ii) in similar circumstances.[176]

One issue concerning non-impairment provision is whether they cover only discrimination based on nationality or other types of discrimination. In *RosInvest v Russia* the tribunal considered that the term 'discrimination' in the non-impairment provision and in the expropriation provision of the treaty 'focuses on a discrimination between nationals and foreigners.'[177] But, on the other hand, in *National Grid* the tribunal asserted that the non-impairment provision does 'not limit discrimination to discrimination on the basis of nationality and may cover measures based on other grounds.'[178] Similarly, according to the tribunal in *Lemire* discrimination requires a measure to be discriminatory and expose the claimant to sectional or racial prejudice or to target one claimant's investments specifically as foreign investments.[179]

This goes in line with the question of whether the non-impartment provision is still an absolute standard or on the contrary whether it has become a relative standard that always needs a comparison. It is useful to recall that the non-

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§§305-316; *Roussalis v Romania* (Award), §§323-325, 358, 362, 434, 521; *Unglaube v Costa Rica* (Award), §§260-267; *Ulysseas v Ecuador* (Final award), §§288-292.

[172] *Siemens v Argentina* (Award), §§320 and 355; *National Grid v Argentina* (Award), §200; *Consortium v Morocco* (Award), §§74-75; *AES v Hungary* (Award), §11.3.2; *Lemire v Ukraine* (Award), §261; *Paushok v Mongolia* (Award on Jurisdiction), §§306-321.

[173] Article I of the Supplementary Agreement to the US-Italy FCN Treaty.

[174] *ELSI (USA v Italy)* (Judgment, Merits, 20 July 1989) 1989 ICJ Rep 15, §121. Unlike non-impairment provisions in BITs, that provision does no refer to 'impairment.'

[175] *Ibid*, §122.

[176] *Ibid*, §134.

[177] *RosInvest v Russia* (Final award), §555.

[178] *National Grid v Argentina* (Award), §198.

[179] *Lemire v Ukraine* (Award), §261.

impairment provision in the MAI was considered absolute standard.[180] Even if there are some overlaps between non-impairment and MFN the better solution appears to be to view it as an absolute standard.

As we have already mentioned, it is important to analyse the wording of the clause in order to apply a non-impairment provision. However, a few tribunals have proceeded to this type of analysis.

In *Saluka* the tribunal proceeded to analyse the different elements of the non-impairment provision and scrutinised on the ordinary meaning of the terms 'impairment', 'measure' and 'non-discrimination' and the term 'investment' as defined in the Treaty. The tribunal noted that the non-impairment provision protected 'investments' and resorted to the definition of investment in the treaty and noted that 'Saluka's shareholding in IPB clearly is an 'investment' in this sense.'[181] In *CMS* the tribunal considered that the standard is 'related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.'[182] Also the tribunal expressed that it was not persuaded by the claimant's view about arbitrariness because 'there has been no impairment, for example, in respect of the management and operation of the investment.'[183] In *Lauder* the tribunal regarded that some personal statements were not 'measures' and consequently were not attributable to the state.[184] In *AES v Hungary* the tribunal considered that '[a]n analysis of the nature of a state's measures, in order to determine if they are unreasonable or discriminatory, is only necessary when an impairment of the investment took place.'[185] The tribunal found that 'AES's receipt of a lower payment from MVM, whilst burdened by unchanged costs, had a detrimental impact on Claimants' investment, as it altered — in a negative way — AES Tisza's regular income.'[186] However, the tribunal considered that 'for such impairment to amount to a breach of the ECT, it must be the result of an unreasonable or discriminatory measure.'[187] Besides that analysis, the tribunal equated discrimination with NT, and asserted that if there is no breach on one, there is no breach of the other.[188] In *Electrabel* the tribunal expressed that 'a

[180] Organisation for Economic Co-operation and Development, Negotiating Group on the Multilateral Agreement on Investment (MAI), the multilateral agreement on investment, commentary to the consolidated text, 22 April 1998, DAFFE/MAI(98)8/REV1, p 29.
[181] *Saluka v Czech Republic* (Partial Award), §462
[182] *CMS v Argentina* (Award), §290.
[183] *Ibid*, §292.
[184] *Lauder v Czech Republic* (Final Award), §§244-247.
[185] *AES v Hungary* (Award), §10.3.3.
[186] *Ibid*, §10.3.5.
[187] *Ibid*, §10.3.5.
[188] *Ibid*, §11.3.2.

breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be significant.' [189]

Concerning the burden of proof, some tribunals considered that the burden is on the claimant.[190] Other tribunals considered that it was the respondent who has the burden of proving a justification.[191] For some tribunals it is necessary to show intention,[192] but for most with the effect of the measure to discriminate is enough.[193]

In *Lemire v Ukraine*, the tribunal suggested that it is always necessary to find a comparator. The tribunal stated that the measure 'could never be considered discriminatory, because in this case no third party existed which benefited from it.'[194], but the measure could nevertheless be arbitrary.[195] This appears to be an assimilation of the non-impairment provision with the NT-MFN provision.

C. General NT - MFN provisions

This type of NT-MFN provision is the typical rule found in most IIAs and the most invoked and analysed NT-MFN provisions in international investment law. With the exception of some of the first BITs from the 60's and 70's, the large majority of IIAs include that kind of provision. These provisions can refer only to 'treatment' or they can refer also to 'activities' followed by a list of activities. They can cover 'nationals', 'investors' and 'investments.' The can cover post or also pre-investment activities.

Article 10 (7) of the ECT include a typical NT-MFN provision. This MFN is accorded to 'investments...of investors' and 'their related activities' followed by a list of activities that includes the 'management, maintenance, use, enjoyment or disposal', 'in its Area.' The provision reads:

> Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use,

[189] *Electrabel SA v Hungary* (Decision on jurisdiction, applicable law and liability), §7.152.
[190] *Genin v Estonia* (Award), §368; *Plama v Bulgaria* (Decision on Jurisdiction), §223; *Paushok v Mongolia* (Award on Jurisdiction and Liability), §316.
[191] See *Nykomb v Latvia* (Award), §128; *Parkerings v Lithuania* (Award on jurisdiction and merits), §§369-370. *Yury v Moldova* (Arbitral Award) §§88 and 90; *Saluka v Czech Republic* (Partial Award), §347; *Lemire v Ukraine* (Decision on Jurisdiction and Liability), §261; *RosInvest v Russia* (Final award), §556.
[192] *Genin v Estonia* (Award), §369; *Lauder v Czech Republic* (Award), §224; *CME v Czech Republic* (Award and Separate Opinion), §612.
[193] *LG&E v Argentina* (Decision on Liability), *Eastern v Czech Republic* (Partial award and partial dissenting opinion), *Electrabel SA v Hungary* (Decision on jurisdiction, applicable law and liability), *Consortium v Morocco* (Award), §74.
[194] *Lemire v Ukraine* (Decision on Jurisdiction and Liability), §392.
[195] *Ibid*, §§386-394.

> enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third State and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.[196]

An example of NT-MFN provision that appears in BITs is Article 3 of the UK-Sri Lanka BIT (1981), applied in *APPL v Sri Lanka*:

> (1) Neither Contracting Party shall in its territory subject investments admitted in accordance with the provisions of Article 2 or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.[197]

D. NT - MFN clauses limited to specific standards

Some BITs limit the MFN or the NT clauses to specific provisions included in the same treaty. This is the case of many early BITs concluded with Spain, where MFN is limited to FET,[198] but this kind of clause can be found also in BITs concluded by other countries.[199] Other BITs limit the MFN to other standards[200] or to more than one standard.[201] In some BITs, apart from having a general MFN

[196] ECT, Article 10(7).
[197] UK/Sri Lanka BIT (1981), Article 3.
[198] See, for example, of the Argentina-Spain BIT (1991), Article IV of the Spain-Soviet Union BIT (1990), Article 5.
[199] See Switzerland-Argentina BIT (1991), Article 3(2), Russia-Mongolia BIT (1995), Article 3; Peru-China BIT (1994), Article 3; Switzerland-Uruguay BIT (1988), Article 3(2); Switzerland-Chile BIT (1999), Article 4(2); Finland-Chile BIT (1993), Article 3(1); Venezuela-Paraguay BIT (1996), Article 4.2; Ecuador-Paraguay BIT (1994), Article IV.2.
[200] In the Netherlands-Argentina and Netherlands-Uruguay BITs the MFN provisions apply to full protection and security (Netherlands-Uruguay BIT, Article 3(2)) in the Netherlands-Argentina BIT (1988), Article 3(2)).
[201] For example, the Chile-China BIT in Article 3 includes MFN only to FET and full protection. The China-Brunei BIT (2000), Article 3, includes MFN only with respect to FET, full protection, arbitrary or discriminatory measures. The MFN provision in the Russia-Argentina BIT (1998) applies to FET and non-discrimination (Russia-Argentina BIT (1998)).

provision, there are specific MFN clauses included that apply to specific standards.[202] Some of these types of clauses have been analysed by investment tribunals with very different results.

