ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Материально-правовые стандарты защиты в международном инвестиционном праве

Анна Жубан-Брет

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Substantive Standards of Protection in International Investment Law

Anna Joubin-Bret

ТОМ 16
VOL. 16

Москва 2023
Moscow 2023

ISSN 2687-105X

Центр международных и сравнительно-правовых исследований
International and Comparative Law Research Center

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Материально-правовые стандарты защиты в международном инвестиционном праве

Анна Жубан-Брет

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Substantive Standards of Protection in International Investment Law

Anna Joubin-Bret

ТОМ XVI / VOL. XVI

Москва
2023

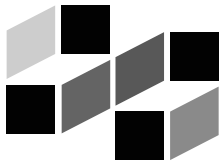
УДК 341.1/8
ББК 67.91
Л43

Лекции Летней Школы по международному публичному праву = Courses of the Summer School on Public International Law. — Т. XVI. Материально-правовые стандарты защиты в международном инвестиционном праве = Vol. XVI. Substantive Standards of Protection in International Investment Law / Анна Жубан-Брет = Anna Joubin-Bret. — М.: Центр международных и сравнительно-правовых исследований, 2023. — 98 с.
Л43

Настоящее издание содержит транскрипт лекций (не для цитирования) Анны Жубан-Брет по теме «Материально-правовые стандарты защиты в международном инвестиционном праве», прочитанных в рамках Летней Школы по международному публичному праву 2021 года.

The present publication contains a transcript of lectures (not for quotation) by Anna Joubin-Bret on the topic “Substantive Standards of Protection in International Investment Law”, delivered within the frames of the Summer School on Public International Law 2021.

УДК 341.1/8
ББК 67.91



ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ

INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2021 году Летняя Школа состоялась в четвёртый раз. Как и в 2020 году, в связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Международное инвестиционное право». Их прочитали Самуэль Вордсворт («Международное инвестиционное право: история, настоящее, перспективы»), Анна Жубан-Брет («Материально-правовые стандарты защиты в международном инвестиционном праве»), Катарина Тити («Право на регулирование в международном инвестиционном праве»), Сергей Усоскин («Иностранные инвестиции и инвесторы»), Макане Моиз Мбенге («Урегулирование споров между инвесторами и государством»). Общий курс международного публичного права прочёл Рюдигер Вольфрум.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову, С. В. Усоскину — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues with the publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2021, the Summer School was held for the fourth time. As in 2020, due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "International Investment Law". The courses were delivered by Samuel Wordsworth ("International Investment Law — History, Present, Perspectives"), Anna Joubin-Bret ("Substantive Standards of Protection in International Investment Law"), Catharine Titi ("The Right to Regulate in International Investment Law"), Sergey Usoskin ("Foreign Investments and Investors"), and Makane Moïse Mbengue ("Investor-State Dispute Settlement"). The General Course on Public International Law was delivered by Rüdiger Wolfrum.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, Bakhtiyar Tuzmukhamedov, and Sergey Usoskin — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Анна Жубан-Брет

Анна Жубан-Брет — Секретарь ЮНСИТРАЛ и руководитель Отдела по праву международной торговли Управления по правовым вопросам ООН, который обеспечивает основное секретариатское обслуживание ЮНСИТРАЛ. До назначения на эту должность в 2017 году Анна Жубан-Брет занималась юридической практикой в Париже, специализируясь на вопросах международного инвестиционного права и инвестиционных спорах. В основном выступала в качестве юрисконсульта, арбитра, медиатора и посредника при разрешении международных инвестиционных споров. До 2011 года она на протяжении 15 лет выполняла функции главного юрисконсульта ЮНКТАД. Анна Жубан-Брет получила степень доктора (DEA) международного частного права в Университете Париж I Пантеон-Сорбонна, магистра международного экономического права в Университете Париж I, а также магистра политологии в Институте политических наук. Она также работала юрисконсультом юридического отдела группы Schneider, генеральным юрисконсультом Группы KIS и директором по экспорту в Pomagalski S.A. Назначалась судьёй коммерческого суда Гренобля (Франция), избиралась региональным советником региона Рона-Альпы в 1998 году.

Anna Joubin-Bret

Anna Joubin-Bret is the Secretary of UNCITRAL and the Director of the International Trade Law Division in the Office of Legal Affairs of the United Nations, which functions as the substantive secretariat for UNCITRAL. Prior to her appointment in 2017, Anna Joubin-Bret practiced law in Paris, specializing in International Investment Law and Investment Dispute Resolution. She focused on serving as counsel, arbitrator, mediator, and conciliator in international investment disputes. Prior to 2011 and for 15 years, she was the Senior Legal Adviser for the UNCTAD. Ms. Joubin-Bret holds a post-graduate degree (DEA) in Private International Law from the University Paris I, Panthéon-Sorbonne, a Master's Degree in International Economic Law from the University of Paris I, and in Political Science from Institut d'Etudes Politiques. She was Legal Counsel in the legal department of the Schneider Group, General Counsel of the KIS Group, and Director-Export of Pomagalski S.A. She was appointed judge at the Commercial Court in Grenoble (France) and was elected Regional Counsellor of the Rhône-Alpes Region in 1998.

TABLE OF CONTENTS

PREFACE 11

LECTURE 1:

General Overview:
The *Quid-Pro-Quo* of Investors Protection 13

1. Evolution of International Investment Treaties 13
2. Shared Interpretative Authority 18
3. Treaty Interpretation Tools 20
4. Examples of Interpretation Tools in Practice 24
5. The Reluctance of States to Use Interpretation Tools 27
6. Means to Reestablish State Control over International Investment Treaties 28

LECTURE 2:

Protection Against Expropriation 30

1. Historical Background 30
2. Direct Taking of Property 32
3. Measures Tantamount to Expropriation 33
4. Conditions for an Expropriation to be Lawful 34
5. Indirect Expropriation 35
6. Regulatory Expropriation 40
7. Treaty Clarification 42

LECTURE 3:

Fair and Equitable Treatment (FET) 47

1. Historical Background and Minimum Standard of Treatment 49
2. Diverging Interpretations: FET and FET as Part of CIL 50
3. FET Provisions in Treaties 51
4. Link Between FET and Minimum Standard 59
5. FET as an Autonomous Standard 62
6. FET Provisions in Recent Treaty Practice 67
7. The Case of Legitimate Expectations 69
8. Clarifying Treaty Language 73

LECTURE 4:

National Treatment and Most-Favoured-Nation Treatment (non-discrimination) 75

1. Historical Origin of National Treatment 76
2. National Treatment in the Pre- and Post-Establishment Phase 78
3. National Treatment: Required Comparison 82
4. Most-Favoured-Nation Treatment 87

PREFACE

My topic for this year's Summer School is substantive standards of protection of investors under investments treaties, but instead of taking the usual approach of reviewing the standard in international law and in investment treaties and then looking at relevant jurisprudence, which would take much more than the time we have allocated in this year's program, I am going to take a very specific approach. I will look at the standards' evolution over time in the way they are included into treaties. We will look together at how these standards have been crafted in the treaties that were concluded in the early days and how these standards have over time evolved. Maybe, not the standards themselves but at least the way of drafting the standards in the investment treaties, and we will see how States have addressed what they considered to be a wrong interpretation of the protection standards, or an overbroad interpretation, or an interpretation that was inconsistent with the intention of the contracting parties of an investment treaty.[1]

In order to do that, we will look at two sets of supporting documents. On the one hand, we will look at original treaty drafting but maybe just *en passant*. The focus will be on the overbroad or incorrect interpretation that was given by arbitral tribunals — in the view of the contracting Parties or the defendant States, and what States did in order to address these inconsistencies or these incorrect interpretations. Basically, it is looking at the corrective measures taken by the States in order to address the overbroad or incorrect interpretation by arbitral tribunals.

[1] For purposes of this transcript, the terms "investment treaties" and "investment agreements" shall encompass both, bilateral investment treaties and treaties with investment provisions.

I would like to start my series of lectures by looking at the tools that States use to interpret their treaties. From there we will go to expropriation, we will look at fair equitable treatment, national treatment, and most-favoured-nation treatment, and in the end, we will put together all the remaining standards of protection where we have less contentious issues or where the standard is less controversial, and where there was no major need for interpretation or for corrective measures taken by the State. So, that is the approach I would like to take.

I would like to thank my colleague David Probst for helping me prepare for the lecture and edit the transcript that you have before you.

LECTURE 1:

General Overview: The *Quid-Pro-Quo* of Investors Protection

1. Evolution of International Investment Treaties

Historical perspective

From a historical perspective, we have to look at international investment treaties in a particular context. This context is the end of the Second World War, when a number of countries have become independent. By becoming independent, they have gained full sovereignty over their resources. At that time, they also needed to develop their own industry and economy. They relied mostly on foreign investments coming from the former colonial powers but also from newly independent countries. They set up a *quid-pro-quo* type of framework, a type of contractual treaty relationship whereby investors from capital-exporting home countries would receive a certain level of protection from the host countries where they were putting their capital and investments.

This protection was enshrined in treaties concluded between home countries of investors and host countries of investors that would be receiving these investments. They more or less always focused on the same type of protection, entry, and facilitation provisions: provisions on the protection of investments established in their territory against political risk, i.e. interference by the host State in their business activities; provisions on liberalization facilitating entry and access to the state economy, and always with a very specific dispute settlement mechanism in order to ensure that the treaty provisions are properly enforced.

Evolution

The very first generation of investment agreements evolved to the ones that we have in front of us today, in the meantime, they have multiplied by 10 in terms of the number of pages and they have detailed, cut out, added, and crafted exceptions to almost all the core provisions of an investment protection treaty. The first treaties were signed in the early sixties, which is also the time when the dispute settlement mechanism in the World Bank with the ICSID Convention was negotiated. It should be noted here that the ICSID Convention of 1965 was part of a tryptic of instruments by the World Bank meant to establish general protection rules for investment (the World Bank Guidelines on foreign investment that did not see the light of the day), the Multilateral Investment Guarantee Agency (MIGA) and ICSID. It is contemporary with the very first BIT, which was signed between Germany and Pakistan in 1959.

In the first generation of treaties, there was a very strong unilateral protection from the capital-importing country of the investments of the capital-exporting country. It was part of the *quid-pro-quo*, the home State of the investor would say: "I will give political risk insurance to my investors, investing in your country, get subrogated in their rights if there is a violation and I will allow the capital to go into your country". You must remember, that at that time, there were very strict capital controls in place across all countries. "As the protection of my own home investors, you commit to also protect these investments against the main political risk that can arise from the investments in your country".

What are these risks, and why do we still find the same provisions sixty years later as we had in the early sixties — because the elements of political risk are always elements of interference by the State in the establishment and the operation of the foreign investor in its territory. This interference can take various forms.

One of the most well-known interferences by a State with foreign investors is to expropriate them or nationalize them and to take their property for political, economic, and any other reasons. Interference can also take the form of a change of the regulation that applied to these investors when they entered the State, and then the legal surrounding changes drastically, and this will generate a loss of profit on the part of the investors.

Another element of political risk is to treat investors in a discriminatory manner as opposed to the domestic investors either by not allowing them to do certain things, for example, not giving them access to domestic credits, or not allowing their investments in the first place into given projects or sectors of the domestic economy, or have a discriminatory regulation that applied to them. Typically, and again you must remember the prevailing rules at that time, that was a case in many countries in the early sixties because they were quite scared of foreign capital wishing to retain control over their natural resources. Therefore, there were a number of sectors that were reserved for domestic investors, or there was simply a different set of rules and regulations applying to foreign investors. That was the case, for example, in China and many Latin American countries. For many years, China was accepting the entry of foreign investors, but they would be subjected to a different treatment, they would not be able to use the same currency, they would not be able to access credits from local banks, they would have a completely different framework applying to them. So, when there are two different legal frameworks, there is a foreign investment framework and a domestic framework, this leads to discrimination that is also considered in the investment treaties.

And last but not least, there is another huge political risk. This is the one when you invest your money outside your home country (you put it into another country where you have a status as a foreigner). How do you ensure that you can repatriate the proceeds of your operation in this country or the money you make in this

country? And ultimately, if things go wrong, how can you repatriate and be guaranteed to repatriate the entire amount of capital that you put into the country?

Over time, all the investment treaties have always dealt with the same issues because they are the fundamental issues where there is political risk, risk of interference by the State with an investment of a foreign investor. Over time, however, and as I mentioned, while investment treaties did always protect against the same risks, the way the standards of protection were formulated has changed a lot. You can see more and more refined and sophisticated wording in order to correct the interpretations that were made of the general principles that were included in the earlier treaties.