The MFN provision in the Spain-Russia BIT invoked in *Renta 4 v Russia* is limited to FET.[203] The majority of the tribunal noted that the subject-matter of the applicable MFN clause was limited only to fair and equitable treatment. It concluded that the MFN clause could not be read to incorporate dispute settlement provisions from other treaties, because its terms 'restrict MFN treatment to the realm of FET as understood in international law.'[204] In the Russia-Mongolia BIT the MFN provision is also limited to FET.[205] When applying this provision, the tribunal in *Paushok v Mongolia* allowed reliance on the FET provision included in another BIT but refused to import an umbrella clause from another BIT.[206]

The MFN provision in the Peru-China BIT, is limited to 'fair and equitable treatment' and 'protection.'[207] The tribunal in *Tza Yap Shum v Peru* analysed

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[202] For example, the Germany-Argentina BIT states in Article 4(4) that the rules governed by that article [full protection and security, expropriation compensation from losses] will enjoy in the territory MFN treatment; the Armenia-Argentina has an MFN provision applicable to expropriation in Article 5(3); the Argentina-Belgium Luxembourg in Article 5.5 has an MFN provision applicable to expropriation and compensation for losses. The Korea-Argentina BIT has a clause applicable to FET (Article 3(2)); the Denmark-Argentina BIT has a clause applicable to full protection (Article 3(2)); the USA-Argentina has a MFN clause applicable to FET (Article II.2 (a)).

[203] Article 5 of the Spain- Soviet Union BIT (1990) reads in relevant part:

> 1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
> 2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

[204] *Renta 4 v Russia* (Award), §68 (emphasis added). The decision of the majority was critiqued by Arbitrator Brower in his dissenting opinion (I. Brownlie, *Principles of Public International Law* (5th ed.), 541, footnote 96. §§15 and ff.)

[205] The Russia-Mongolia BIT (1995), Article 3, reads:

> 1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.
> 2. The treatment mentioned under paragraph 1 of this Article, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State.

[206] *Paushok v Mongolia* (Award), §§562-563.

[207] Peru-China BIT (1999), Article 3 of the BIT provides as follows:

> 1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
> 2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.

whether the reference to 'treatment' in that provision may be interpreted so as to include the broader provisions on ICSID arbitration established by ulterior BITs.[208] The tribunal examined the evidence produced by the respondent – including witnesses who have participated in the negotiation of the BIT– and decided that it was not convincing as an intention of the contracting parties with regard to the scope of this MFN clause.[209] The tribunal stated without further explanation that the 'wording of the MFN clause itself seems to be opened to a broader interpretation, which may include access to procedure protections more favourable (which would potentially include ICSID arbitration) for alleged violations of the fair and equitable treatment principle.'[210] However, the tribunal expressed that 'the specific wording of Article 8(3) [the ISDS clause] should prevail over the general wording of the MFN clause in Article 3' and rejected the application of MFN to broaden the dispute settlement provision.[211]

In the Mexico-Spain BIT the MFN provision is also limited to FET.[212] Perhaps for this reason in *Tecmed v Mexico* the claimant invoked the MFR in Article 8(1) of the Mexico-Spain BIT as an MFN provision.[213]

The decisions in *Renta 4* and *Paushok* contrast with the approach followed by investment tribunals interpreting the MFN provision in the Argentina-Spain BIT. Article IV.1 of that treaty provides that each party shall guarantee FET, Article IV.2 provides that in 'all matters governed by this Agreement' 'such treatment' (i.e. FET) will be granted in NT and MFN basis.[214] This provision was applied in the *Maffezini* and the subsequent tribunals that applied the Spain-Argentina BIT. However, the reference to 'such treatment' was not analysed.[215] Only in *Telenor*

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[208] *Tza Yap Shum v Peru* (Decision on Jurisdiction), §204.
[209] *Ibid*, §212.
[210] *Ibid*, §213.
[211] *Ibid*, §217.
[212] The Mexico-Spain BIT (1995) Article IV reads:

> 1. Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo, conforme al Derecho Internacional, a las inversiones realizadas por inversores de la otra Parte Contratante.
> 2. Este tratamiento no será menos favorable que el otorgado en circunstancias similares por cada Parte Contratante a las inversiones realizadas en su territorio por inversores de un tercer Estado.

[213] *Tecmed v Mexico* (Award), §§69 and 74.
[214] Art. IV of the Argentina-Spain BIT (1991) provides:

> 1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.
> 2. In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.

[215] The only references appears to be the following. In *Maffezini* the tribunal stated: 'The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of 'all matters subject to this Agreement' in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that 'this treatment' shall be subject to the clause, which is of course a narrower formulation' (*Maffezini v Spain* (Decision on objections to jurisdiction), §60).

the tribunal stated that from the Spanish BITs analysed by *Maffezini* apart from the Argentina-Spain BIT '[a]ll other treaties omitted this reference and confined the MFN clause to 'this treatment' (i.e., treatment accorded to the investments), which as the tribunal noted was a narrower formulation....'[216] Many arbitral awards that dealt with that provision do not even quote the first paragraph of the provision. This is perhaps because Argentina never raised this issue before any tribunal.

E. Most favoured rules (MFR) under domestic and international law

Some treaties grant that investors shall receive the more favoured treatment provided in other international agreements, in international law or under domestic laws. These provisions are sometimes called 'preservation of rights' clauses, 'application of other rules' clauses, or more favourable rule ('MFR') clauses.[217] They regulate the relation of IIAs with other international rules or with local rules.[218] They are not technically MFN or NT provisions. The treatment granted by them is not that of most favoured nation but that of most favoured rule of the contracting parties or international rule between the contracting parties (not a third party). They refer to more favourable rules than those provided for in the agreement not provided for outside that agreement (e.g. through internal measures). Thus the basis of comparison is always in the treaty (a rule in the treaty with a rule outside the treaty). Sometimes it can allow for an abstract comparison since it refers to 'treatment entitled', not to treatment effectively provided.

These type clauses have been invoked in the most imaginable ways possible by parties in the proceedings and applied in very different ways by tribunals, sometimes as clauses of applicable law, others as MFN provisions, or others as a way to enlarge the jurisdiction of the tribunal. Schwarzenberger considered in his commentary on the Abs-Shawcross Draft Convention that the purpose of the provision is to clarify that what are intended as minimum standards of treatment are not interpreted as 'constituting an upper ceiling for the treatment of foreign nationals.'[219]

Newcombe and Paradell observe that '[a]t first glance, the clause might be viewed as a particularly widely worded MFN clause that could apply to extend the scope

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[216] *Telenor v Hungary* (Award), §87.

[217] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 316-318.

[218] Other way of regulating the relation of IIA and other agreements can be found in the ECT's Article 16. For an interpretation of that provision see *Electrabel SA v Hungary* (Decision on jurisdiction, applicable law and liability), §§4.173-4.177 and *AES v Hungary* (Award), §§7.6.7 - 7.6.9.

[219] Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945), 161.

of IIA protections available under other host state IIAs. This interpretation, however, would overlook the fact that the more favourable treatment in question is that of 'obligations under international law … between the Contracting Parties.' It does not extend to more favourable treatment accorded by the host state to third-state-investments.'[220] They also underline that preservation of rights clauses 'should not be confused with …applicable law clauses.'[221]

This type of provision normally expresses that if rules in addition to the treaty entitle investments by investors of the other contracting party to a treatment more favourable than that provided in the treaty, such rules shall prevail to the treaty. The rules referred to can include:

- principles of international law,
- international obligations in general,
- international obligations between the contracting parties,
- investment agreements,
- national laws and regulations.[222]

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[220] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 317.

[221] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 318.

[222] For example, these kind of rules can be found in most Argentinean BITs: Italy-Argentina BIT (1990), Article 10(1); United Kingdom-Argentina BIT (1990), Article 11; Belgium Luxembourg - Argentina BIT (1990), Article 9; Germany-Argentina BIT (1990), Article 7(1) [Referred to in *Hochtief* the Germany-Argentina BIT Article 7(1)]; Chile -Argentina BIT (1991), Article 7.1; Spain-Argentina BIT (1991), Article VII; Poland-Argentina BIT (1991), Article 9; Switzerland-Argentina BIT (1991), Article 7; Canada-Argentina BIT (1991), Article XIII.1; Denmark-Argentina BIT (1992), Article 4(3); Egypt-Argentina BIT (1992), Article V; Netherlands-Argentina BIT (1992), Article 3(4) [referred to in TSA, but nothing is said about it]; Tunisia-Argentina BIT (1992), Article 10; Austria-Argentina BIT (1992), Article 7(1); China-Argentina BIT (1992), Article 9; Turkey-Argentina BIT (1992), Article 7; Finland-Argentina BIT (1993), Article 8; Rumania-Argentina BIT (1993), Article 8; Armenia-Argentina BIT (1993), Article 10; Senegal-Argentina BIT (1993), Article 7; Venezuela-Argentina BIT (1993), Article 9; Hungary-Argentina BIT (1993), Article 7; Bulgaria-Argentina BIT (1993), Article 8; Croatia-Argentina BIT (1994), Article 7; Bolivia-Argentina BIT (1994), Article 7; Ecuador-Argentina BIT (1994), Article VII; Korea-Argentina BIT (1994), Article 10; Jamaica-Argentina BIT (1994), Article 7; Peru-Argentina BIT (1994), Article 9; Portugal-Argentina BIT (1994), Article 9; Malaysia-Argentina BIT (1994), Article 11; Indonesia-Argentina BIT (1995), Article 8; Israel-Argentina BIT (1995), Article 11(1); Cuba-Argentina BIT (1995), Article 7; Australia-Argentina BIT (1995), Article 4.3; Ukraine-Argentina BIT (1995), Article 10(1); Vietnam-Argentina BIT (1996), Article 7; Morocco-Argentina BIT (1996), Article 7.1; Lithuania-Argentina BIT (1996), Article 7; El Salvador-Argentina BIT (1996), Article 9; Mexico-Argentina BIT (1996), Article 8; Panama-Argentina BIT (1996), Article 7; Czech Republic-Argentina BIT (1996), Article 10; Costa Rica-Argentina BIT (1997), Article 9; South Africa-Argentina BIT (1997), Article 7; Guatemala-Argentina BIT (1998), Article VIII; Nicaragua-Argentina BIT (1998), Article 9; New Zealand-Argentina BIT