There are basically three generations of treaties. A first generation that we will call the "older generation of treaties" which were very basic, with strong unilateral protection, roughly from the 1960s into the 1990s. Then there was a wave of free trade agreements including investment chapters that have replaced the BITs in a number of regions. For example, NAFTA — the North American Free Trade Agreement, a treaty that has given rise to a lot of investment disputes. Over time, particularly, after the 1990s when the investment treaties were really proliferating, when cross-border investment flows were booming, and when — surprise — disputes began to arise, States began to refine their treaties responding to the need to address some issues of interpretation and of incorrect, overbroad and unclear use of treaty terms by arbitral tribunals.

Lastly, and since the early 2000s, we have now a new generation of treaties, which has developed in the last ten years where they are trying to better balance the host States' rights and the States' obligations, with a particular focus on the State's right to regulate. We often hear talk about rebalancing investment treaties by including investors' obligations alongside the State's

obligations. But I am not convinced that this is really that strong a trend. Some still very few address issues such as corporate social responsibility or the investors' obligations, environmental and social measures but most of the time in a more aspirational form and with no impact on dispute settlement for instance. What characterizes the last generation of treaties, is that there are very well-developed and very well-crafted protection elements and a strong protection of action by the State that is not otherwise discriminatory or targeted but is taken for a public purpose, in order to make it clear that the host State has rights and not only obligations towards the foreign investors operating in their territory. And all of this was not contemplated in the early investment treaties.

Focus of lecture: substantive standards

There are four main sets of substantive provisions of protection in international investment treaties:

- Protection against expropriation
- Fair and equitable treatment
- Full protection and security and freedom of transfer of funds
- National treatment and most-favoured-nation treatment

I will look more specifically at the evolution of these substantive provisions following the interpretation given by arbitral tribunals and the "corrective" measures taken by the States in later treaty wording.

But before we enter into each of these substantive protection standards, please allow me to look into the issue of treaty interpretation and the action that States have taken (or not) to clarify, to interpret, and to correct wording that was not interpreted as they had envisaged. And in order to do that, let us take a look into treaty interpretation rules and tools.

2. Shared Interpretative Authority

States are the masters of their treaties

What I would like to emphasize is that indeed the States are the masters of their treaties. The States are not the ones to decide on the dispute arising from the treaties, because they have delegated this task in the investment agreements to *ad hoc* arbitral tribunals established under ICSID or UNCITRAL arbitration rules. The UNCITRAL arbitration rules are often cited as one of the rules to settle investment disputes in the treaties, mainly for the States that are not parties to the ICSID Convention. So, the States while having delegated the task of resolving these disputes to international arbitral tribunals nevertheless continue to be the masters of their treaties in the sense that they can make these treaties evolve, they can interpret them and they have the right of giving an authoritative interpretation of a legal rule because it belongs solely to the authority that has the power to create, modify or suppress it. And this authority is typically the State. The States are indeed the only ones that have the ability to change the content of a treaty and they can do so in various manners. This was stated by the Permanent Court of International Justice as early as 1923: "[T]he right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it".[2]

This is one of the first areas where over the years there are disagreements between States that are the crafters and the owners of the treaties and the arbitral tribunals that are given the task to apply them. I would say, it is a difficult task that is given to arbitrators to apply what is in a treaty when it is generally not very precise because it is relying on general principles or is sometimes poorly crafted because investment treaties like any other instruments of international law are the results of compromises and negotiation,

[2] Permanent Court of International Justice, Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37.

with a lot of what we call "constructive ambiguity". So, when you are an arbitrator sitting in front of this text and you read something that is not very precise or that sometimes is not worded clearly, it does not help you in the interpretation. And there is a temptation on the part of the arbitral tribunal to say: "Oh, this is probably what they wanted to say but they have not said it, and anyway, this is what other tribunals have said before us in disputes involving other treaties, so, let us take the same interpretation".

This is where the tension between arbitral tribunals and States both in the area of international trade in the WTO and in investment treaties arises.

Regarding the WTO, I would like to refer to the most recent problem in replacing or setting up an appellate body where one country has been blocking the establishment of a new appellate mechanism, precisely, because they considered that the appellate body of the WTO was going beyond its role of settling disputes and was going into redrafting or giving other content to the WTO treaties, to the Marrakesh agreements. And in the area of investment disputes, it's exactly the same. The tribunal in the *Sempra Energy International v. Argentina* case said something totally different from what the PCIJ said in 1923, the one I cited earlier: "[I]nterpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty".[3] That is not always easy.

Lack of predictability

Because of the lack of precision and clarity of some general protection standards in early treaties and because there is no consistent interpretation and application of treaty standards by arbitral tribunals, there is a lack of predictability in the current

[3] *Sempra Energy International v. Argentina*, ICSID No. ARB/02/16, Objections to Jurisdiction, May 11, 2005, para. 146.

international investment agreements interpretation by arbitral tribunals. Some of the interpretations have been quite farfetched and others are more conservative. For example, disagreement between tribunals and ICSID *ad hoc* committees on Argentina's necessity defense.[4] Or disagreement and inconsistency as to the application of umbrella clauses, or inconsistency about the content of Fair and Equitable Treatment.

What is important to understand is that in the existing investment agreement and dispute settlement systems every tribunal is independent from the other. We do not have any rule of precedent whereby a tribunal would have to pay attention to what the previous tribunal has decided. Tribunals applying the same treaty with the same provision may come to finding a totally different interpretation of what this treaty provision actually means and what conduct of a State can be a violation of this treaty.

In this particular instance, we can refer to a paper that was prepared by UNCITRAL for Working Group III.[5] It contains a whole list of cases that interpret the same treaty provision in very different manners.

This lack of consistency combined with the lack of predictability has made it necessary for the States to look closer into the wording of their treaties.

3. Treaty Interpretation Tools

In the terms of the treaty interpretation tools, I will not look into tools that arbitrators have at their disposal. Arbitrators typically use the plain meaning of the text and the other tools the Vienna Convention on the Law of Treaties provides. Arbitrators should not

[4] See *CMS v. Argentina / Enron v. Argentina / LG&E v. Argentina / Sempra v. Argentina*.
[5] See Report of Working Group III, A/CN.9/964.

be looking into other frameworks, bring in provisions that could be similar or could be borrowed from another area of the law. Creativity is not what is expected of arbitrators, but it is to settle the dispute at hand with the tools they have.

The States, also, have a number of interpretation tools at their disposal. There are different phases where States can interpret their treaty language.

- A clear and precise wording

In the early drafting phase or when putting out a model investment protection agreement, it is important for the States to give a clear and precise wording. With very clear indicators and guidance to arbitral tribunals, they will not have to find out or borrow standards or principles from here and there to help them interpret. This is for example what States have done when clarifying in their treaties the way of establishing a violation of national treatment, with what to compare that treatment, with what comparator.

- Reference to interpretation rules (VCLT) and to other areas of law / Objectives in preamble

When States want to provide a reference to the source of the standard or the law arbitral tribunals should refer to in interpreting the standard, for instance, international law or international customary law or the international minimum standard of treatment of aliens, they should say so clearly and also make sure that in the preamble there are clear objectives that allow the arbitrators to go to another element of the Vienna Convention, when the standard is not clear, for example, the object and purpose of the treaty. Obviously, if the preamble says that the objective of the treaty is to promote and protect foreign investment into the host State and if it does not refer to the sustainable economic and social development of the State or the need to balance various objectives, arbitral tribunals will not have the ability to read in tea leaves what the Contracting Parties wanted to achieve.

During the IIA conclusion, there are two sets of tools available:

- Formal or informal side agreements / Unilateral statements in ratification documents

Some States are very fond of having side agreements, you just wonder why they cannot put it in the agreement itself. But basically, it is because they have a very standard agreement, and whatever is a bit different from a standard agreement they prefer to put it to a side letter rather than having it in a treaty itself as they want to continue to use consistently the same model wording. Some States want to refer to a particular domestic framework, for example, on exchange controls, and because it is a domestic law, they put it into a side letter. The United States in its more recent treaties includes the clarification of the source and content of some of the standards into an annex. In any event, this is an available tool and can be used to clarify the meaning of a standard.

During the phase where the investment agreement is in force, there are various possibilities:

- *Ad hoc* or authoritative interpretation by treaty parties
- Authoritative interpretation by treaty institutions established under the treaty (commissions or committees)
- Release of *travaux préparatoires*
- Unilateral documents and declarations / Model BITs

I would like to insist on the role of the Model BITs. Model BITs are the document that is exchanged between the parties at the beginning of a negotiation. On the basis of this model, you can have a clearer understanding of where the State comes from in the various provisions of the treaty.

During the phase of dispute settlement, States have also various ways to intervene:

- *Renvoi* mechanisms at the request of the arbitral tribunal seeking this information
- Consultation of draft awards by the parties to the dispute, which includes the contracting State and may allow, if and when it is used, to clarify elements the tribunal may have omitted
- Intervention of non-disputing party in a dispute involving one of the treaty parties
- Expert advice given to the tribunal during the proceedings

Generally, this intervention by the non-disputing parties is provided for in the treaty provisions themselves. There is a provision that allows the non-disputing States to also make an intervention during the dispute even if they are not affected by the dispute themselves but whether the arbitral tribunal is going to interpret the provision that might also apply to them where they are to be challenged.

- Public evaluation of the rendered awards

In a post-dispute phase, after the dispute is being rendered, there can also be a public evaluation of the rendered awards. This tool is not used very often in practice as there is reluctance by States to comment on arbitral awards, although in early years, Switzerland had used it in the interpretation that was given by an arbitral tribunal of a BIT between Switzerland and Pakistan in the *SGS v. Pakistan* case.[6] Recent cases involving European countries in solar and wind power energy cases under the Energy Charter Treaty have given rise to comments by States involved or by the Commission of

[6] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13); See note on the Interpretation of Article 11 of the Bilateral Investment Treaty Between Switzerland and Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General (1 October 2003), reprinted in Mealey's Int'l Arb. Rep., Feb. 2004.

the European Union. A case in point is also the *Achmea* case brought against Slovakia under a BIT involving two States members of the European Union, Slovakia and the Netherlands.[7]

4. Examples of Interpretation Tools in Practice

Joint interpretation

A most interesting joint interpretation, which I am going to use to illustrate a number of substantive protection provisions is the interpretation given by the NAFTA Free Trade Commission.

The NAFTA is the North American Free Trade Agreement between Mexico, Canada, and the United States that was signed in 1994. It has been revised very recently by what is called the USMCA, which is a revised NAFTA between the same treaty parties, and there also has been a lot of evolution.

The three countries came together in Washington, D.C., and reviewed arbitral awards rendered under Chapter 11 — the investment chapter of the NAFTA.

> *"Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:*
>
> *[…] 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*

[7] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (I) (PCA Case No. 2008-13).

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. […]"[8]

Evolution through Model BITs

The other way for States to interpret or to give guidance to tribunals on a particular interpretation of the treaties is to use a model treaty or a subsequent treaty

- to give more guidance to the arbitral tribunal;
- to facilitate an evolutionary reading of the investment agreement;
- to mirror a country's investment policy approach that may have evolved over the years from strictly capital-importing to both capital-importing and -exporting, for example.

The **Model BIT (2012) of the United States, Article 30 (3)** provides that "A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision".

This is very precise and targeted wording because they have the experience of the Free Trade Commission interpretation and one arbitral tribunal saying: "Why do I have to follow what the State says when we are in the middle of a dispute? This is opportunistic, and I am not bound by what the State party says".

[8] NAFTA Free Trade Commission, July 31, 2001: Notes of Interpretation of Certain Chapter 11 Provisions.

The same concern is addressed in **Canada Model BIT (2021), Article 32 (2)**: "If serious concerns arise as regards matters of interpretation, the Minister for International Trade of Canada [...] may agree to adopt an interpretation of this Agreement. An interpretation adopted by the Minister for International Trade of Canada and [...] shall be binding on a Tribunal established under this Section". This is particularly the section on investment treaties.

Further examples

China-Mauritius FTA (2019), Article 8.29 (3): *"A joint decision of the Parties declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision."*

Comprehensive Trade and Economic Agreement between Canada and the EU (CETA), Article 8.31 (3): *"Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date."*

What these two examples say is that "we, the treaty parties, have a right to interpret, and if we interpret, tribunals must abide by what we say". What the CETA says is that the Joint Committee may decide if interpretation shall have a binding effect from a specific date, which goes a bit further because it may go to an earlier date than the date of the actual meeting of a declaration by the Joint Committee.

Now let us look at examples of provisions of non-disputing party submissions:

> ***Canada model BIT (2021), Article 37 (4):*** *"The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section."*

> ***US model BIT (2012), Article 28 (2):*** *"The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty."*

Remember that if you are a non-disputing party you are not being challenged or sued by the investor. But you are a Contracting Party of this treaty (and of course, it works better if it is a multilateral treaty where you have more than two treaty parties) then you can intervene and say: "This is what I understand is fair and equitable treatment, or this is as I understand is an indirect expropriation".

5. The Reluctance of States to Use Interpretation Tools

In practice, States do not sufficiently make use of the tools that are available to them to clarify what is the meaning of the treaties when there is no clear wording, content, or source for a protection standard.

Sources from treaty parties account for only 29% of interpretive sources cited in arbitral awards. And tribunals' decisions can give the impression of a "closed-circuit feedback loop between tribunals and academics, unconstrained by the discipline of the treaty parties' practice or expectations".[9]

[9] See Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (January 12, 2010). American Journal of International Law, Vol. 104, page 190.

This has to do, of course, with the different roles of the State when it negotiates a treaty and when it is sued by an investor. States might feel no need to provide such inputs. It also has to deal with legal systems and tradition. For example, the United States consistently uses all these interpretive tools, as do other Common law countries where jurisprudence — the precedent — plays a role, and the other countries and regions never use these tools. The European Union has included it into the treaties it negotiates.

Another reason is that, of course, States may not be perceived as interfering with treaty-based dispute settlement.

6. Means to Reestablish State Control over International Investment Treaties

Firstly, there is a need to bring more clarity into the treaties themselves and **promote tighter treaty drafting**.

We will see that the early generations of treaties were rather vague when it came to the content of general principles or standards. Of course, a general principle of law is a principle — you do not need to include all sorts of examples of what can be a violation of that principle for the arbitral tribunal to be able to interpret it. But at the end of the day, with many years of experience in disputes, we see that there is an actual need to have a much clearer treaty drafting.

Secondly, there is a need for **capacity building on the use of existing interpretation tools**, because States do not use them sufficiently. Clearly, intervening into disputes as a non-disputing party involves resources, it requires that the State coordinates internally and that it participates in a dispute with all the time and costs associated with it. But it is an important tool that ought to be used more.

Thirdly, there is a need for **including explicit provisions on interpretation in the international investment agreements**

themselves, for providing for institutionalized authoritative interpretation (Free Trade Commission or Joint Committee) and for a clear reference to the source of the standards, whether international law or customary international law, in addition to the application of the Vienna Convention on the Law of Treaties.

And fourthly, there is, of course, a need for guidance on the **interpretation standards on key issues**, for example, if fair and equitable treatment does or does not include the protection of legitimate expectations of the investor, and guidance to find the occurrence of indirect expropriation.

LECTURE 2:

Protection Against Expropriation

1. Historical Background

Protection against expropriation is historically the most important standard of protection in investment agreements and in international investment law.

To start, there is this basic public international law statement that has been reaffirmed in numerous investment treaties and arbitrations:

> *There is a sovereign right by any State to take property from private citizens and to do with it what the State wants.*

Basically, there is a sovereign prerogative to expropriate foreign-held assets, a right to expropriate. This right has been further developed and codified in identifying a number of conditions that are necessary for a State to expropriate in a lawful manner under international law.

Four basic conditions must be fulfilled for an expropriation to be considered internationally lawful. First of all, expropriation must be made:

- in a non-discriminatory manner;
- for public purpose or benefit;
- following the due process of law (this can be challenged before domestic courts);
- with adequate compensation for the affected investor.

This has been restated over the years in the wording of the treaties, but it comes from what we call the Hull formula, which is the **Note by the U.S. Secretary of State Cornell Hull (1938)**:

> *"[N]o government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore."*

This has now found its way into the majority of investment treaties. There are few, which have a different formulation for compensation because they considered that this one was more adequate for developed nations and that one — for developing countries. But generally, in most investment treaties the conditions for expropriation to be lawful are stated in a treaty itself.

In most investment treaties starting from the earliest **Germany-Pakistan BIT (1959), art. 3(2)** there is a provision that says:

> *"Nationals or companies of either party shall not be subjected to expropriation of their investments in the territory of the other party except for public benefit and against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law."*

The last sentence means the possibility to appeal to the domestic court against expropriation and this right to be open and available also to foreigners, to the foreign investors.

2. Direct Taking of Property

Over the years, these provisions have been refined. They have focused on three different types of expropriation.

First of all, a **direct expropriation** is a direct taking of the property by the State through nationalization, or a direct requisition. It can take place through expropriation legislation. In *Crystallex v. Venezuela,* the arbitral tribunal found that:

> *"It is generally understood that a 'direct' expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure, [...]"*[10]

Nationalization is a term similar to expropriation with the addition that it frequently involves complete sectors of the economies as opposed to a particular project or a piece of land. For example, in Bolivia, or in Venezuela, the governments in early 2000 had expropriated the entire energy sector and said that energy generation belongs to the State, as well as all the coal and oil exploration and exploitation. So, the entire industry was nationalized and the State became the owner of the investments that were taken from the investors.

Here is the example of how nationalization is defined in the *OIEG v. Venezuela* case:

> *"'Nationalization' is a term similar to expropriation, with the addition that it frequently involves complete sectors of the economy and that the State normally assumes ownership of the investment it has taken from the investor."*[11]

[10] *Crystallex v. Venezuela* (ICSID Case No. ARB(AF)/11/2), Award dated 4 April 2016, para. 667.
[11] *OIEG v. Venezuela* (ICSID Case No. ARB/11/25), Award dated 10 March 2015, para. 32.

Confiscation is an outright taking without compensation and, therefore, does not comply with the legality of the requirement of compensation, which is a condition for an expropriation to be lawful. It may or may not fulfill other conditions such as having a legitimate purpose, but in any event, it does not fulfill the requirement of compensation.

3. Measures Tantamount to Expropriation

This is another category of measures that are not directly expropriations, but they have the same effect as expropriation in the sense that they will deprive the investor of his or her ownership rights in the investment.

NAFTA 1110(1) calls it "a measure tantamount to nationalization or expropriation". In other treaties, there can be found the wording "measures having the same effect or having an effect similar to nationalization or expropriation".

Here are two quotes from NAFTA cases. First is *Waste Management v. Mexico* (II):

> *"It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast, where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant. […]"*[12]

To take an example: you are exploiting a coalmine. Coal can be sold in the country and also exported. The government has taken a

[12] *Waste Management v. Mexico* (II), (ICSID Case No. ARB(AF)/00/3), Award dated 30 April 2004, paras. 143 and 144.

measure which says: "Coalmining from now on is forbidden". You are still the owner of your mine, but in practice, your property right amounts to nothing because you can no longer exploit and sell what you take out of the mine.

In the *Feldman v. Mexico* case, the tribunal also makes a distinction between the direct takings and measures tantamount to expropriation:

> *"Most significantly with regard to this case, Article 1110 deals not only with direct takings but indirect expropriation and measures 'tantamount to expropriation,' which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights. The Tribunal deems the scope of both expressions to be functionally equivalent."*[13]

This is because they have the same effect and result as the owner of the property is not able to exploit, or explore, or run the company, or operate the investment as a full owner.

4. Conditions for an Expropriation to be Lawful

Almost 98% of the treaties put the following conditions that are rooted in customary international law into the treaty text itself. Basically, in order for the expropriation of a foreign investor to be lawful it has to be:

- for a public interest,
- non-discriminatory,
- follow the due process of law,
- a compensation.

[13] *Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of the Tribunal dated 16 December 2002, para. 100.

In the *Al Tamimi v. Oman* case, the tribunal says about cumulative fulfillment:

> *"The four criteria for a lawful expropriation are, of course, conjunctive rather than disjunctive: that is, all four criteria must be satisfied before an expropriation may be considered lawful."*[14]

So, we have a clear framework for what we call "direct expropriation" but it is getting trickier when the State takes a measure that either indirectly or in a manner tantamount to expropriation results in depriving the investor of the control and enjoyment of his or her investment.

5. Indirect Expropriation

There is no definition of the investment treaties on what is an indirect expropriation. What we have seen before is that direct expropriation is pretty straightforward, it can be done through an expropriation decree or expropriation law, which is targeted at a particular land, or a particular industry or investment.

It can also be targeted at a particular industry, or sector of the industry as in the case of nationalization when you nationalize a banking sector or the energy sector. It can also take place through the confiscation of the property of the particular investor.

This is pretty straightforward. What is also straightforward is what are the conditions of expropriation to be lawful. We have seen, it has to be for public purpose. It is not for taking the property from the investor and giving it to a particular person, or the minister, or the family of the minister. It has to be non-discriminatory. It is not discrimination based, for example, on nationality, saying "we are expropriating all American investments as opposed to all the

[14] *Al Tamimi v. Oman* (ICSID Case No. ARB/11/33), Award dated 3 November 2015, para. 347.

European investments". It has to follow the due process of law which means that there is a right to appeal or review it and it has to be against prompt and effective compensation.

So, it is unquestionable and has its roots deeply in customary international law. Where we are getting into a less clear territory, where has been a lot of case law that has developed over the early years, is indirect expropriation and measures that are tantamount to expropriation because they result in a deprivation of the investor's rights and value of its or the control over it.

What we have here for indirect expropriation is a lack of definition. From a review of case law, we can see that it has to be an "effective loss of management, use or control or a significant depreciation of the value, of the assets of a foreign investor".[15]

But what makes it different between direct and indirect expropriation is that the legal title of ownership of the investments still belongs to the foreign investor, but it is worth less or nothing because the investor does not have the ability to use, control or manage the investments. And if the investor wants to sell it the value will be extremely depreciated.

One case which looked into indirect expropriation is the *Tecmed v. Mexico* case where the tribunal looked at different methods for expropriating indirectly and identified two types of indirect expropriation.

> *"[…] both expropriation methods [creeping expropriation and de facto expropriation] may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place."*[16]

[15] UNCTAD, International Investment Agreements, Key Issues, Vol. 1, p. 235.
[16] *Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award dated 29 May 2003, para. 114.

The one called “creeping” means that it is not by a single law or a single measure that the government will deprive the owner of use management of his or her investment or where the value of the investment will diminish a lot.

But it is taking place over the years. It can be done, for example, through taxation. When you invite investors to invest in your country you give very interesting tax rates and over the years you roll back on these investment incentives and by the end of a given period the investor will no longer be able to operate to make a profit out of the investments and the investment will consequently lose in value in an important manner.

Here I would like to take a series of examples that stand from a very recent range of cases that were brought against European countries because of the very liberal, open, and extremely strongly incentivized investments into renewable energy. A number of countries have put in place attractive investment conditions for investors to invest into renewable energy like wind or solar energy. Generally, because of a broader economic crisis, the host State has realized that the conditions that were given to investors in order to attract their investments were in fact not sustainable for the State because it resulted in very high energy prices for the public. The State then changed the conditions that had been given to the investors in the early days of their investments, first at the margin and then increasingly affecting the profitability of the investment. As a result, the investment was not receiving as much incentives as when it was set up first; the energy it produces is not bought at the same price by the State in order to be redistributed to the end customers; they did not sell energy or electricity at the same price that was originally agreed upon. And of course, the value of the investments had diminished considerably. If they had sold their plants at the time when the incentives were rolled back, they would have lost a lot of money.

These cases are only an example, but a number of cases where investors have claimed that the measures by the State were tantamount to expropriation because they resulted in an important complete loss of value of these investments have been brought against States in investment disputes.

In the area of indirect expropriation, case law has developed over the years. So now, to what I want to illustrate in this lecture, as I told you yesterday. What we see in the treaties as a result of the case law is the development of a number of criteria that tribunals have used in order to find an indirect expropriation. The second generation of investment treaties has developed criteria to guide tribunals and identify when an indirect expropriation may have occurred. These criteria are made for tribunals to assess: "The claimant says that it has been subjected to an indirect expropriation although the treaty does not say anything about what the indirect expropriation is. Here are elements that help us (tribunals) to identify that an indirect expropriation has taken place". They are generally based on criteria identified in various cases and that are crystalized by States when they include them into their model or new generation treaties. Among these criteria, some are clearly included, others are clearly excluded.

- Substantial deprivation:

It is not that you have to take the entire property away but you have to take a substantial part of the ownership away in order to constitute an indirect expropriation. An interference with the investment or its profitability at the margin is not an indirect expropriation.

- Durational aspects:

The value of the investment has to be diminished or completely lost for a foreseeably long or definitive time. It does not focus on fluctuations in the value but rather a definitive loss.

- Loss of control, management, use of the investment
- Frustration of legitimate expectations the investor had when making the investment

Tribunals have identified the fact that the State has committed under the investment treaty not to expropriate unless certain conditions are met. It is considered by the investors as an expectation that the property will not be expropriated or if the State has taken a specific commitment towards a particular investment or investor, the State has not reneged on it.