A typical MFR clause is the one appearing in the Netherlands-Czech and Slovak Republic BIT (1991), which in Article 3(5) reads:

> If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the Present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present agreement, such rules shall to the extent that they are more favourable prevail over the present agreement.[223]

In *CME v Czech Republic* the majority of the tribunal applied that provision together with the applicable law provision included in Article 8(6) of the same treaty. In the partial award of 2001 the majority considered very briefly under the title 'The obligation to treat investments in conformity with principles of international law (Articles 3(5) and 8 of the Treaty)' that respondent's agency actions as described 'are not compatible with the principles of international law, which the Arbitral Tribunal is charged with applying. On the contrary, [the actions], are together a violation of the principles of international law assuring the alien and his investment treatment that does not fall below the standards of customary international law.'[224] In the dispositive provision the majority decided that the respondent '[had] violated.... the obligation to treat foreign investments in conformity with principles of international law (Article 3 (5) and Article 8 (6)....'[225] Thus, the majority applied both the MFR provision and the applicable law provisions as clauses allowing the tribunal to decide whether there was a breach of customary international law. It is difficult to agree with the tribunal that the function of that provision has the effect of expanding the jurisdiction of the court in order to create a new cause of action under customary international law.

Something similar had already happened in *AAPL v Sri Lanka* when the tribunal applied an MFN provision (not a MFR clause) in order to 'incorporate' other rules of international law. The tribunal considered that 'the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature. Such extension

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(1999), Article 11; Philippines-Argentina BIT (1999), Article 9; India-Argentina BIT (1999), Article 13; Algeria-Argentina BIT (2000), Article 7; Thailand-Argentina BIT (2000), Article 11.

[223] This provision is included in many BITs concluded by Germany, the UK, Greece, Netherlands and Israel. See for example Germany-Togo BIT (1961), Article 7; United Kingdom/Hungary BIT (1987), Article 11, Georgia-Israel BIT (1995), Article 11.

[224] *CME v Czech Republic* (Partial award), §614.

[225] *Ibid*, §624.

of the applicable legal system resorts clearly from Article 3.(1) [MFN concerning investments], Article 3.(2) [MFN concerning nationals and companies], and Article 4 [emergency clause] of the Sri Lanka/U.K. Bilateral Investment Treaty.'[226]

Coming back to the *CME v Czech Republic* case, in the final award of 2003 the same majority (but now with a different dissenter) using the same MFR in the Netherlands - Czech and Slovak Republic BIT allowed the application of the 'fair market value' included in the clause on expropriation contained in another treaty invoking once more Article 3(5) of the treaty. The clause on expropriation in Netherlands/Czech and Slovak Federal Republic BIT (1991) provided for 'just compensation.' The majority considered that the provision interpreted in accordance with Article 31 of the VCLT provided for fair market value. [227] The majority, quoting *Maffezini*, reasoned that the determination of compensation on the basis of 'fair market value' found 'further support' in the MFR in Article 3(5) of the treaty and referred to the United States - Czech Republic BIT which provides that compensation shall be equivalent to the fair market value.[228] The tribunal concluded that the Czech Republic therefore was obligated to provide no less than 'fair market value' to the claimant in respect of its investment.[229]

Thus the majority applied the MFR clause as a classical MFN provision and followed the *Maffezini* approach. It is difficult to share the position of the majority. First, it says that Article 3(5) applies to 'obligations under national law of either party' and then it refers the US- Czech BIT (perhaps it wanted to say 'international'). Second, it does not perform an analysis of the provision. Let's recall that the provision refers to obligations under international law 'between the Contracting parties.' It is hard to understand how the reference to 'between the Contracting Parties' could refer to treaties concluded by one of the contracting parties with a third country.[230] In a separate opinion Brownlie rejected the position of the majority and suggested that MFN treatment does not apply to compensation provisions because MFN treatment only applies to treatment of an investment and not the process of dispute settlement.[231]

Also under the Netherlands - Czech and Slovak Republic BIT, in *HICEE v Slovac Republic* the claimant argued that it was entitled to invoke the broader definition of investment in other BITs concluded by Slovakia through the MFN provisions in Articles 3(2) and the MFR in Aritlce 3(5) of the BIT.[232] The respondent alleged that Article 3(5) was textually limited to further agreements between the same

[226] *AAPL v Sri Lanka* (Final award on merits and damages), §21.
[227] *CME v Czech Republic* (Final award), §496.
[228] *Ibid*, §500.
[229] *Ibid*.
[230] Netherlands/Czech and Slovak Federal Republic BIT 1991, Date signed: 29 April 1991, Date in force: 1 October 1992; United States/Czech and Slovak Federal Republic BIT 1991, Date signed 22 October 1991, Date in force 19 December 1992.
[231] CME v Czech Republic (Final award), Separate opinion by Brownlie, §§11-13.
[232] *HICEE v Slovac Republic* (Partial award), §91.

Parties. The claimant disputed this arguing that the terms 'between the Contracting Parties' apply only to the words 'established hereafter.' In support of this interpretation, the claimant pointed to the *CME* arbitration, in which a tribunal employed Article 3(5) of the same BIT to import the definition of 'damages' from the United States-Czechoslovakia BIT. The tribunal rejected the application of the MFN provision to the concept of investment without analysing these arguments submitted by the parties. The tribunal briefly stated that '[t]he clear purpose of Article 3(2), as of Article 3(5), is to broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it cannot legitimately be used to broaden the definition of the investors or the investments themselves.'[233]

In *Tecmed v Mexico* the claimant invoked the MFR[234] of the Mexico-Spain BIT as an MFN clause in order to avoid the time limitations provided in the treaty. The tribunal rejected the allegation of the claimant but it did not distinguish that the clause was not an MFN clause neither did it perform an analysis of the provision.[235]

In *MCI v Ecuador* claimants invoked the MFN clause of the US-Ecuador BIT seeking the protection afforded by the MFR in Article VII of the Argentina-Ecuador BIT.[236]The claimant contended that the reference made in that later article to treaties entered into 'between the Contracting Parties' referred to Contracting Parties of treaties that had not yet entered into force, e.g. the US-Ecuador BIT. The tribunal considered that the references made in the text of Article VII of the Argentina–Ecuador BIT of 'Contracting Parties' unquestionably referred to the Contracting Parties of the Argentina–Ecuador BIT.[237] Consequently, the tribunal 'reject[ed] the possibility of considering the application

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[233] *Ibid*, §149.

[234] The MFR provision included in the Mexico-Spain BIT (1995) (Article 8(1)) provides:

> If the provisions of law of one of the Contracting Parties or obligations under international law at the margins of the present Agreement, current or future, between the Contracting Parties, result in a general or specific regulation according to which it should be given to investments of investor of the other Contracting Party, a treatment more favourable than that it is envisaged in the present Agreement, such regulation shall prevail over the present Agreement, to the extent that it is more favourable.

[235] *Tecmed SA v Mexico* (Award), §§ 69 and 74.

[236] Article VII of the Argentina-Ecuador BIT (1994), provides 'If the provisions of the law of either Contracting Party or obligations under international law existing at present or that are established in the future between the Contracting Parties in addition to this Treaty or if any Agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific entitling investments by investors of the other Contracting Party to treatment more favorable than is provided for in this Treaty, such rules shall, to the extent that they are more favorable, prevail over this Treaty. (MCI Tribunal's Translation).'

[237] *MCI v Ecuador* (Award), §127.

of the most–favored–nation clause, in the terms, and with the effects, claimed by the Claimants.'[238]

In *Siemens v Argentina* the claimant invoked the MFR in Article 7(1) of the Argentina-Germany BIT as part of its arguments on applicable law in order to claim that that provision reinforced its allegation that international law prevailed over national law, applied in the case of a *lacunae* of national law and that national law would prevail on the provisions of the treaty only to the extent that it provides treatment to the investment more favourable that the treaty.[239] The tribunal appears to have rejected this statement and considered that 'Argentina's domestic law constitutes evidence of the measures taken by Argentina and of Argentina's conduct in relation to its commitments under the Treaty.'[240]

In *Kardassopoulos v Georgia* claimants made a similar argument invoking the MFR in the Georgia-Israel BIT [241] as part of its arguments on applicable law. That treaty did not explicitly set out the applicable law. On the basis of the MFR in the treaty claimants alleged that substantive treaty rules are the principal source of law to be applied by the tribunal, the law of the host State and other rules of international law playing a secondary role and applying only to the extent they offer more favourable treatment for the investor. The tribunal, following the *Wena* and *Enron* tribunals suggested that 'consistent with Article 42(1) of the ICSID Convention, it may apply the substantive rules of the Georgia-Israel BIT, international law and Georgian law, as the Tribunal determines relevant and appropriate, to decide the claims before it.'[242]

In *Eureko BV v Slovak Republic* the tribunal also had to deal with the MFR in the Netherlands-Czech and Slovak Federal Republic BIT. The respondent alleged that the the accession to the EC Treaty by Slovakia replaced the BIT. The MFR provision was invoked by the claimant as evidence that two States by including that provision (which envisages more favourable treatment under later agreements) had in mind that future treaties between them would complement the parties' rights and obligations, and not that such provisions would replace provisions in the BIT.[243] The tribunal did not deal with this contention but rejected the contention that accession to the EC Treaty replaced the BIT.