- Predictability and stability of the legal framework and the degree to which the legal framework under which the investment was made has been modified and how
- Discrimination

There should not be discrimination against a particular type of investment or particular nationality of investors.

- Proportionality

There is a theory that it is very much used in European law and has subsequently found its way to investment arbitration. Proportionality requires that the measure that is taken by the State has to be proportionate to its objective and that, if there are other means for a State to correct some negative economic effects rather than an outright expropriation or a measure that has the result of indirect expropriation, these means are taken into account and in any event, the burden of the economic loss is not only put on the foreign investors but more evenly distributed. It is a way of measuring by the tribunal whether the measure is proportionate to its objective — to take a metaphor, whether you are using a hammer to kill a fly — and whether the State could have taken other measures which would not have harmed the investor rather than taking this particular measure, which results in loss of the investments.

- Due Process

A last point which is generally embedded in a treaty itself but has also been analyzed in the jurisprudence is that there is a possibility to have recourse against the measure, to challenge it domestically and the due process element which is included in the criteria for a direct expropriation to be lawful, has also been respected in the case of an indirect expropriation.

6. Regulatory Expropriation

We mentioned as a condition for expropriation that it has to take place for public (not private) interest and that it is to protect or benefit the public. We have seen a number of regulatory measures that are taken by the State that have been considered by arbitral tribunals as regulatory takings. These cases are based on laws or regulations entered into by the State, not targeted at foreign investors or their investments but that have a direct impact on the foreign investment and its profitability. It is the legitimate regulatory action in the public interest (also called "police powers").

Let me take the example of two cases that look into the "public purpose" test.

The first is *Methanex v. USA,* where the tribunal found that "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".[17]

[17] *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005, Part IV – Chapter D, para. 7.

In accordance with the legitimate expectations of an investor, the government would not take a particular measure and would not, for example, regulate the field of business or change particular conditions agreed upon with the foreign investor. And what the tribunal says that this is not a general statement in an investment treaty, but it has to be a very specific commitment in writing to the particular investor that this type of regulation will not be enacted.

In the *Saluka v. Czech Republic* case the tribunal says: "In the opinion of the Tribunal, 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".[18]

In investment treaty cases, a number of tribunals have "corrected" the findings of earlier jurisprudence and held that what a State was doing which has an adverse effect on the value and on the actual control of the investors over their investments was not an indirect expropriation and by doing so, in fact, raised the threshold for finding that an indirect expropriation has taken place.

As a result, the case law on expropriation and on indirect expropriation has vastly diminished. It has become more difficult now for claimants to prove an indirect expropriation and this is for two reasons.

First of all, a bulk for jurisprudence has emerged, which has comforted the position that not everything a State does through its laws and regulation that has a negative impact on investment is tantamount to expropriation.

Secondly, treaties have become much more precise in their wording of what can constitute indirect expropriation and have given much more guidance to arbitral tribunals in identifying

[18] *Saluka v. Czech Republic*, Partial Award dated 17 March 2006, para. 262.

that indirect expropriation has taken place and have crystalized into treaty language a high threshold to find an indirect expropriation.

And one of the unexpected results is that claimants particularly have also changed their strategy now. They no longer raise claims for violation of expropriation provisions but they have moved to claim for violation of fair and equitable treatment, importing, as we will see, some of the criteria or tests used for indirect expropriation but no longer supported by jurisprudence or by treaty language.

7. Treaty Clarification

Let us see now what treaties have said about expropriation and what are the criteria the tribunal must follow in order to find that an indirect expropriation has taken place.

We can start with the US Model BIT. I like Model BITs because they are very consistent in wording. When you take a treaty that has been negotiated you will find provisions that are changed from the model, of course, because it has been negotiated between two parties, trying to accommodate different concepts, legal traditions, and experience. I would say, it is not as pure from a legal point of view as a model treaty. I think the model treaty illustrates better what the State really intends to grant in terms of protection.

What do we have under expropriation to clarify indirect expropriation? In the US Model BIT as well as in the Canadian but not in the vast majority of other treaties, expropriation is split into two parts. There is article 6 on expropriation, which sets the customary international law standard. And there is an Annex with more clarification or guidance.

Annex B of the **US Model BIT 2012** says:

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation] (1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

Very important here is that the US and their treaty partners make it very clear to arbitral tribunals: "You have to go back to customary international law in order to assess whether an expropriation has taken place".

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation] (1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation] (1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

The example of CETA is more or less the same. CETA is a recent treaty between the European Union and Canada, dating back to 2017. It is a state of art in terms of explaining what indirect expropriation is.

CETA, Annex 8-A

Expropriation

The Parties confirm their shared understanding that:

1. Expropriation may be direct or indirect:

(a) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

If you look at that you may say they just paraphrase what we have seen set by many tribunals and what was already in earlier treaties. But it is included here as a guidance to the tribunal, and it says very clearly that:

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:

(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

So, what the treaty says is that the mere fact that you lose money because of the State measure does not automatically make it an indirect expropriation.

(b) the duration of the measure or series of measures of a Party;

Is it something that has taken place overtime or is it something taken place in one go?

(c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and

Coming back to the *Methanex* case, it has to be a very specific commitment made by the State to this particular investor or a specific group of investors that is violated in order to constitute an indirect expropriation.

(d) the character of the measure or series of measures, notably their object, context, and intent.

Here we have a much more precise clarified test for the finding that an indirect expropriation has taken place and the criteria and step-by-step analysis that has to be made by a tribunal are clearly set out by the States in their treaty itself.

If you compare this approach by States in late 2015 and onwards with the 1959 treaty between Pakistan and Germany, which basically says: "you cannot expropriate unless the following conditions are met, it has to be for a public purpose, to be due process of law, non-discriminatory, provide compensation", you see that there is a huge change, an improvement or at least a clarification in the treaty itself clarifying what has to be looked at in order to qualify a State measure or series of measures as indirect expropriation.

I would like to conclude from this explanation that as a result of clarifying indirect expropriation in so much detail it has become much more difficult for investors to bring a case for indirect expropriation. Direct expropriation remains as it is — you have a permit to build a hotel somewhere, you have built it and have begun to operate it and then this permit is withdrawn and the operation of the hotel is given back to a State agency, that continues to be a direct expropriation. And finding an indirect expropriation has been similarly codified by both treaty language and case law.

LECTURE 3:

Fair and Equitable Treatment (FET)

Investment treaties are designed to protect investors against a limited and circumscribed set of political risks that can happen to their investments. They are no insurance policies against any business or industrial risk or any risk of force majeure. They are designed to cover very specific situations.

I have already mentioned expropriation. Another one is a commitment by the State to provide fair and equitable treatment, I will use the acronym FET, to the investor and/or its investment. Then there are a couple more standards of protection. One is full protection and security which relates to the physical protection of the investment in the State where it is located. Another important one is the guarantee by the State of the freedom of transfer and repatriation of the funds invested and the proceeds of the investment. Then there are the so-called non-discrimination guarantees, the treatment provisions like the national treatment and most-favoured-nation treatment provisions that do not protect against the risk itself but create an obligation on the part of the State to treat the foreign investor in a certain manner, which is not discriminatory.

One of the most frequently used and invoked provisions of investment agreements is fair and equitable treatment. I will look at it from two diverging points of view, that result from divergent interpretations and subsequent clarifications in the investment treaties themselves.

According to the United States, Canada, Mexico, and the countries that have negotiated treaties with them, fair and equitable treatment is a part of a customary international law standard of

treatment which has been interpreted and refined by the treaty negotiators over the years in order to reach now a very narrow understanding of what fair and equitable treatment is and where it finds its source.

Another interpretation of fair and equitable treatment is that it is a standard that does not require to be linked to any particular source of international law and that it is basically for the tribunal to assess based on a set of facts whether the conduct of the State is fair and equitable. It is also called the autonomous or treaty-based standard.

In my view, the clearer the treaty provision, the more defined the content of such a standard, the better it is for both parties of a dispute, the investor and the State. Because, on the one hand, the investor knows what to expect, on the other hand, the State knows what is expected from it in terms of thresholds, in terms of level of the standard, and in terms of what are the measures of the State that would be contrary to fair and equitable treatment.

If you look at the standard itself that says for example that "investments shall at all times be accorded fair and equitable treatment" you will probably agree that it is not a clear standard of protection in the sense that it does not say what "fair" is, it does not say what "equitable" is, and it does not link it to any corpus of international law where you could draw from what this standard is actually about.

I am going to look now with you into these two sets of standards. I think the US negotiators would strongly disagree with me. But in my view, it is the same standard. There is no American standard of customary international law or fair and equitable treatment, and European fair and equitable treatment. In my opinion, it is one and the same. It is just the responsibility of the negotiators to ensure that they link it to the appropriate source of international law that will allow tribunals to interpret (based on the facts of the case, of

course) but to interpret it with more certainty, more care, and less creativity than what has emerged over the years and has resulted in the need for clarification in the treaty language.

So, I will go from the divergence into the convergence and try to show that at the end of the day it is all part and parcel of one standard only, and what is important is that it is clarified in the treaty language in order to avoid any overly creative interpretations.

1. Historical Background and Minimum Standard of Treatment

The very first references to "equitable treatment" or "fair and equitable treatment" that we find in very early conventions[19] go back to the early days of investment protection treaties and were included from the outset into the Friendship, Commerce and Navigation Treaties concluded by the United States with its treaty partners.

Since the early sixties, all international investment agreements include a commitment by the State to grant it with very few exceptions. There were a couple of treaties that have omitted including fair and equitable treatment on purpose saying that: "we do not want to commit on fair and equitable treatment and therefore we leave it out", which has not prevented rare tribunal from saying that even if it is not written in the investment agreement it still applies because it is a principle of international law.

So, it is the standard that tribunals have been using especially bearing in mind the clarification of indirect expropriation that made it harder to prove that an expropriation even indirect or regulatory had taken place. Therefore, the vast majority of treaty cases currently

[19] See, for example, 1959 Abs-Shawcross Draft Convention on Investment Abroad, Article I: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties".

are based on a violation of fair and equitable treatment because it is a sort of what we call “expropriation light” like “Coca-Cola light”.

2. Diverging Interpretations: FET and FET as Part of CIL

There are two different types of fair and equitable treatment, it appears from the treaty language and from the case law. The one is, I would say, unqualified, which is not linked to any source and is autonomous. The other one is a minimum standard of treatment that has its source in customary international law and derives or builds on the minimum standard of treatment of aliens.

On the one hand, a vast majority of the 2.500 treaties in force to-date imply the use of the term “fair and equitable treatment” and do it in a fairly homogenous manner, with only few variations in the formulation of the standard. There is, of course, a handful of treaties which do not provide for fair and equitable treatment at all.

A majority of older, first-generation treaties say: “fair and equitable treatment” but **do not link it to a particular source**.

Then there are treaties that link fair and equitable treatment to **international law**. I would say, it is already better because at least you know where you can take the substantive content of conduct of the State from — it comes from international law, i.e. it comes from the relations between States.

Some treaties in recent days have used fair and equitable treatment in connection with **customary international law**.

And some treaties (which, I would say, are ill-advised) are using fair and equitable treatment in connection with **relative standards** meaning that they will say at all times investors shall be granted fair and equitable treatment that is not less than national treatment or most-favoured-nation treatment. In my view, this mixes apples with oranges because fair and equitable treatment is a standard

that does not need comparing with other treatment and the relative standards, and national treatment and most-favoured-nation treatment are all about comparing the treatment of the foreign investor to the treatment of domestic investors or to the treatment of another foreign investor. So, mixing them together does not help tribunals in finding whether the given treatment is fair and equitable (because the treatment provided for foreign investors, in general, can be very unfair and very inequitable) with your own citizens and investors. And again, the sources of these standards differ: the one is national law and the other one is international law.

Let us look now into interpretations and application by arbitral tribunals before we see what "corrective" actions have been taken by States in their subsequent treaties.

We will first look at interpretation and application of standard FET provisions and then see how the minimum standard of treatment, including FET, has been interpreted by tribunals who wandered away from what the States had in mind. We will then look at the interpretation issued by the NAFTA Free Trade Commission of what fair and equitable treatment is and where it has its source. Afterward, this formulation has been used in most of the treaties that are concluded between the United States and Mexico, Chile, Canada very clearly using this standard. We will look at NAFTA decisions after FTC interpretation and see whether some concerns remain.