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[238] *Ibid*, §128.
[239] *Siemens v Argentina* (Award), §§70-71.
[240] *Ibid*, §78.
[241] The Georgia-Israel BIT provides in Article 11 'Application of Other Rules'

> If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present agreement..'

[242] *Kardassopoulos v Georgia* (Award), §223.
[243] *Eureko v Slovak Republic* (Award on Jurisdiction, Arbitrability and Suspension), §§88 and 98.

In *Roussalis v Romania* the tribunal showed ready to broaden its jurisdiction through a MFR, but rejected it in that specific case. The claimant invoked the MFR provision in the Greece-Romania BIT[244] in order to claim that the right to property under Article 1 of the First Additional Protocol to the ECHR came within the jurisdiction of the Tribunal because it created better treatment than the expropriation clause in the BIT.[245] The tribunal contemplated the issue under the headlines 'the legal framework applicable to the merits' and 'the applicable law.' It considered that since the MFR in Romania-Greece BIT referred only to the international obligations established between the contracting parties it only encompasses international obligations between these two countries.[246] The tribunal did 'not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights.'[247] However, the tribunal considered the issue was moot in that particular case 'given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments.'[248] The tribunal concluded that the MFR of the BIT 'cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT.' [249]

In *Biwater v Tanzania* the claimant alleged that it had complied with the six months negations period provided for in the dispute settlement provision of the treaty and alternatively alleged that the MFR in the BIT[250] in conjunction with the Tanzanian investment law (without six months requirement) eliminated the six months requirement. The argument was that by reason of the MFR in the BIT local law prevailed over the BIT to the extent that its provisions were more favourable to the investor.[251] The tribunal regarded that the 6 months were an

[244] Article 10 of the Greece-Romania BIT provides that: '[i]f the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement.'
[245] *Roussalis v Romania* (Award), §117.
[246] *Ibid*, §311.
[247] *Ibid*, §312.
[248] *Ibid*.
[249] *Ibid*.
[250] The UK-Tanzania BIT in its Article 11 provides: 'That [i]f the provisions of law of either Contracting Party … contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.'
[251] *Biwater v Tanzania* (Award), §265.

admissibility issue and could be dispensed and consequently that issue did not require determination.[252]

In *Walter Bau AG v Thailand* the claimant invoked the application of the arbitration provision of the 2002 Germany-Thailand BIT into the 1961 Germany-Thailand BIT through an MFR provision in this later treaty.[253] The claimant acknowledged that the MFR in the 1961 Treaty was not a MFN clause.[254] The tribunal rejected the claim. It was observed that '[t]he Claimant's argument would involve the Tribunal having to rewrite the provisions of the 1961 Treaty by extending investor-state arbitration to the 1961 Treaty. All Article 7 [the MFR] of the 2002 Treaty does is to leave undisturbed agreements made under the 1961 Treaty.'[255] It was also observed that from the different attempts in other cases to utilise MFN provisions for dispute resolution cited by the Claimant '[i]n no case...has a tribunal incorporated a right to arbitrate through the MFN mechanism where none existed before.'[256]

In *AMT v Zaire* the tribunal expressed that the object of the 'Preservation of Rights' clause in the US-Zaire BIT[257] was 'to preserve the treatments which would remain more favourable than those resulting from the Treaty.' [258] In *Berschader v Russia* the tribunal considered in passim with regard to the MFR in the treaty[259] that 'it is hardly conceivable that a future treaty could contain

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[252] *Ibid*, §349.

[253] Article 7 of the 1961 Germany-Thailand BIT provides:

> 'If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to the present Treaty, result in a position entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Treaty, such position shall not be affected by the present Treaty. Each Contracting Party shall observe any other obligation it may have entered into with regard to investments within its territory by nationals or companies of the other Contracting Party.'

[254] *Walter Bau v Thailand* (Award), §9.47.

[255] *Ibid*, §9.49.

[256] *Ibid*, §9.50.

[257] Article IX of the Zaire –U.S. BIT (1984) entitled ' Preservation of Rights' , provides :

> 'This Treaty shall not supersede, prejudice, or otherwise derogate from :
> (a) laws and regulations, administrative practices or procedures, or adjudicatory decisions of either Party;
> (b) international legal obligations: or
> (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization.
> Whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments, or associated activities, of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.'

[258] *American Manufacturing & Trading, Incorporated v Zaire* (Award), §5.36.

[259] Article 8.1 of the Belgium/Luxembourg-Soviet Union BIT provides 'The present Treaty shall not prevent investors from benefiting from more favourable terms provided by the laws applicable

provisions which would improve the treatment of investors already provided for by that Article.'[260]

In *Accession Mezzanine v Hungary* [261] claimants alleged *inter alia* that in accordance with MFR in the UK-Hungary BIT[262] the tribunal's jurisdiction in the ISDS provision allowed it to find that Hungary's measures breached customary international law, to the extent that rules are more favourable than those in the Treaty. The respondent opposed, alleging that the claimants' attempt to construct consent for those claims on the basis of the MFR in the BIT since the MFR rule 'does not extend the scope of the dispute resolution clause to customary international law claims any more than it extends it to arbitrate disputes under national law.' The tribunal rejected the claimant's claim under the MFN and the MFR provisions. [263]

The different interpretations followed by tribunals show the problems of applying a clause without paying attention to its specific wording. MFR regulate the relation of IIAs with other international rules or with local rules. However, the comparison included in the provision cannot be equated to the one in a MFN or NT provision. They cannot be interpreted as broadening the jurisdiction of the court or including new causes of action.

F. NT and MFN with respect to compensation for losses in times of emergency

Many IIAs provide for a provision that regulates compensation for losses in time of national emergency, war or other serius situations, the so called war or emergency clause.[264] This clause obliges generally contracting states to apply NT

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to them in the country in which the investments are made, or by international treaties concluded by the Contracting Parties at present or in the future.'

[260] *Berschader v Russian* (Award), §190.

[261] *Accession Mezzanine v Hungary*, (Decision on Respondent's Objection under Arbitration Rule 41(5)).

[262] The UK-Hungary BIT (1987) in Article 11 'Application of Other Rules' provides:

> If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

[263] *Accession Mezzanine v Hungary*, (Decision on Respondent's Objection under Arbitration Rule 41(5)), §§73-74.

[264] See for example, Article 12(1) of the ECT. These provisions appear in almost all Argentinean BITs: Italy-Argentina BIT (1990), Article 4; United Kingdom-Argentina BIT (1990), Article 4 (Payments will be freely transferred); Belgium Luxembourg-Argentina BIT (1990), Article 5.4 (only MFN); Germany-Argentina BIT (1991), Article 4(3)-(4); Chile-Argentina BIT (1991), Article 4.3; USA-Argentina BIT (1991), Article IV.3 (with respect to the measures adopted with respect to that loses); France-Argentina BIT (1991), Article 5.3 (do not specify the measures); Poland-Argentina BIT (1991), Article 4.2; Argentina-Switzerland BIT (1991), Article 5 (2);

and MFN treatment in case of compensation given due to losses suffered in time of emergency. A typical example is Article IV.3 of the Argentina-United States BIT, which provides:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.[265]

Early commentators considered that these types of provisions were exceptions to the application of the rest of the treaty.[266] Contemporary authors however consider that it does not create a ground for exemption from liability.[267] Tribunals have applied these types of clauses in different ways. It was applied as a substantive