3. FET Provisions in Treaties

Unqualified FET provisions without reference to international law or any further criteria (referred to as unqualified, autonomous, or self-standing FET standard). The way it is worded in treaties is:

"All investments made by investors of one Contracting Party shall enjoy fair and equitable treatment in the territory of the other Contracting Party."[20]

"Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party."[21]

That is basically the broadest and less qualified fair and equitable treatment provision, but it is found in the vast majority of investment treaties, at least in the early ones.

FET provisions linked to international law

We are not yet in customary international law, which, in my view, is much more circumscribed and less broad than international law. But you find that the treatment is linked to international law where it says:

"Each Party shall at all times accord to covered investments ***fair and equitable treatment*** *and full protection and security and shall in no case accord treatment less favourable than that* ***required by international law."***[22]

And the one between Croatia and Oman says the same thing:

"Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded ***fair and equitable treatment in accordance with international law*** *and provisions of this Agreement."*[23]

[20] BLEU (Belgium-Luxembourg Economic Union) — Tajikistan BIT (2009), art. 3(1).
[21] Mauritius — United Arab Emirates BIT (2015), art. 3(1).
[22] Bahrain — United States of America BIT (1999), art. 2(3)(a).
[23] Croatia — Oman BIT (2004), art. 3(2).

FET provisions linked to the minimum standard

The Canada Model BIT (and subsequently all the treaties concluded by Canada) is the illustration of the FET provisions linked to the minimum standard. It says:

> *"Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."*[24]

FET and minimum standard of treatment of aliens

The source of this standard goes back to the early 20th century, and an important milestone in this development was the *Neer* case, a case between a gentleman called Mr. Neer and the United Mexican States. This was the case of an American citizen who was trading in Mexico. He was jailed by the Mexican government and subsequently, he died.

Relying on the *Neer* case as a first manifestation of this standard that has then crystalized into customary international sets a high threshold to the finding of a violation of FET, because it basically requires treating a foreign very badly you have to do something really egregious like killing him or sending him to jail without any judgment. The basic obligation of the State would be not to deny justice, but to provide access to justice including a fair trial.

In order to violate this standard, you really have to behave in an egregious manner towards the foreign investor.

> *"…the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to insufficiency of governmental action so*

[24] Canada Model BIT 2004, art. 5(1).

> *far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."*[25]

In their first investment treaty disputes and consistently over the years, the United States have argued that fair and equitable treatment is nothing more than the *Neer* standard of 1926 that comes from customary international law where States take their obligations from. Different tribunals have looked at it in different ways and held that the *Neer* standard had evolved: "This is no longer what fair and equitable treatment is about". There has been an evolution in the standard over time and, in fact, it is now lower than the *Neer* standard.

The tribunal in *Mondev International Ltd. v. United States of America* said:

> *"Neer and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments, it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms — had they been current at the time — might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."*[26]

So, the tribunal thought, and I make it up for you: "No, we do not buy the fact that 80 years later the standard is still the same and

[25] *Neer v. United Mexican States* (1926) 4 RIAA 60, p. 61.
[26] *Mondev International Ltd. v. United States of America*, Award dated 11 October 2002, para. 116.

it is still a standard of physical protection of an individual and a really basic access to justice and no denial of justice".

FET and CIL — NAFTA Decisions

Several decisions were made by NAFTA tribunals in early 2000 where tribunals basically said: "You are telling us that the *Neer* standard is still the same as in 1920 and barely revisited. But we do not buy it, and it is our responsibility to say what fair and equitable treatment means nowadays".

In these cases, particularly, in cases brought against Canada,[27] the State was found to have breached the treaty.

The FTC Interpretation

The three NAFTA parties — Canada, Mexico, and the United States — decided to come together and clarify: "What do we mean by fair and equitable treatment? Apparently, the way we have written it in our earlier treaties is not clear enough".

It is the State's responsibility, who are drafting these treaties and who are negotiating and concluding them, to say what they actually mean, should there be a lack of clarity and a need for guidance to tribunals in the application of the standard.

Let us look carefully at what this interpretation says.

The Trade Ministers of the three NAFTA countries rely on:

Article 2001(2): The Free Trade Commission (FTC) shall "resolve disputes that may arise regarding [the Agreement's] interpretation or application."

[27] See, for example, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award dated 30 August 2000; *S.D. Myers v. Canada*, Partial Award dated 13 November 2000; *Pope & Talbot, Inc. v. Canada*, Award dated 10 April 2001; *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, 2001 BSCS 664 (May 2, 2001).

> *Article 1131(2): "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under [Section B of Chapter Eleven]."*
>
> Have decided that:
>
> *Minimum Standard of Treatment in Accordance with International Law*
>
> *1. Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*
>
> *2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*

What the States have said is that there is no difference between customary international law minimum standard and standard such as fair and equitable treatment or full protection and security (FPS) because FET and FPS do not require a higher threshold. They are also embedded in the customary international law standard of treatment of aliens — the *Neer* standard, which we spoke about earlier.

> *3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).*

As a result of this clarification by the FTC, NAFTA tribunals have "fallen in line" with the interpretation of the Contracting States. In *Mondev Int'l v. USA*, the tribunal says:

"Article 1105(1) did not give a NAFTA Tribunal unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case."[28]

The message was well received. The Free Trade Commission says that "fair and equitable treatment is nothing above the customary international law minimum standard of treatment and it is very closely and narrowly defined", and the jurisprudence follows:

"…the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law."[29]

Loewen v. USA does the same thing:

"'[F]air and equitable treatment' and 'full protection and security' […] constitute obligations only to the extent that they are recognized by customary international law. […] To the extent, if at all, that NAFTA Tribunals in Metalclad Corp v. United Mexican States, S.D. Myers, Inc. v. Government of Canada and Pope & Talbot, Inc. v. Canada may have expressed contrary views, those views must be disregarded."[30]

What we see is that arbitral tribunals have considered themselves to be bound by the interpretation that was given by the Free Trade Commission of the standard they applied.

Waste Management II v. Mexico says more or less the same thing and tries to provide more content:

"[T]he minimum standard of treatment of [F&ET] is infringed by conduct attributable to the State and harmful to the claimant if … arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory

[28] *Mondev Int'l v. USA*, para.119.
[29] Ibid.
[30] *Loewen v. USA*, ICSID AF, Award dated 26 June 2003, para. 128.

and exposes the claimant to sexual or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process…"[31]

So, in this particular case, we see that the tribunal is trying to give content, to list elements that will allow a tribunal to identify the violation of FET, but even here, they go back to a failure of natural justice.

This circumscribed definition of what constitutes FET and how it is linked to customary international law and to the minimum standard of treatment of aliens has been consistently advocated by the United States in cases brought against it. It has been used to counter attempts to read into an obligation to provide FET the need for the State to be transparent and not to change its laws and regulations, or not to upset the legitimate expectations of foreign investors. I would like to illustrate this consistent approach by looking at the US Counter-Memorial in *Glamis Gold v. USA* which is

- addressing the absence of "any relevant State practice to support its contention that States are obligated under international law to provide a transparent and predictable framework for foreign investment";[32]
- addressing the absence of "any customary international law rule requiring States to regulate in such a manner — or refrain from regulating — so as to avoid upsetting foreign investors' settled expectations with respect to their investments";[33]

[31] *Waste Management II v. Mexico,* para. 98.
[32] *Glamis Gold v. USA,* dated 19 September 2006, pp. 226-27.
[33] Ibid., pp. 230-33.

- rejecting attempts to "lift one factor to be considered in an indirect expropriation claim [i.e. legitimate expectations] and adopting that factor as the sole test for a violation of the minimum standard of treatment".[34]

The United States says in this case: "Not only do we reject fishing from other standards or finding some content that is not substantiated by customary international law, but in addition, we strongly object to going to the expropriation standard taking out from the expropriation standard some factors that then can be used to find the violation of the minimum standard of treatment".

4. Link Between FET and Minimum Standard

Glamis v. USA

In *Glamis v. USA*, the tribunal followed the arguments of the United States and said that there are indeed treaties that provide FET that might go beyond customary international law minimum standard because they do not refer specifically to the source of the standard and therefore, it is an autonomous obligation taken by the State under the treaty. The *Glamis* tribunal also finds a fundamental difference between a treaty, which links fair and equitable treatment to customary international law, like the NAFTA for example, and those that do not link fair and equitable treatment to any customary international law or international law standards. Because treaties have to be interpreted based on the treaty language and because of this fundamental divide between those treaties where fair and equitable treatment is basically stand-alone or autonomous and free trade agreements like the NAFTA that are to be understood in reference to customary international law, the tribunal will have to look into customary international law and not an approximation with the FET standard in other treaties.

[34] Ibid., pp. 233-34.

Para. 606 ("it finds two categories of arbitral awards that examine a fair and equitable treatment standard: those that look to define customary international law and those that examine the autonomous language and nuances of the underlying treaty language. Fundamental to this divide is the treaty underlying the dispute: those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention.")

Para. 608: "As Article 1105's fair and equitable treatment standard is, […], simply 'a shorthand reference to customary international law,' the Tribunal finds that arbitral decisions that apply an autonomous standard provide no guidance in as much as the entire method of reasoning does not bear on an inquiry into custom."[35]

In my view, making this divide was very useful for the *Glamis Gold* tribunal because it clearly allowed the tribunal to say: "We are not going to look into anything which is not linked to customary international law or any other type of treatment". But there is some "collateral damage" in this approach because the *Glamis* case has written this divide into stone, which is not correct, in my view.

Merrill & Ring v. Canada

Here is also an illustration of a later tribunal of 2010.

Para. 182: "The most complex and difficult question brought to the Tribunal in this case is that concerning fair and equitable treatment. This is so because there is still a broad and unsettled

[35] Ibid., pp. 606-08.

discussion about the proper law applicable to this standard, which ranges from the understanding that it is a free-standing obligation under international law to the belief that the standard is subsumed in customary international law."

Para. 213: "In conclusion, the Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the Neer case and its progeny. Specifically, this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. ***The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard."***[36]

So, just to recap, in the case of treaties that have linked fair and equitable treatment to a customary international law standard, we see that in the early days there was a very strict leaning by the State parties on the *Neer* standard in their arguments. Tribunals have then said: "we do not buy that the *Neer* standard is still the one that we need to apply" and have gone into creative or broader interpretation.

The Free Trade Commission has then said: "Stop. That is not what we agreed upon. We agreed that it has to be linked to customary international law and it is not different from this minimum standard of treatment". This clarification has resulted in a fairly consistent application by tribunals of the standard and the need to find the required conduct in customary international law.

The difficulty for arbitral tribunals in the face of this strict interpretation by the FTC is still to give content to the standard itself, under customary international law, as it applies to modern

[36] *Merrill & Ring v. Canada* (ICSID Case No. UNCT/07/1), Award dated 31 March 2010.

or contemporary international law. And we will see in the next part of this lecture that the attempt at giving content has also been a constant struggle for tribunals looking into violations of FET as an "autonomous" standard as the *Glamis* tribunal has called it.

5. FET as an Autonomous Standard

This is the standard of treatment that is not linked to customary international law or international law and just says that investors shall at all times be granted, or that the State shall grant fair and equitable treatment and full protection and security to the investments of investors, with minor variations, as I explained earlier.

I repeat here that, in my view, there are not two different standards to which States can be held as regards the treatment of foreign investors: one standard that would apply to North American States because they have clarified that it is linked to customary international law minimum standard of treatment and another standard that would apply to say Asian or European countries because they do not. But let us look into the interpretation of its content that has been given by arbitral tribunals.

This is indeed a most open formulation and one that has given rise to the most creative and sometimes unrealistic interpretations by arbitral tribunals, who did not have a source or a standard in international law they could use.

Here is one of the examples of creative interpretation which comes from the *Tecmed v. Mexico* tribunal Mexico is a NAFTA party, remember the clarification we just talked about and the link to the customary international law standard. But they also have bilateral investment treaties. In this case, there was a bilateral investment treaty with Spain, that did not refer to any source. The tribunal nevertheless tried to link it and find its content in international law

but it linked it to the international law principle of good faith and then gave it some content, as follows:

> *"[I]n light of the good faith principle established by international law, [the provision] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."*[37]

What the tribunal says is that the State must act in a manner that is consistent with what the private party expects from the State.

To me, this is not a correct interpretation of the standard and application of international law. In my view, you cannot say, on the one hand, there is a principle in international law that works among State parties — it is not something defined by private parties — and then for the tribunal to say what international law requires of a State is that it takes into account what the foreign investor expected when making its investment. This is the standard to which the State shall be held: what an investor expects.

The tribunal then continues by saying:

> *"[T]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. […]"*[38]

So, a State must always be consistent. But find me a State where there is full transparency as expected from foreign investors in

[37] *Tecmed v. Mexico*, para. 154.
[38] Ibid.

their relations with the State. The reading of the standard is really unrealistic and in any event too high.