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Sweden-Argentina BIT (1991); Canada-Argentina BIT (1991), Article VI; Denmark-Argentina BIT (1992), Article 6; Egypt-Argentina BIT (1992), Article IV.2; Netherlands-Argentina BIT (1992), Article 8 (refers also to the treatment under international law); Tunisia-Argentina BIT (1992); China-Argentina BIT (1992), Article 4.3; Turkey-Argentina BIT (1992), Article 4.2; Finland-Argentina BIT (1993), Article 5; Argentina-Rumania BIT (1993), Article 4(2); Argentina-Senegal BIT (1993), Article 4(2); Venezuela-Argentina BIT (1993), Article 7; Argentina-Hungary BIT (1993), Article 4 (2); Bulgaria-Argentina BIT (1993), Article 5; Croatia-Argentina BIT (1994), Article 4(2); Bolivia-Argentina BIT (1994), Article 4(2); Ecuador-Argentina BIT (1994), Article IV(2); Korea-Argentina BIT (1994), Article 4 (includes arbitrary action); Jamaica-Argentina BIT (1994), Article 4(2); Peru-Argentina BIT (1994), Article 5; Portugal-Argentina BIT (1994), Article 4(3); Malaysia-Argentina BIT (1994), Article 5; Indonesia-Argentina BIT (1995), Article 5; Israel-Argentina BIT (1995), Article 4 (includes arbitrary action); Cuba-Argentina BIT (1995), Article 4(2); Australia-Argentina BIT (1995), Article 8; Ukraine-Argentina BIT (1995), Article 4; Vietnam-Argentina BIT (1996), Article 4(2); Argentina-Morocco BIT (1996), Article 4 (2); Lithuania-Argentina BIT (1996), Article 4(2); El Salvador-Argentina BIT (1996), Article 7.4; Mexico-Argentina BIT (1996), Article 3.4; Panama-Argentina BIT (1996), Article 4; Argentina-Czech Republic BIT (1996), Article 4.1; Costa Rica-Argentina BIT (1997), Article 6; South Africa-Argentina BIT (1998), Article 4.2, Article 4(3); Guatemala-Argentina BIT (1998), Article V.5; Argentina-Russia BIT (1998), Article 7; Nicaragua-Argentina BIT (1998), Article 6(2); New Zealand-Argentina BIT (1999), Article 7; Philippines-Argentina BIT (1999), Article V; Thailand-Argentina BIT (2000), Article 6.3, Article 5.3; Algeria-Argentina BIT (2000), Article 4(5). The ones that do not have such provisions are Argentina-Spain BIT (1991); Argentina-Austria BIT (1992); Argentina-Armenia BIT (1993).

[265] Article IV.3 of the Argentina-United States BIT (1991).

[266] Sachs, W. (1984). New US Bilateral Investment Treaties, The. Int'l Tax & Bus. Law., 2, 192. ('Thus, while the host State is not obligated to compensate anyone, it must treat protected investors no less favorably than it does local investors and those from third countries when arranging restitution, indemnification, compensation, or other appropriate settlement.'); K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards, 4 Int'l Tax & Bus. Law. 105 (1986) at 127 ('provide two standards of treatment in the event of property loss resulting from war or civil disturbance.')

[267] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Alphen aan den Rijn, 2009), 314-315 and K.J. Vandevelde, *US Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992), 212.

clause allowing for objective liability (due diligence) (*AAPL* and *AMT*), as a further guarantee in times of crisis (Argentine cases and *Funnekotter v Zimbabwe*) and as an exception clause (*LESI*, and argued also by Arbitrator Asante in his dissenting opinion in *AAPL*).

The first investment tribunal to deal with that kind of provision was the *AAPL v Sri Lanka* tribunal.[268] The tribunal had to apply Article 4 of the UK-Sri Lanka BIT (1981), which includes two subparagraphs. Article 4(1) provides that if foreign nationals suffer losses owing to a national emergency, any treatment granted as regards compensation would be granted in a NT and MFN basis, while Article 4(2) provides that if such losses result from the action of government forces or authorities, foreign nationals shall be accorded restitution or adequate compensation. The majority of the tribunal considered that if the situation described in Article 4(2) did not apply, Article 4(1) applied. It considered that the MFN provision in Article 4(1) was a *renvoi* provision that made applicable primary obligations of customary international law.[269] It also regarded that the losses suffered by AAPL brought it within the scope of Article 4(1) make Sri Lanka responsible from the mere 'failure to exercise due diligence.'[270] The majority concluded that Sri Lanka violated its due diligence obligations under Article 2(2) [full protection and security] and under general international law (applicable by virtue of *renvoi* in Article 4(1)).

It is useful to analyse in detail the reasoning followed by the majority to reach these conclusions. The majority maintained that Article 4(1) was a 'special provision...which envisages the legal consequences of losses suffered by foreign investments' owing to the emergency situations included in the provision[271], while Article 4(2) was 'a more specific rule tailored particularly to cover two types of 'losses'': requisitions or destruction of property by governmental forces or authorities.[272] Then, the majority considered that '[i]n presence of such situation not possibly governed by Article 4.(2) [requisitions or destruction of property by governmental forces or authorities], the search has to be first directed towards investigating the existence of certain rules more favourable to the foreign investor than those provided for under Articles 2.(2) [full protection and security] and 4.(1) [the emergency clause], since the better treatment accorded to investors of the Third State could be extended to apply by virtue of the most-favoured-nation clause stipulated in Article 3 of the Sri Lanka/U.K. Treaty...'[273], and that '[i]n the absence of a more favourable system applicable by virtue of Article 3 [the NT and MFN provision in the treaty], the applicable rules become necessarily those governing the liability of the Host State under Article 4.(1) and Article 2.(2)....'[274]

[268] *AAPL v Sri Lanka* (Final award).
[269] *Ibid*, §66.
[270] *Ibid*, §76.
[271] *Ibid*, §43.
[272] *Ibid*, §43.
[273] *Ibid*, §44. (iii).
[274] *Ibid*, §44. (iv).

The majority contended that the situation did not fall under the conditions necessary for the applicability of Article 4(2) and that 'Article 4.(1) becomes the only part of Article 4 providing remedy that could be available for the Claimant to base his claims thereunder.'[275] The majority considered that '[f]or the applicability of Article 4.(1), the only condition required is the presence of 'losses suffered' and that Article 4.(1) 'extends as *lex generalis* to all situations not covered by the special rule of Article 4.(2),'[276] For the majority '[t]he only difficulty encountered under Article 4.(1) ... relate ...to the type of remedy provided for thereunder.... Article 4.(1) contains simply an indirect rule whose function is limited to effecting a reference (*renvoi*) towards other sources which indicate the solution to be followed.... the 'no less favourable treatment' granted thereunder covers all possible cases in which the investments suffer losses owing to events identified as including 'a state of national emergency, revolt, insurrection, or riot', with regard to remedies enumerated in the text itself: 'restitution, indemnification, compensation or other settlement.'[277] 'Consequently, ... through the above-stated *renvoi* technique, had not left the host State totally immune from any responsibility in case the foreign investor suffers losses due to the destruction of his investment which occurs during a counter-insurgency action undertaken by the governmental security forces....In implementation of Article 4.(1), the host State could find itself in such a situation bound to bear a certain degree of responsibility to be determined in implementation of the *renvoi* contained in that Article 4.(1)....Once failure to provide 'full protection and security' has been proven (under Article 2.(2) of the Sri Lanka/UK. Treaty or under a similar provision existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the States failure to comply with its 'due diligence' obligation under the minimum standard of customary international law.'[278] The majority agreed it had to review the evidence and to determine whether respondent 'failed to comply with ... Article 2.(2), as well as by virtue of the rules governing State responsibility under general international law (which becomes necessarily applicable by virtue of the *renvoi* contained in Article 4.(1) of the Treaty).'[279] The majority came to the conclusion that the 'Respondent's responsibility is established under international law.'[280]

Arbitrator Asante in his dissenting opinion criticised the decision of the majority. He stated that Article 4 'prescribes specific rules governing the responsibility of a host state in respect of losses or damage sustained in civil disturbances. Article 4(1) restates the general customary international law principle that excludes

[275] *Ibid*, §§60-64.
[276] *Ibid*, §65.
[277] *Ibid*, §66.
[278] *Ibid*, §67.
[279] *Ibid*, §78.
[280] *Ibid*, §86.

liability for compensation where investments suffer losses owing to [the emergency situations described] ....In such event Article 4(1) does not mandate the payment of any compensation ....It merely requires [NT and MFN treatment].'[281] He considered that '[s]ince Article 4 contains specific rules governing the particular case of investment losses sustained in civil disturbances ...this provision must, in accordance with a well-settled principle of treaty interpretation, prevail over the general property protection provision in Article 2(2).'[282] Asante also criticised the tribunal finding that Article 4(1) provides a further basis for the respondent's liability.[283] For him 'it is fundamentally erroneous to construe Article 4(1) in such a manner as to impose a substantive liability to pay compensation.'[284] He added that '[b]y employing the concept of *renvoi* in interpreting Article 4(1), the Tribunal reaches the untenable result of substituting a general standard of property protection derived from customary international law for a specific undertaking of Sri Lanka to a national or a company of a third State.'[285]

In *AMT v Zaire*[286] Zaire made jurisdictional objections based on the MFN provision in Article II and the emergency clause in Article IV of the US-Zaire BIT. The tribunal rejected the objection as these provisions 'clearly concerned the merits of the case and the Tribunal does not see how they can be invoked to pre–empt the admissibility of AMT's claim.'[287] In the merits phase the tribunal considered that Zaire breached its obligations under Article II(4) of the BIT (full protection and security) by failing to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.[288] The tribunal considered that '[t]he engagement of the responsibility of the State of Zaire is more specifically reinforced by the provisions of Article IV paragraph 1(b) [the emergency clause] of the BIT'[289] The tribunal regarded Zaire was responsible for all the losses resulting from riot or act of violence in its territory and that '[i]t is of little or no consequence whether it be member of the Zairian armed forces or any burglar whatsoever.'[290] Invoking Article II(4) (full protection and security) and Article IV (1)(b) (the emergency clause) the tribunal reached the conclusion that 'Zaire is inevitable responsible for the losses and damages resulting from the events ...without having to determine by whom these losses were caused.'[291] In reaching this conclusion the tribunal did not proceeded to interpret the wording of the provision.