This is an example to illustrate the two approaches vis-à-vis FET. If we compare this with the content of the *Neer* standard that the US has insisted over the years is what customary international law expects, then we will see there are three oceans between these two interpretations. The *Tecmed* case is really the one that has triggered a lot of reaction by States.

Because this is what it also says:

> *"The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. … The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. […]"*[39]

So, not only is the tribunal completely going overboard in its assessment of what these obligations of the State are, but it is also wrong because it includes as a part of the obligation under FET, elements of the expropriation standard which is depriving the investor from its investments without compensation and making this a part of fair and equitable treatment.

Here is an example of another case, *Saluka v. Czech Republic*,[40] that has tried to put some flesh around the term "fair and equitable treatment" and here are some of the salient parts of its reasoning.

- No reference to international law in the treaty at hand, but

[39] Ibid.
[40] *Saluka v. Czech Republic*, UNCITRAL, Partial Award dated 17 March 2006.

- General standards cannot be reduced to a precise statement of rules, "though shall do this or though shall do that…"
- The tribunal is not asked for a decision *ex aequo et bono,* meaning that the tribunal must look into the applicable international law for guidance and not decide on what it considers is fair and equitable by its own standard
- A tribunal does not have an open-ended mandate to second-guess government decision-making
- Specification through judicial practice

Here is what the tribunal held:

"Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."[41]

Again, that was an attempt for the tribunal to say: "This is what we consider as fair and equitable treatment, based on what we have".

So, you see that tribunals have been struggling to give some content to the obligation to provide FET, they have looked for sources, they have approximated, linked it to other decisions, and ultimately began to find some elements that have emerged over the years.

Elements of FET found in arbitral awards

- Fact-specific assessment:

Tribunals have found that there is a need to weigh carefully the facts of the case and that there is no one rule "fits all".

[41] Dutch-Czech BIT, art. 3(1).

- Procedural fairness and due process (denial of justice)

Procedural fairness and due process (denial of justice) have emerged consistently as an element of FET. A number of cases looked at a denial of justice. For instance, there are cases against Ecuador where the investor has argued that there was a denial of justice because took ten years before the Supreme court in Ecuador could decide about the case and therefore the domestic justice procedure denied the investor justice.

- Good faith

We have seen that good faith is a principle of international law but that it's translation into the actual behaviour of a State towards a foreign investor is more difficult to set as a requirement.

- Absence of discrimination and arbitrariness

It again borrows from another set of provisions in investment treaties which are discrimination provisions and tries to include this into fair and equitable treatment and element of comparison.

- Reasonableness, proportionality

- Transparency

Provided you consider that this requirement is set internationally, in my view, it is problematic because there is no international law requirement on a State to be transparent about its domestic legislation, rulemaking, and administrative procedures. Transparency is a creation of the World Trade Organization and international trade law environment. In the multilateral context, where States agree among themselves to remove barriers or open sectors of their economy to international trade, there is a need to be transparent in order to allow the other member States of the WTO to monitor what is going on and what different States are doing in terms of compliance with these obligations. But in my view, it is not

standard of international law that would apply to foreign investors specifically.

- Stability and predictability

Stability and predictability for the foreign investor of the legal framework that applies to its business.

- Legitimate expectations (of the foreign investor)
- Legality

This is the content that tribunals tried to assemble over the years through cases that gave flesh to fair and equitable treatment in international investment treaties.

6. FET Provisions in Recent Treaty Practice

FET provisions with additional substantive content

Now we see a first attempt at including some content into the fair and equitable treatment standard in the treaty itself. We find it in a number of treaties because treaties and their parties have reacted to the creativity of tribunals and broadness of the standard, particularly when States have regulated a particular sector of their economy.

Let us look at the example of the ASEAN-Australia-New Zealand free trade agreement which says:

> *"fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;"*[42]

It sets a comparator to allow the tribunal to say "it has to be a denial of justice" in order to equate to a violation of fair and equitable treatment. Nothing more, but also nothing less.

[42] AANZFTA, cap 11, art. 6(2)(a).

The India Model BIT says:

> *"No Party shall subject investments made by investors of the other Party to measures which constitute* ***a violation of customary international law through****: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment."*[43]

This is very close to the *Neer* standard, referred to by the United States in their treaties and in their treaty dispute, if you remember what we said earlier.

CETA, which is the Canada-EU free trade agreement, says:

> *"A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress, and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."*[44]

It tries to narrow down but at the end it says there may be other elements of fair and equitable treatment that the tribunal can look at. But they have to be in a treaty, of course.

[43] India Model BIT 2015, art. 3.1.
[44] CETA, art. 8.10(2).

The **RCEP**, the treaty between China and Pacific countries also deals with fair and equitable treatment narrowing down the commitment to the following content:

> *"1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.*
>
> *2. For greater certainty: (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings."*[45]

I would like to look now with you at the special case of legitimate expectations by the investor, as I am sure you can tell that this is one of the elements of FET that I personally find problematic.

7. The Case of Legitimate Expectations

Let me look again at the case of

Tecmed v. Mexico

Facts:

- *Tecmed* acquired a landfill of hazardous industrial waste in 1996.
- The license issued to operate the landfill had to be extended every year.
- In 1998, *Tecmed's* request to extend the license was rejected, based on breaches of regulation.

[45] RCEP, Article 10.5 Treatment of Investment.

- *Tecmed* claimed that the decision was political and constituted an expropriation, breach of FET and FPS under the Mexico — Spain BIT.
- Mexico claimed that the denial of the permit is a control measure in a highly regulated sector which is very closely linked to public interests.

The treaty provision — a classical European type of treaty — provides that "Each Contracting Party shall guarantee in its territory fair and equitable treatment, in accordance with international law, for the investments made by investors of the other Contracting Party".[46]

Award dated 29 May 2003:

Para. 154: "The Arbitral Tribunal considers that this provision [art. 4(1)] of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."

Para. 157: "Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws."

Just to further illustrate attempts to give content to FET, there are cases that look into including into FET an expectation by foreign investors no matter how legitimate it might be. I find it really problematic, as I told you already. Why? Because we are

[46] Mexico — Spain BIT (1995), Article IV (1).

talking about the standard of international law and the conduct that the State has to follow because international law is not created by what private parties expect. It is created by what States do, in a way States conduct their business or, as clarified by the NAFTA FTC, it is created by what the States do, a general and consistent practice of States (as spelled out by the Annex on Customary International Law of United States BITs and Free Trade Agreements) that they follow from a sense of legal obligation. This is really what I want to emphasize.

CMS v. Argentina

Para. 275: "The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. […] It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision."

Para. 281: "The Tribunal, therefore, concludes against the background of the present dispute that the measures adopted resulted in the objective breach of the [FET] standard laid down in Article II(2)(a) of the Treaty."[47]

Another element of FET: proportionality in recent renewable energy cases under the Energy Charter Treaty

These are cases that are more recent and have looked into the different elements, particularly, in the cases of renewable energy disputes under the ECT which have started looking at other means of identifying violations of fair and equitable treatment. Particularly, those who have started to do what I will call "evaluation of proportionality". Is the measure by the State proportional to its aim, which is, for example, to redress some economic equity or mitigate the effects of a crisis? Is the way it affects foreign

[47] *CMS v. Argentina* (ICSID Case No. ARB/01/8), Award dated 12 May 2005.

investors proportionate or are they been imposed by the State a too important share of the economic burden? Or to put it in a different perspective: if something happens in the economy of the State do foreign investors have to share the burden of measures that redress or help the economy, for example in terms of currency control or convertibility, in terms of tax contribution, or are they protected by the FET provision of an investment treaty that the legislation and regulation will not change, because they are foreign, from this effort that every citizen of the country has to make? As you will see, this question has been underlying the findings of some tribunals.

***Charanne and Construction Investments v. Spain*:**

"The Tribunal shares the position of tribunals that have estimated, based on the good faith principle of customary international law, that a State cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations."[48]

***Blusun v. Italy*:**

"It is true that informal representations can present difficulties, which is why tribunals have increasingly insisted on clarity and the appropriate authority to give undertakings binding on the State. It is also true that a representation as to future conduct of the State could be made in the form of a law, sufficiently clearly expressed. But there is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment. There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right. International

[48] *Charanne and Construction Investments v. Spain* (SCC Case No. 062/2012), Final Award dated 21 January 2016, para. 486.

law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only."[49]

***RWE Innogy v. Spain*:**

"First, in considering whether a legitimate expectation has been generated that falls for protection under Article 10(1), a representation in the form of domestic law cannot correctly be elided with a specific promise or contractual commitment: a law remains a norm of general application (greater or lesser), and only applies whilst it remains in force. Further, if the application of the Article 10(1) FET standard turns on a question of whether legitimate expectations had been defeated, and it were accepted that such expectations could readily be generated by domestic law, the FET standard would in practical terms start to approximate an overarching stabilization clause, elevating each change in a domestic legal regime to a source of potential breach of international law. […] Second, however, the absence of a specific commitment does not mean that the fact that an investor has invested by reference to a given tariff regime ceases to be a relevant factor in applying the FET standard under Article 10(1). The Tribunal's task is to assess whether the Respondent State has acted fairly and equitably, and in considering this one important tool is an assessment of whether the change to a given tariff regime is disproportionate, […]"[50]

8. Clarifying Treaty Language

From the examples below we see that in recent treaties, contracting States have reacted to the use and to the reference to legitimate expectations by the investor and they have tried again to narrow them down by providing:

[49] *Blusun v. Italy* (ICSID Case No. ARB/14/3), Award dated 27 December 2016, para. 371.
[50] *RWE Innogy v. Spain* (ICSID Case No. ARB/14/34), Decision on Jurisdiction, Liability and Certain Issues of Quantum dated 30 December 2019, paras. 461 and 462.

CETA:

"When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a ***specific representation*** *to an investor to induce a covered investment, that created a* ***legitimate expectation****, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."*[51]

CPTPP:

"1. Each Party shall accord to covered investments treatment ***in accordance with applicable customary international law principles****, including fair and equitable treatment and full protection and security. […]*

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an ***investor's expectations*** *does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."*[52]

So, there are different ways in different treaties to deal with these legitimate expectations that have emerged from jurisprudence (overly broad jurisprudence, in my view). Subsequent treaties are trying to clarify that: yes, you can look at the legitimate expectations invoked by the investor but only if they are specific representation to investor about a particular investment.

[51] CETA, art. 8.10(4).
[52] CPTPP, art. 9.6.

LECTURE 4:

National Treatment and Most-Favoured-Nation Treatment (non-discrimination)

In this lecture we will deal with another set of standards that, in my view, are different from the standards of protection that we have seen so far, namely, protection against expropriation, freedom of transfer of funds, full protection and security.

These standards of treatment are prescribing the way the investors are to be treated not in an absolute way but rather in comparison to the way other economic actors are being treated. These commitments are different in essence from the standards of protection because they have to be spelled out specifically in the treaty. If they are not in the treaty, they cannot apply. The tribunals can always find that international law contains a duty for the State, for example, of good faith, or transparency. This is the kind of conduct that — "falls from the sky". I like this image, which comes from customary international law. The sky is public international law principles; they are embedded in international law that will prevent a State from acting in a certain manner. This is exactly the way customary international law is defined. It is a standard to which States hold themselves because of their participation as actors in international law.

Here we are looking at standards found in treaties only, and this is why we call them conventional standards. They do not fall from the sky. Most importantly, they are not universal. They are not standards or principles, but they require what we call a comparison. So, in order to identify whether investors are treated in accordance with an obligation of national treatment or most-favoured-nation treatment what you have to do is to compare. Fair

and equitable treatment is absolute. It has to be fair and equitable towards a particular investor. The expropriation standard is an absolute standard and does not require to compare with domestic or other foreign investors. Whereas in national treatment and most-favoured-nation treatment we have a comparative standard because we need to compare the treatment afforded to the foreign investor, to the treatment of the domestic investor, or the treatment afforded to another investor. In my view, this is where an unclear overlap between public international law and international investment treaties which also contain economic and business components, and which deal fundamentally with a private entity — the foreign investor is a private entity. It is important to keep it in mind when looking at national treatment and particularly at most-favoured-nation treatment. Because most-favoured-nation treatment, as the term precisely says is about favoured and less favoured nations, not individuals. And once again, investment treaties are using an international law mechanism of comparing the treatment among other States to the treatment among other investors. So, we are losing the State component and bringing it down to comparing investors in the same circumstances under the treaty.

1. Historical Origin of National Treatment

It is important to understand that national treatment is used in investment treaties for two different purposes. One is in order to force the State into opening up to investors from outside and not to reserve sectors or industries, or entire parts of the economy to the domestic investors. It may sound very strange today, because every country on earth is looking for foreign investments, and for foreign capital in the broadest sense to help finance their economic growth. States are not looking for investors only in the oil industry or in the coal industry, but if there is a foreign investor willing to bring in foreign capital to develop any kind of economic activity, nowadays States are, I would say, to 90% open to foreign investments.

There are still few areas of the economy that may remain closed to foreign investors, and this is mainly for political or institutional reasons. For example, there may have been, like it was the case of Venezuela, a nationalization of an entire sector of industry, and from there on no foreign investment is desired and is allowed to enter into this particular sector.

Other than that, most of the States nowadays are completely open to foreign investments and actively promoting and attracting foreign capital. This was not the case sixty years ago. We have to go back to the post-World War and post-colonial period where a major claim of the newly sovereign States was to regain control over their natural and national resources. Basically, at that time, countries and their economies were closed to foreign capital and investments and were only opening up step-by-step and in a very focused and strategic areas where they needed the technology, or the export market, or the capital because they did not have it.

In the early sixties and from then on, national treatment was used as a tool for liberalization meaning removing barriers to entry and operation of foreign investors. This way of liberalizing at the end of the last century was through national treatment by saying that the investor of a foreign county will enjoy the same treatment or treatment no less favourable than the treatment afforded to domestic investors. In a nutshell, when a sector of the economy is open to domestic investors, it has to be open to foreign investors in the same conditions.

So, we see here the relative nature of the standard. It is about comparing, it is not an absolute standard, it does not fall from the sky of public international law, it is a conventional standard because it has to be included in the agreement in order to apply, and it requires a comparison of treatment.

There are two schools of conventional practice as regards national treatment. A school of practice of the Western hemisphere

which was mainly driven by the United States which considered national treatment as a tool to facilitate entry and to make these treaties a means of opening up to their investments.

Another school is the more conservative school of treaties, which was more used in the European countries that were also mostly capital-exporting but they did not use these investment treaties as a tool for opening up. They considered that national treatment would only apply once the investment has been made and has entered the country in accordance with the laws and regulations of the host State. So, basically, if the laws and regulations of the host country say: no foreign investment is allowed in this sector of the economy, the treaty commitment does not kick in. The national treatment provision will only start to work and to protect the investor against discriminatory treatment once the investment has been admitted into the country.

So, one school is about liberalization, lowering barriers, changing the regulation of the whole State, about lowering any obstacles to entry. The other one is observing the existing barriers, but it applies once the investor is in. The investor has to enjoy full national treatment meaning it has to be treated exactly as the domestic investors.

2. National Treatment in the Pre- and Post-Establishment Phase

General

National treatment provisions are pretty much always worded in the same manner, depending on whether they apply to the pre-establishment phase or that they apply only to the post-establishment phase when the investment is already made and has been admitted in accordance with the laws and regulations of the host State. The pre-establishment phase of the investment is the

stage where the investor has not yet made his or her investment but rather is still contemplating the investment, is in the process of making an investment for example by applying for a license or a concession but has not yet transferred the capital or set up the local company that will be the vehicle of the investment. This is where the difference in the wording of the clauses lies: the phase the national treatment provision applies to.

Now even if, as I said earlier, nowadays 90% of the countries are open to foreign investment and seek to attract foreign capital into their economy, there are always sectors of the economy that remain closed. The way National Treatment clauses differ whether they cover the pre-establishment phase or the post-establishment phase of an investment and whether they seek to grant national treatment through the treaty or whether they rely on the admission into the host State in accordance with its laws and regulations.

Let me take some examples to illustrate:

The classical National Treatment provision that does not seek to open the market or the economy, that relies on the domestic laws and regulations for the entry and establishment of the investment and that does not contain any exceptions is generally worded as follows:

BIT between the Russian Federation and Thailand (2002):

> *"Each Contracting Party shall accord in its territory to investments made **in accordance with its laws** by investors of the other Contracting Party treatment no less favourable than it accords to the investment of its own investors […]"*

The "liberalization" National Treatment provision, which seeks to apply to the pre-establishment phase is typically worded as follows:

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

And here you can see the different phases of the life cycle of an investment being expressly covered, including the pre-establishment phase which is covered by the terms "establishment, acquisition, and expansion".

There are always some sectors that are reserved for the State. The most obvious one is, of course, everything that has to do with the military and defense industry where the State does not wish to let investors that are from outside enter this particular sector of the economy.

You also have an education that in most countries is a sector that is reserved to the State, as is public health, but nowadays you have more and more privatization of health care or even schools and universities that can be private. So, here in investment treaties, you have very often a limitation only to the State, to the domestic private sector, and domestic operators, which are not open to foreign investors.

In treaties that seek to liberalize the economy and to open it up to foreign investors from the other contracting States, the exceptions that exist in each economy, need to be spelled out clearly in the treaty as exceptions to National Treatment. If you look at the Free-Trade Agreements concluded by the United States with its treaty partners, you will see an annex or schedule referring to National Treatment that lists all the sectors of the economy where national treatment does not apply, basically that remain reserved. Again, keep in mind that National Treatment is not an absolute standard that falls from the sky and has to apply, it is a conventional standard that is being negotiated between the

contracting parties and all the exceptions where it does not apply must be listed.

Conversely, most of the treaties that do not seek to open up or liberalize the economy for foreign investment, the exceptions to entry of foreign investors can be found in the laws and regulations of the host State and not in the treaty itself.

> *"Foreign investors will be granted a treatment that is not less favourable than the treatment that it is granting to its own investors, in accordance with its national legislation."*[53]

This is really the trigger "in accordance with the laws and regulations of the host countries". If the laws and regulations of the host country do not allow an investment to enter, the investment will not be admitted. But once the investment is in the country then national treatment kicks in, and the investor has to be treated exactly like the domestic operator or investor.

I mentioned that national treatment requires comparing the national investor with the foreign investor, and the way of comparing is important. And this is where over the years States have refined their treaties by including comparators and tests to compare, in order to give guidance to tribunals when applying them.

But first, it is important to remember that when we talk about national treatment, we are looking at treatment on the basis of nationality. A foreigner is treated differently because of his or her nationality than the way the domestic investor is treated.

There are three tools or tests, with variations in their wording. One is that the foreign investor and the domestic investor that are being compared have to be "in like circumstances". The second one is that there are different variations in the way the treatment has to be compared: either it has to be the same or it has to be "not less

[53] Argentina — Spain BIT (1991), art. IV(5).

favourable than…" — there are variations around this terminology in treaties. And the last one is, in case there is a discrimination or a different treatment, whether it is done for justifiable reasons.

There is a question — if the State does it for legitimate reasons or in a totally capricious or political approach. This is also an element that you find in more recent investment treaty wording.

Here is a quote from the *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* case where the tribunal has identified these three tests**:**

> *"The Tribunal will first determine whether Bayindir's investment was in a '**similar situation**.' If so, it will then assess whether Bayindir's investment was accorded **less favourable treatment** than PMC-JV and whether the difference in treatment was **justified**."*[54]

So, here are three elements of comparison looked at or summarized by the Baiyindir tribunal. Let us see how they have found their way into more recent treaty practice to ensure that the comparison is done as States want it to.

3. National Treatment: Required Comparison

Like circumstances

The first element of comparison is to make sure that you compare apples with apples and oranges with oranges, and that you indeed look at domestic investors that are either in the same business, the same economic sector, or in the same type of economic operation.

[54] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.

This is an element that you have certainly heard of in the context of international trade, in the WTO. This is a multilateral treaty that is designed to liberalize flows of trade and services across national borders. The essential pillar of the WTO is, on the one hand, most-favoured-nation treatment, meaning that when you become a member of the WTO you grant to all other members of the WTO the treatment that you grant to your most favoured treaty partner in other trade agreements and on the other hand, market access, which is meant to allow products and services into your market in the same conditions as the products and services of your own operators. And of course, this is on a reciprocity basis in international trade.

It is easy to imagine that it is much more difficult to find comparators in the case of investors or investment than in the case of trade. When you look at the trade in goods and the application of national treatment you can compare what we call "like products". There is a bottle of "Coca-Cola", a bottle of "Fanta", and you have a tariff that applies to the bottle of "Fanta" and you have a higher tariff applying to the bottle of "Coca-Cola". The State will say: "Oh, yes, that is normal because 'Coca-Cola' is different from 'Fanta', indeed, but it is still a soft drink, and it is still a soda". You may say, we can compare "Fanta" with "Coca-Cola" because it is a "like product". It is meant to be used in the same conditions and fulfills the same purpose.

For investors, it can be much more complicated because many times, especially in developing countries, you have no domestic comparator. You do not have a company in a given country that will do what the foreign investor does. This is precisely the reason for bringing in a foreign investor.

We have a couple of examples. *Apotex v. USA* is a very recent case:

> *"The Parties accept that the determination of whether NAFTA claimants are in 'like circumstances' with the relevant investors or investments (as 'comparators') involves a* ***highly fact-specific inquiry****."*[55]

Similarly, the *S.D. Myers* case says**:**

> *"The Tribunal considers that the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the* ***general principles that emerge from the legal context of the NAFTA****, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account* ***circumstances that would justify governmental regulations that treat them differently in order to protect the public interest****. The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same* ***'sector'*** *as the national investor."*[56]

In both cases, tribunals have tiptoed around this need for comparison and for identifying a suitable comparator.

Same treatment and "no less favourable than"

The second comparison element, once you have found a suitable comparator, is to look at what is the level of treatment that is afforded, and whether this treatment is below or less favourable than the treatment afforded to domestic investors. We often say in a joking manner that, of course, you can treat your domestic investors terribly, and in this case you would also treat your foreign investors terribly, and you can also decide to treat your foreign investor through positive discrimination much better than you treat

[55] *Apotex v. USA* (III) (ICSID Case No. ARB(AF)/12/1), Award dated 25 August 2014, para. 8.15.
[56] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, para. 250.

your domestic investors. But this is not the issue under investment protection treaties.

Feldman v. Mexico:

> *"NAFTA is on its face unclear as to whether the foreign investor must be treated in the **most favourable** manner provided for any domestic investor, or only with regard to the **treatment generally accorded** to domestic investors **or even the least favourably** treated domestic investor."*[57]

The national treatment provision obligation as the tribunal in *Total v. Argentina* looked at it:

> *"the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from **de iure** or **de facto** discrimination based on nationality."*[58]

Absence of justification

The third element is that there has to be unjustifiable differentiation or discrimination in order to constitute a violation of national treatment.

I would like to flag that in the case of violation of national treatment, we are still looking at the conduct of the State from the point of view of its complete sovereignty to decide if and how to deal with its own citizen and with foreign investors.

[57] *Feldman v. Mexico*, para. 185.
[58] *Total v. Argentina* (ICSID Case No. ARB/04/1), Decision on Liability dated 27 December 2010, para. 211.

Parkerings-Compagniet AS v. Republic of Lithuania:

> *"An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context."*[59]

Treaty wording seeking to clarify and provide guidance on national treatment

The RCEP is the regional comprehensive economic partnership agreement that brings together most of the countries of South-East Asia, North Asia around China. It is very similar in its wording to the CPTPP, or to the CETA, or to free trade agreements concluded by the United States that always serve as the benchmark in the sense that these counties have been very proactive in including into their treaties lessons from the arbitral awards that have been rendered and have made clarification or fine-tuned the treaty language in subsequent treaties.

> *"Each Party shall accord to investors of another Party, and to covered investments, treatment no less favourable than that it accords,* ***in like circumstances****, to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."*[60]

It is interesting that in the RCEP, which is a Chinese initiative, you will find exactly the same wording as in the US treaties or in the US and Canada NAFTA treaties. In the RCEP, Contracting Parties then add that:

> *"For greater certainty, whether the treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment*

[59] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, para. 368.
[60] RCEP, Article 10.11 Compensation for Losses.

distinguishes between investors or investments on the basis of legitimate public welfare objectives."[61]

This last paragraph is a further fine-tuning of the "like circumstances", which provides that there may be reasons where this treatment is discriminatory, where there is a difference between domestic and foreign investors. That has to be for the reason of legitimate public welfare objectives.

There are very few cases where foreign investors actually claim violation of national treatment. You find it as an ancillary claim in several cases because the strategy by claimants is to take multiple provisions of the treaty and they will try to demonstrate that there is a violation of each one of them. In case the expropriation claim fails you still have a fair and equitable treatment claim. If it fails, then you still have full protection and security and you still have something what you can grab from national treatment. Generally, you will find in a claim that most of the treaty provisions will be identified as having been violated by the State. And the same approach is taken to claim for the violation of fair and equitable treatment You take all the different elements of fair and equitable treatment that have been identified by other tribunals over the years (we have discussed them yesterday) and try to establish a violation of each one of these elements to make sure that if one fails you still have another one to base your claim on.