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[281] *AAPL v Sri Lanka* (Final award), Dissenting Opinion by Samuel.K.B Asante, §14.2.
[282] *Ibid*, §16.
[283] *Ibid*, §37.
[284] *Ibid*, §39.
[285] *Ibid*, §47.
[286] *AMT v Zaire* (Award).
[287] *Ibid*, §5.31.
[288] *Ibid*, §6.11.
[289] *Ibid*, §6.12.
[290] *Ibid*, §6.13.
[291] *Ibid*.

Argentina sought to rely on this type of emergency clauses as a defence in its cases related with the Argentine crisis of 2001-2003, arguing that the measures complained of in those cases had been taken in a state of 'national emergency' and were thus exempted from BIT obligations except for the national and MFN treatment prescribed in those clauses. All investment tribunals rejected the argument. They considered that these types of provisions were not exceptions. In some cases tribunals expressed that these provisions showed that the emergency was contemplated at the time of the conclusion of the treaty, that it was a minimum treatment standard in time of war, that it was a further guaranty, and that it was included to address the measures taken in response to the emergency and not these measures that caused the emergency, and that it did not exclude the application customary law. All tribunals, however, considered that the economic crisis in Argentina could be regarded as a political-economic occurrence similar to a national emergency and that the emergency clause of the BIT is therefore applicable to the situation.

In *CMS v Argentina*,[292] Argentina invoked the emergency clause in Article IV(3) of the US-Argentina BIT.[293] The tribunal expressed that the 'plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non– discriminatory manner.'[294] In *LG&E Argentina*[295] the tribunal considered that the inclusion of Article IV(3) 'confirms that the States Party to the Bilateral Treaty contemplated the state of national emergency as a separate category of exceptional circumstances.'[296] The tribunal continued that '[i]t has not been shown convincingly to the Tribunal that during [the time of the Argentine crisis] the provisions of Article IV(3) of the Treaty have been violated by Argentina. On the contrary, during that period, the measures taken by Argentina were "across the board".'[297] In *Enron v Argentina*,[298] the tribunal found that 'the only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses'[299] and that 'it still would not allow derogation from rights under the Treaty as it refers to a different matter. Even less so can it be read as a general escape

[292] *CMS v Argentina* (Award).
[293] The US- Argentina BIT (1991) in Article IV.3 provides 'Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.'
[294] *CMS v Argentina* (Award), §375.
[295] *LG&E Energy v Argentina* (Decision on Liability), §44.
[296] *Ibid*, §244.
[297] *Ibid*.
[298] *Enron v Argentina* (Award).
[299] *Ibid*, §320.

clause from treaty obligations and thus does not result in excluding wrongfulness, liability and eventual compensation.'[300] With almost the same language in *Sempra v Argentina*[301] the tribunal stated that 'the only purpose of Article IV(3) is to provide for a minimum level of treatment for foreign investments that suffer losses in the host country'[302] and that it 'still not allow derogation from Treaty rights since the Article refers to a different matter. Even less so can the Article be read as a general escape clause from treaty obligations. It consequently does not result in the exclusion of wrongfulness, liability and eventual compensation.'[303] The annulment committee in *Enron v Argentina*[304] considered that 'different interpretations of this provision are possible' and that it was not able to find an annullable error.[305] In *El Paso v Argentina*,[306] the tribunal established that Article IV(3) 'applies to measures adopted in response to a loss, not to measures that cause a loss. The plain meaning of the provision is that the standards of treatment of the BIT — national treatment and most favoured nation treatment — have to be applied when a State tries to mitigate the consequences of war or other emergency.'[307] The tribunal concluded that Article IV(3) did not excuse Argentina from liability.[308]

In *BG Group plc v Argentina*,[309] Argentina invoked the emergency clause in the UK-Argentina BIT. [310] The tribunal followed the analysis by the *CMS* and *LG&E* tribunals and it found that no state of emergency defence was available to Argentina under the treaty. In the tribunal's view, 'neither Article 4 of the treaty, nor the BIT as a whole, exonerates Argentina's breaches on grounds of state of emergency or state of necessity.'[311] It considered that 'Article 4 is merely concerned with the situation where nationals of the host State are indemnified or compensated, or benefit from a settlement. ...Liability and compensation are thus expressly mandated, not excused.'[312] The tribunal concluded that Argentina cannot invoke a state of emergency or state of necessity on the basis of the BIT to

[300] *Ibid*, §321.
[301] *Sempra v Argentina* (Award).
[302] *Ibid*, §362.
[303] *Ibid*, §363.
[304] *Enron v Argentina* (Decision on Application for Annulment).
[305] *Ibid*, §398.
[306] *El Paso v Argentina* (Award).
[307] *Ibid*, §559.
[308] *Ibid*, §560.
[309] The UK-Argentina BIT (1990) in Article 4 'Compensation for Losses' provides 'Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.'
[310] *BG Group v Argentina* (Final award).
[311] *Ibid*, §381.
[312] *Ibid*, §382.

excuse liability for the breach of Article 2.2 of the BIT.[313] In *National Grid v Argentina*,[314] the tribunal considered that 'the purpose of Article 4 is not to exclude compensation for losses arising from, among other situations, national emergency but rather the contrary. The commitment of the parties is to ensure that their respective investors do not lose out in such situations. In this respect, the Tribunal finds it significant that the losses due to war, armed conflict, etc. are lumped together with those arising from arbitrary treatment which would be in breach of Article 2(2) and give rise to a right to compensation.'[315]

In *Suez and ors v Argentina*[316], Argentina put forward similar arguments based on Article 4 of the Argentina-U.K quoted below and Article 5(3) of the Argentina-France BIT.[317] The tribunal highlighted that the provision 'contains no reference whatsoever to other obligations imposed by the BITs on Contracting Parties, let alone to provide for an exemption from such obligations. Had the Contracting Parties, after carefully negotiating a complex set of legal obligations to protect and promote investments, intended that such obligations would not apply in times of war, civil disturbance, or national emergency, they certainly would have so stated specifically.'[318] It concluded that the provisions 'do not exempt Argentina from its other treaty obligations under the BITs.'[319] In *EDF v Argentina*[320]Argentina invoked Article 5(3) of the Argentina-France BIT. The tribunal considered that 'it serves as a non-discrimination provision, not a shield against host state liability for treaty violation.'[321] 'Article 5(3) may best be understood against the background of the rules of customary international law on State Responsibility toward foreign investors during periods of war, insurrection and other extraordinary circumstances, which determines host State responsibility toward aliens.'[322] For the tribunal, the emergency clause in Article 5(3) 'leaves those customary rules untouched and indeed supplements their content by requiring equality of treatment in response to such extraordinary circumstances'[323] and it does not serve as an exemption clause from liability.[324]

[313] *Ibid*, §387.
[314] *National Grid v Argentina* (Award).
[315] *Ibid*, §253.
[316] *Suez v Argentina* (Decision on Liability).
[317] Article 5(3) of the Argentina-France BIT states: 'Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favorable than that accorded to its own investors or to investors of the most-favored nation.'
[318] *Suez II v Argentina* (Decision on Liability), §270.
[319] *Suez I v Argentina* (Decision on Liability), §271.
[320] *EDF v Argentina* (Final award).
[321] *Ibid*, §1157.
[322] *Ibid*, §1158.
[323] *Ibid*, §1159.
[324] *Ibid*, §1162.

In *Impregilo v Argentina*[325] the respondent invoked the emergency clause in the Argentine-Italy BIT. The tribunal rejected Argentina's contention, expressing that that provision 'provides for no exception from the obligations of the State in whose territory an investment was made but merely gives the investor a right to national treatment and most-favored-nation treatment in respect of damages.'[326] The tribunal found that 'when concluding the BIT, had national emergencies and similar occurrences in mind but considered that no special regulations were necessary.'[327] It further added that the emergency clause 'applies to measures adopted in response to a loss, not to measures that cause a loss. The plain meaning of the provision is that the standards of treatment of the BIT — national and most-favored-nation treatment — have to be applied when a State tries to mitigate the consequences of a situation of war or other emergency.'[328] The tribunal concluded that any violations committed by Argentina cannot be excused by the emergency clause but it considered, however that the provision 'cannot be read so as to exclude the application of customary international law to an emergency situation.'[329]

In *Funnekotter and ors v Zimbabwe*,[330] the respondent invoked the emergency clause in Article 7 of the Netherlands-Zimbabwe BIT.[331] The tribunal considered that clause 'does not exonerate Contracting Parties from their obligation under Article 6 in case of national emergency or riot. It only provides in such a case for a further guarantee of equal treatment with nationals of the Contracting Party or nationals of Third Parties.'[332]

On the other hand, in *LESI v Algeria*,[333] the tribunal reached the opposite conclusion. The respondent invoked the emergency clause in Article 4.5 of the Algeria-Italy BIT.[334] The tribunal considered that 'les articles 4.1 [full protection

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[325] *Impregilo v Argentina* (Final award).
[326] *Ibid*, §339.
[327] *Ibid*, §340.
[328] *Ibid*, §341.
[329] *Ibid*, §343.
[330] *Funnekotter v Zimbabwe* (Award).
[331] Article 7 of the Netherlands- Zimbabwe BIT (1996) provides that '[n]ationals of the one Contracting Party who suffer losses in respect of their investment in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable that that which that Contracting Party accords to its own nationals or nationals of any third State, whichever is more favourable to the nationals concerned.'
[332] *Funnekotter v Zimbabwe* (Award), §104.
[333] *LESI v Algeria* (Award).
[334] Algeria-Italy BIT (1991), Article 4.5 provides:

> 'Les nationaux ou personnes morales de l'un des Etats contractants dont les investissements auront subi des pertes dues à la guerre ou à tout autre conflit armé, révolution, état d'urgence national ou révolte survenus sur le territoire de l'autre Etat contractant, bénéficient, de la part de ce dernier, d'un traitement non moins favorable que celui accordé à ses propres nationaux ou personnes

and security] et 4.5 [emergency clause] de l'Accord bilatéral, prévoyant des niveaux de protection des investissements différents, ne peuvent être appliqués cumulativement. Tant la structure interne de l'article 4 … que les termes qu'il emploie invitent le Tribunal arbitral à conclure que l'intention des Etats... était de faire du [article 4.5] une règle spéciale dérogeant à la règle générale du premier paragraphe afin de permettre aux Etats contractants d'être libérés de leur obligation de pleine et entière protection en cas de guerre ou autre conflit armé, de révolution, d'état d'urgence national ou de révolte.'[335] The tribunal further added that 'sauf à priver de sens et d'effet les dispositions spéciales de l'article 4.5 de l'Accord bilatéral, lorsque ses conditions d'application sont réunies, l'Etat contractant n'est pas tenu de garantir aux investisseurs de l'autre Etat une protection et une sécurité « constantes, pleines, et entières » qu'il lui serait impossible d'assurer mais simplement un traitement non moins favorable que celui accordé à ses propres nationaux ou à ceux de la nation la plus favorisée. …S'agissant d'une exception au principe général de pleine et entière protection, les cas d'ouverture limitativement visés par l'article 4.5, qui ont pour conséquence d'amoindrir substantiellement le niveau de protection de l'investisseur, doivent cependant être interprétés strictement.'[336] It considered that Article 4.5 was '*lex specialis*.'[337] Later on, the tribunal considered that '[l]e traitement accordé au Groupement n'est pas moins élevé que celui accordé aux nationaux ou aux autres investisseurs placés dans la même situation et confrontés aux mêmes difficultés …. Il s'ensuit que l'article 4.5 de l'Accord n'est pas violé.'[338]

The position that upholds that emergency clauses exclude responsibility (followed by the first commentators, by Arbitrators Asante in *AAPL*, and the *LESI* tribunals) appears to be more convincing. Tribunals acting in cases against Argentina have recognised that that type of measure 'confirms that the States Party to the Bilateral Treaty contemplated the state of national emergency as a separate category of exceptional circumstances', [339] that the only meaning of these provisions 'is to provide a minimum treatment to foreign investments suffering losses'[340] and that '[t]he plain meaning of the provision is that the standards of treatment of the BIT — national treatment and most favoured nation treatment — have to be applied when a State tries to mitigate the consequences of war or other emergency.'[341] It is generally recognised that under customary international law states are not responsible for damages suffered by foreigners in the course of a riot, an

morales ou à ceux de la nation la plus favorisée.'

[335] *LESI v Algeria* (Award), §174.
[336] *Ibid*, §175.
[337] *Ibid*, §182.
[338] *Ibid*, §181.
[339] *LG&E Energy v Argentina* (Decision on Libility), §244.
[340] *Enron v Argentina* (Award), §320.
[341] *El Paso v Argentina* (Award), §559.

insurrection or civil war.[342] The emergency provisions appear to be a *lex specialis* to that rule, allowing for NT and MFN in case of compensation. Thus it appears reasonable to treat them as exceptions. Otherwise, what would be the purpose of including a measure granting NT and MFN in case of losses if that treatment would be already included in the general MFN-NT provisions? It has been argued by tribunals that this type of provision 'applies to measures adopted in response to a loss, not to measures that cause a loss.' [343] But the provision expressly refers to the measures that caused the loss when referring to losses 'owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events.'

G. NT - MFN on 'access to courts'

Some States, in particular the United States in its first BITs, and Japan and Korea include in their BITs a special NT and MFN treatment provision applicable to access to the courts of justice and administrative tribunals.[344] These provisions appear together with a general MFN provision. It has been argued that this provision could cover investor-state arbitration. However, this provision covers different issues. This has been confirmed by the Japan-Colombia IIA, where MFN on access to courts coexists with clarification that MFN does not apply to dispute settlement.

Reference to 'access to courts' was normally included in NT and MFN provisions in treaties of friendship commerce and navigation[345] and later on in BITs. An example of a NT-MFN provision in a BIT applicable to access to the courts of justice and administrative tribunals is found in Article 4 of the Japan-Russia BIT:

> Investors of either contracting Party shall within the territory of the other Contracting party be accorded treatment no less favourable than that accorded to investors of such other Contracting Party or to investors of any third country with

[342] H. Arias, 'The non-liability of states for damages suffered by foreigners in the course of a riot, an insurrection or civil war' (7 AJIL, 1913), 724-766; Julius Goebel, Jr., 'The international responsibility of states for injuries sustained by aliens on account of mob violence, insurrections and civil wars' (8 AJIL, 1914), 802-852.
[343] *El Paso v Argentina* (Award), §559; *Impregilo v Argentina* (Final Award), §351.
[344] See, for example, United States-Haiti BIT (1983), Article II.8 ('…Each Party shall grant to nationals or companies of the other Party, on terms and conditions no less favorable than those which it grants in like situations to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice who otherwise qualify under applicable laws and regulations of the forum regardless of nationality, for the purpose of assorting claims, and enforcing rights, with respect to their investments.'). Similar provisions can be found, for example in the United States-Senegal BIT (1983), Article II.9; United States-Bangladesh BIT (1986), Article 2.7; United States-Cameroon BIT (1986), Article II.7; Poland-Kuwait BIT (1990), Article 2.10; Denmark-Kuwait BIT (2001), Article 3.3; Australia-Mexico BIT (2005), Article 22.
[345] FNC US Japan 1953 Article IV; FCN US Italy 1948 Article V.4; FCN UK Japan 1962 Article 7 (4), US-Greece FCN Article VI.

> respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction both in pursuit and in defense of their rights. [346]

The Korean BITs include a similar provision. The difference is that the provision is generally included in the ISDS clause. For example, the Hungary-Korea BIT of 1988, in its Article 10 provides:

> 1 , Any dispute between either Contracting Party and the investor of the other Contracting Party including expropriation or nationalization of an investment shall as far as possible be settled by the disputing parties in an amicable way.
>
> 2 . The legal remedies under the laws and regulations of a Contracting Party in the territory of which the investment has been made are available for the investor of the other Contracting Party on the basis of treatment no less favourable than that accorded to investments of its own investors or investors of any third State, whichever is more favourable to the investor.
>
> 3 . If any dispute concerning expropriation or nationalization can not be settled within six months from the date either party requested amicable settlement, it shall upon request of either the investor or the Contracting Party be submitted to the International Centre for Settlement of Investment Disputes established by the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States.
>
> 4 . If a dispute not referred to in paragraph 3 of this Article can not be settled within six months from the date either party requested amicable settlement, it shall be submitted, upon agreement on such submission by both parties to the dispute, to the International Center for Settlement of Investment Disputes for conciliation or arbitration under the

[346] Japan-Russian Federation BIT (1998), Article 4. Exactly the same provision appears in the Japan-Pakistan BIT (1998), Article 4; Japan-Bangladesh BIT (1998), Article 4; Japan-Mongolia BIT (2001), Article 4. Very similar provisions but with a reference to 'like circumstances' appear in the Japan-Hong Kong BIT (1997), Article 4; Japan-Republic of Korea BIT (2002), Article 3; Japan-Vietnam BIT (2003), Article 3; Japan-Cambodia BIT (2007), Article 5; Japan-Uzbekistan BIT (2008), Article 4; Japan-Lao People's Democratic Republic BIT (2008), Article 6; Japan-Papua New Guinea BIT (2011), Article 5. Similar provisions appear (but with reference to 'nationals and companies', not to ' investors') in Japan-Egypt BIT (1997), Article 4; Japan-Sri Lanka BIT (1982), Article 4; Japan-Turkey BIT (1992), Article 4; Japan-China BIT (1998), Article 4.

Washington Convention. [347]

The Korea-Argentina BIT of 1994 has a similar provision together with the requirement to resort to local courts for a period of 18 months.[348] The Japan-Colombia BIT of 2011 expressly indicates that the MFN provision applies to the access to the local courts of justice and administrative tribunals and at the same time clarifies that the MFN provision does not apply to the provisions concerning the settlement of investment disputes. [349]

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[347] Hungary-Korea BIT (1988), Article 10. Similar provisions appear in Poland-Republic of Korea BIT (1989), Article 8.2; China-Republic of Korea BIT (1992), Article 9.2; Peru-Republic of Korea BIT (1993), Article 8.2; South Africa-Republic of Korea BIT (1995), Article 8.2; Greece-Republic of Korea BIT (1995), Article 9.2; Chile-Republic of Korea BIT (1996), Article 8.3; Hong Kong-Republic of Korea BIT (1997), Article 9.2; Israel-Republic of Korea BIT (1999), Article 7.2; Guatemala-Republic of Korea BIT (2000), Article 8.2; Brunei-Republic of Korea (2000), Article 8.2; Honduras-Republic of Korea BIT (2000), Article 8.2; Nicaragua-Republic of Korea BIT (2000), Article 8.2; Trinidad and Tobago-Republic of Korea (2002), Article 8.2; Costa Rica-Republic of Korea BIT (2002), Article 8.2; Jamaica-Republic of Korea BIT (2003), Article 8.2; Jordan-Republic of Korea BIT (2004), Article 8.2; Mauritania-Republic of Korea BIT (2004), Article 8.3; Congo-Republic of Korea BIT (2005), Article 8.2.

[348] Article 8 of the Korea-Argentina BIT (1994) untitled 'Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party' provides:

> (1) Any dispute which arises within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.
>
> (2) If the dispute cannot thus be settled within six (6) months following the date on which the dispute has been raised by either party, it may be submitted, upon request of any of them, to the competent tribunal of the Contracting Party in whose territory the investment was made, on the basis of treatment no less favourable than that accorded to investments of its own investors or investors of any third State, whichever is more favourable to the investor.
>
> (3) The aforementioned dispute may be submitted to international arbitration in the following circumstances:
>
> (a) if one of the parties so requests, where, after a period of eighteen(18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute;
>
> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

[349] The Japan-Colombia BIT (2011) in its Article 3 provides:

> 1. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities.
>
> 2. Each Contracting Party shall in its Area accord to investors of the other Contracting Party treatment no less favorable than the treatment which it accords in like circumstances to investors of a non-Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.

H. NT - MFN with respect to taxes

Taxation is an essential sovereign right. It is common for investment treaties to exclude taxation, from the application of the NT and MFN provisions or from the entire treaty.[350] However, some IIAs include specific NT-MFN provisions dealing with taxes, fees and charges applicable to investors.[351] One example of these clauses is Article 4 of the Netherlands-Uruguay BIT (1988) that grants NT and MFN on tax matters but with the exclusion of double taxation treaties or REIO agreements:

> With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party, who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party under an agreement for the avoidance of double taxation, by virtue of its participation in a customs union, economic union or similar institution, or on the basis

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The Article includes a Note that provides:

> It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes such as the mechanism set out in Chapter III and Chapter IV, that are provided for in other international agreements between a Contracting Party and a non-Contracting Party.

[350] See for example, Article X of the US-Ecuador BIT (1993). That provision was discussed in *Duke Energy v Ecuador* (Award), §§171–189.

[351] See for example, Denmark-Argentina BIT (1992), Article 3(4); Argentina-Netherlands BIT (1992), Article 5. This is a typical clause in the Dutch treaties. It can be found, for example, in the Netherlands-Yemen BIT (1985), Article 4; Netherlands-Uruguay BIT (1988), Article 4; Netherlands-Ghana BIT (1989) Article 4; Venezuela-Netherlands BIT (1991), Article 4; Netherlands-Jamaica BIT (1991), Article 4; Estonia-Netherlands BIT (1992), Article 4; Netherlands-Bolivia BIT (1992), Article 4; Netherlands-Peru BIT (1994), Article 4; Netherlands-Bangladesh BIT (1994), Article 4; Netherlands-Albania BIT (1994), Article 4; Netherlands-Ukraine BIT (1994), Article 4; Netherlands-Moldova BIT (1995), Article 4; Egypt-Netherlands BIT (1996), Article 4; Netherlands-Uzbekistan BIT (1996), Article 4; Netherlands-Slovenia BIT (1996), Article 4; Netherlands-Zimbabwe BIT (1996), Article 4; Netherlands-Jordan BIT (1997), Article 4; Netherlands-Bosnia and Herzegovina BIT (1998), Article 4; Netherlands-Croatia BIT (1998), Article 4; Netherlands-Nicaragua BIT (2000), Article 4; Netherlands-Mozambique BIT (2001), Article 4; Netherlands-Honduras BIT (2001), Article 4; Netherlands-Namibia BIT (2002), Article 4; Netherlands-Belize BIT (2002), Article 4; Netherlands-Gambia BIT (2002), Article 4; Netherlands-Tajikistan BIT (2002), Article 4; Netherlands-Kazakhstan BIT (2002), Article 4; Netherlands-Lao People's Democratic Republic BIT (2003), Article 4; Netherlands-Malawi BIT (2003), Article 4; Netherlands-Ethiopia BIT (2003), Article 4; Netherlands-Cambodia BIT (2003), Article 4; Netherlands-Zambia BIT (2003), Article 5; Netherlands-Suriname BIT (2005), Article 4; Netherlands-Dominican Republic BIT (2006), Article 4; Netherlands-Bahrain BIT (2007), Article 4.

> of reciprocity with a third State.

In *Conoco v Venezuela*[352] the tribunal had to analyse a similar provision included in the Netherlands-Venezuela BIT. Claimants alleged that Venezuela had breached the FET provision standard as a result of the imposition of increased royalties and income taxes on the investments. Venezuela alleged that Article 4 of the treaty accorded only NT and MFN in relation to tax matters, and that the FET standard was not applicable to tax measures. Claimants argued that Article 4 should not be interpreted as a tax carve-out provision, and that Article 4 simply states that a foreign investor cannot bring a claim for NT or MFN treatment standards due to more favourable provisions in tax treaties or economic unions contracting parties concluded with third countries.

The tribunal considered that the wording and structure of the general FET and MFN provision in Article 3 and an specific MFN provision on tax matters in Article 4 lead it to conclude that matters of taxation, fees, charges and fiscal deductions and exemptions were subject only to the obligations stated in Article 4 and not to the more generally worded FET obligation included in Article 3.[353] Among the contextual issues, the tribunal noted (i) 'that format and wording is adopted in the majority of the almost one hundred bilateral investment treaties which the Netherlands has signed' and '[i]n a number of those Netherlands' bilateral investment treaties that do not have a separate provision about taxation ... the double taxation agreement exception is included in the general provision requiring fair and equitable protection and non-discrimination'; (ii) 'in at least five model bilateral investment treaties which have no separate taxation provision, double tax agreements are expressly excluded from the application of the non-discrimination obligations'; and (iii) 'that the power to tax is in principle within the customary regulatory or sovereign powers of the State.'[354]

I. MFN with respect to free transfer of funds

Some treaties include an express MFN provision with respect to free transfer of funds provisions. In the case of China's BITs it has been stated that this is 'an express confirmation that the transfer provisions should be applied in accordance with the MFN requirements.'[355] For example the Argentina-Sweden BIT (1991) establishes in Article 5(3):

> (3) Subject to the provisions of Article 3[MFN], the Contracting Parties undertake to accord to transfers referred to in Paragraph (1) of this Article a treatment no less favourable than that accorded to transfers originating from

[352] *Conoco v Venezuela* (Decision on Jurisdiction and the Merits).
[353] *Ibid*, §315.
[354] *Ibid*, §§310-312.
[355] N. Gallagher and W. Shan, *Chinese Investment Treaties: Policies and Practice* (2009), 184.

investments made by investors of any third State.[356]

So far there have not been any investment tribunals interpreting these kinds of provisions.

[356] Argentina-Sweden BIT (1991), Article 5(3). Similar provisions can be found in the Hungary-Sweden BIT (1987), Article 7(2); Poland-Sweden BIT (1989), Article 5(2); Canada-Russian Federation BIT (1989), Article 7(3); Canada-Poland BIT (1990), Article 7(4); Czech and Slovak Federal Republic-Sweden BIT (1990), Article 5(2); Canada-Hungary BIT (1991), Article 7(3); Poland-Turkey BIT (1991), Article 6(4); Poland-Estonia BIT (1993), Article 5(3); Poland-Albania BIT (1993), Article 5(3); Poland-Latvia BIT (1993), Article 5(3); Poland-Slovakia BIT (1994), Article 5(3); Poland-Croatia BIT (1995), Article 5(3); Poland-Egypt BIT (1995), Article 6(3); Poland-Slovenia BIT (1996), Article 5(3); Greece-Croatia BIT (1996), Article 6(3); Croatia-Italy BIT (1996), Article 6(2); China-Lebanon BIT (1996), Article 6(3); Poland-Bangladesh BIT (1997), Article 5(3); Poland-Jordan BIT (1997), Article 5(3); Italy-Lebanon BIT (1997), Article 5(4); Lebanon-Czech Republic BIT (1997), Article 6(3); Slovenia-Bosnia and Herzegovina BIT (2001), Article 6(3); Lebanon-Pakistan BIT (2001), Article 5(3); China-Bosnia and Herzegovina BIT (2002), Article 6(4); Spain-Bosnia and Herzegovina BIT (2002), Article 7(3). Similar clauses appear in Malaysia-Italy BIT (1988), Article 7(2); Italy-Egypt BIT (1989), Article 6(2); Hungary-Kuwait BIT (1989), Article 8(2); China-United Arab Emirates BIT (1993), Article 7(2); Armenia-Argentina BIT (1993), Article 6(2); China-Oman BIT (1995), Article 6(2); Pakistan-Malaysia BIT (1995), Article 6(3); Pakistan-Morocco BIT (2001), Article 6(3). Also United-States Argentina BIT (1991), Protocol §10; Argentina-Malaysia BIT (1994), Article 6(3); Argentina-Belgium BIT (1991), Article 7(2).