4. Most-Favoured-Nation Treatment

General

It is important to consider most-favoured-nation treatment from the point of view of its role in investment treaties as a tool of liberalization and non-discrimination. We will do that before

[61] Ibid., Article 10.3 National Treatment, footnote 17.

turning to the public international law use of most-favoured-nation treatment, which refers to a treatment among nations.

Most-favoured-nation means exactly that we are comparing the relations we have with one State to the relations we have with another State, and we see that this State has to have exactly the same treatment or type of relation as the first State.

In the context of investment treaties, States are not granting this treatment to another State but granting it to a private party of that other State, an investor of that State. It is a tool of public international law that is used in the relation between a State and a private entity.

I mentioned the central non-discrimination tools in investment agreements, I mentioned that we have comparative and relative standards as opposed to the absolute protection standards. And that the use of most-favoured-nation treatment has long been used in the treaties of Friendship, Commerce and Navigation (the FCN agreements) which were the predecessors of the older generations of bilateral investment treaties and were mainly negotiated by Anglo-Saxon countries, and some of them were going back very early in time — 1654, where the foreigner has to be treated in the same manner as other foreigners to which privileges are granted.

Treaty of Peace and Commerce between Great Britain and Sweden (1654):

"The people, subjects and inhabitants of both confederates shall have, and enjoy in each other's kingdoms, countries, lands and dominions, as large and ample privileges, relations, liberties, and immunities, as any other foreigner at present doth and hereafter shall enjoy."

Most-favoured-nation treatment will ensure that the host State extends to the covered foreign investor and its investments

treatment that is no less favourable than that which it accords to foreign investors of any third country with which it has a similar agreement.

As I mentioned before, it is one of the central pillars of the multilateral trading system. The WTO is based on most-favoured-nation treatment meaning that once you become a member of the WTO you are going to be enjoying exactly the same tariffs and conditions for the goods and for the servicing crossing the border as any other member of the WTO. The WTO institutionalizes most-favoured-nation treatment.

What is interesting, is that there are very few cases where the violation of most-favoured-nation treatment in terms of substantive treatment of an investor has been invoked. Why? For the simple reason that the States do not differentiate between investors from one country and investors from another country. Can you imagine how cumbersome this would be to enact and enforce in practice? And because there is no multilateral system that covers it in the case of investment rules, the treaties will provide specifically for most-favoured-nation treatment and indicate any exceptions there are to this treatment. So, there can be exceptions to this MFN treatment but they have to be specific. Again, MFN, like NT is a relative standard, it is not absolute, it does not fall from the sky of public international law if it is not in the treaty it cannot be used or presumed.

What is interesting, however, is that because the method of treating other nations in a particular manner is a public international law tool, it is a treaty tool, it has been used in an unpredicted manner in investment disputes. Very much to the surprise of most of the countries that had investment treaties, it has been used to "shop" in other treaties concluded by the same State, with other treaty partners, more favourable treaty provisions than in the basic treaty between the home State and the home State of the investor. And it allows through the most-favoured-nation treatment provision to

borrow provisions from other treaties and bring them into the basic treaty.

Here again, remember the approach I am taking in these lectures: we will show what has been done subsequently by States in order to prevent this type of use of the most-favoured-nation treatment clause. My explanation of this unforeseen effect of the most-favoured-nation clause is that it was simply not thought through by the negotiators of these investment agreements who were not public international law lawyers but rather trade lawyers interested in this tool to liberalize trade and investment. They were more concerned about what could be a *de facto* discrimination of the investment that has been made than using it as a treaty shopping tool that it has subsequently turned out to be.

Let me first show you how this use of the most-favoured-nation treatment clause happened and then how this effect was "corrected" or rather "prevented" in subsequent treaty language.

Let me take the example which is a treaty between Argentina and Spain that provides:

> *"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."*[62]

It is important to look at this wording and read carefully because the subsequent arbitral tribunals after the first case that looked into that treaty said: "Yes, that is a very specific wording and because of this wording we could go shop from another treaty another provision and in other cases we could not".

We have two interesting cases that we can look at to see how the MFN clause has been invoked to "shop" in other treaties for a

[62] Argentina — Spain BIT (1991), art. IV(2).

level of substantive protection of the investor that is not available under the basic treaty protecting that investor.

Substantive protection

The one is *Berschader v. Russia* where the tribunal insists that:

> *"it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties [...]"*[63]

What the tribunal says is that the MFN clause in bilateral investment treaties is meant to afford substantive treatment and not procedural treatment.

In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, the tribunal says:

> *"Neither in its Reply nor at the jurisdictional hearing, did Pakistan dispute Bayindir's assertion that the investment treaties which Pakistan has concluded with France, the Netherlands, China, the United Kingdom, Australia, and Switzerland contains an explicit fair and equitable treatment clause (C-Mem. J., p. 38, 131-132). Under these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, prima facie, that Pakistan is bound to treat investments of Turkish nationals fairly and equitably."*[64]

Even though there is no fair and equitable treatment provision in the treaty itself, in this case, the tribunal allows the claimant to "import it" through the most-favoured-nation treatment clause from other treaties that contained this provision.

[63] *Berschader v. Russia* (SCC Case No. 080/2004), Award dated 21 April 2006, para. 179.
[64] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, para. 231.

Dispute Settlement

Let us look now at one of the effects of the MFN clause, that was not foreseen by treaty negotiators and became a real concern for States, particularly those that had signed many investment treaties, is that it was used to import dispute settlement provisions from other treaties that were considered to be more favourable than the provision in the basic treaty.

This was done first in a case known as *Maffezini v. Spain*. In this case, there is a treaty between Spain and Argentina, and you have a claimant that is Argentinian who claims that the Spanish government has treated the Argentinian investor poorly (it was in a shopping mall). This is a very early case and for a long time it was the only case where a claimant from a developing country is claiming against a developed country.

The treaties that Argentina concluded for a long time were treaties that included in their dispute settlement provision as a result of the Calvo Doctrine, a need for investors to wait for 18 months and to start resolving the case in front of local courts for 18 months before being able to bring their case to international arbitration. This was the standard policy for Argentina and all their early treaties had this provision that you could not trigger the dispute settlement arbitration clause before having waited for 18 months.

This was a requirement by Argentina. What the investor in this case did is he looked at other treaties concluded by Spain. Spain in this case is a host country of the investor. It is an Argentinian investment in Spain. What the Argentinian investor wanted to do here is to circumvent this 18-month waiting period and say that Spain has also concluded treaties with other countries that do not have this 18-months period.

And in this case, the Argentinian investor did not want to wait for 18 months before being able to go to international arbitration and it invoked the dispute settlement provision of another BIT concluded by Spain, with Chile and which did not provide for these 18 months waiting period. The claimant said: the treaty that protects me has a most-favoured nation clause and therefore I must benefit from the same advantages as investors from other countries through their treaties. And not having to wait for 18 months is clearly a better treatment, and this is the one I am now claiming.

The tribunal in this case decided that investors can rely on the MFN clause and invoke the more favourable ISDS provision in the Chile-Spain BIT, which did not provide for such a waiting period.

In the treaty between Argentina and Spain, there is no limitation to the scope of most-favoured-nation treatment, as we have seen in other treaties where it is limited to the various stages of the life cycle of an investment. The Argentina-Spain BIT says that "in all matters governed by this agreement" investors have to enjoy MFN. The tribunal reads this as exactly what it says: it includes every provision including the dispute settlement provisions of another treaty.

As you can imagine, after this decision in the *Maffezini* case, there was a flurry of cases where claimants were trying to find more favourable provisions in other treaties and some countries had a number of treaties. China, for example, in early 2000 had already more than a hundred treaties concluded. Germany had 130. And therefore, the risk that you could shop literally in different treaties for more favourable provisions including most importantly in the area of dispute settlement became a real concern.

That has happened also in a case against Russia. Russia had very limited scope for dispute settlement in the case of an expropriation where arbitration was only available to establish the amount of compensation for an expropriation but not to establish whether an

expropriation, let alone an indirect expropriation, had or not taken place. And by "shopping" from another treaty, you could broaden the scope of the basic treaty provision considerably.

Subsequent tribunals have tried to limit the access to dispute settlement through the most-favoured-nation treatment clause because it had opened Pandora's box.

They further elaborated on a limitation to the use of MFN based on public policy considerations that had already been identified by the *Maffezini* tribunal, and among them they identified:

- Requirement for exhaustion of local remedies
- Fork-in-the-road clauses
- Reference to particular arbitration fora
- Highly institutionalized system of arbitration such as NAFTA

Importance of wording

Interpretation of the notion of "treatment"

The subsequent tribunals have started looking into what the treatment actually entails. When we are talking about investors, not a State — how are these investors treated and how can you qualify this treatment — you can see that you had provisions in the investment treaties, particularly the ones which are meant to liberalize investments:

- Treatment with respect to "the management, maintenance, use enjoyment or disposal of their investment"
- Treatment "with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of their investments"
- "in the territory"

• "in respect to all matters"

The *Maffezini* case has triggered two types of reactions by States in negotiating subsequent treaties. Some treaties considered that the wording of the MFN provision which was limited to the life cycle of investment did not include a dispute settlement provision and that this was sufficient to rule out the import of other more favourable dispute settlement provisions.

MFN is clearly identified in these treaties when they provide: "With regard to the establishment, acquisition, expansion management, use, and other disposition of the investor of the investment an investor shall not be treated less favourably than the investor from another State".

These treaties in their wording make it clear that the treatment is relating to these different steps of the life cycle of an investment.

But some go further and, even though they have this list of stages of an investment to which MFN applies, they nevertheless make an explicit exception for dispute resolution clauses.

"For greater certainty": Art. 8.7 CETA

Here we find the usual approach for greater certainty. And I am taking the example of the CETA, which is the treaty between the European Union and Canada which does two things. First, there is an illustration of the limited scope of most-favoured-nation treatment. And there is a carve out of the dispute resolution clauses.

> *"1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments* ***with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory****.*

[…]

*4. **For greater certainty, the 'treatment' referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and States** provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."*[65]

It basically says: first, you cannot use a most-favoured-nation treatment clause to import dispute settlement provisions or procedures that would be more favourable. Second, you cannot import substantive obligations from other treaties or agreements unless there is a specific obligation in this treaty to also observe substantive obligations that are found in other treaties.

So, what you see here is really curtailing and a very strong narrowing of the most-favoured-nation clause in order to avoid the *Maffezini* effect.

To wrap up, I would like to remind us what we have in terms of the most-favoured-nation treatment and the national provisions in these treaties. We really have to remember that these standards are standards of treatment, and they are relative, they require a comparison, they are not substantive and absolute standards. That they do not extend to matters that are, for example, found in treaties such as dispute settlement unless the wording of the treaty allows it, and unless there are no specific exceptions included in the treaty. Let us also remember that in the more recent treaty practice, States have been very careful to carve out dispute settlement completely from the scope of the most-favoured-nation treatment

[65] CETA, art. 8.7, Most-favoured-nation treatment.

clause, and to include into both most-favoured-nation treatment and national treatment comparators an obligation to compare with like circumstances or like situations as in CETA agreement. And that there are a number of exceptions to these provisions relating mostly to sectors of the industry that remain for which the State can continue to discriminate or to close its borders to the entry of foreign capital.

Научно-практическое издание

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ
ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

COURSES OF THE SUMMER SCHOOL
ON PUBLIC INTERNATIONAL LAW

ТОМ XVI / VOL. XVI

Анна Жубан-Брет / Anna Joubin-Bret

Материально-правовые стандарты защиты
в международном инвестиционном праве

Substantive Standards of Protection
in International Investment Law

На английском языке

Корректор *А. С. Ермолаева*
Вёрстка *В. В. Котов*
Дизайн обложки *Д. Кравец*

ISSN 2687-105X

Подписано в печать 27.01.2023. Формат 60 × 90 1/16.
Гарнитура «PT Serif». Печать цифровая. Усл. печ. л. 6,1.
Тираж 100 экз.

АНО «Центр международных и сравнительно-правовых исследований»
119017 Россия, г. Москва, Кадашёвская набережная, д. 14, к. 3
E-mail: info@iclrc.ru
Сайт: www.iclrc.ru

Отпечатано в типографии «Onebook.ru»
ООО «Сам Полиграфист»
129090, Москва, Волгоградский проспект, д. 42, к. 5
E-mail: info@onebook.ru
Сайт: www.onebook.ru

www.iclrc.ru