world trade institute

nccr trade regulation
swiss national centre of competence in research

International Framework of Investment Law

Dr Rodrigo Polanco
Senior Lecturer and Researcher
World Trade Institute
November 2017

u b
UNIVERSITÄT BERN

Outline

Standards of Treatment

- Relative standards:
  - National Treatment (NT)
  - Most Favoured Nation Treatment (MFN)
- Absolute standards:
  - International Minimum Standard of Treatment (IMS)
  - Fair and Equitable Treatment (FET)
  - Full Protection and Security (FPS)

IIAs: Typical Elements

- **Scope of Application**
  - Definition of covered “investments”
  - Definition of covered “investors”
  - Temporal scope
  - Territorial scope
- **Standards of Treatment**
  - Relative standards:
    - National Treatment (NT)
    - Most Favoured Nation Treatment (MFN)
  - Absolute standards:
    - International Minimum Standard of Treatment (IMS)
    - Fair and Equitable Treatment (FET)
    - Full Protection and Security (FPS)
- **Standards of Protection**
  - Protection against unlawful expropriation
  - Compensation in cases of strife
  - Transfer of funds
  - Subrogation
  - Umbrella Clause
- **Dispute Settlement**
  - State to State
  - Investor – State Arbitration (ISDS)

Two main categories of IIAs:

•Bilateral Investment Treaties (BITs)

•Investment Chapters in Preferential Trade Agreements (PTAs)

STANDARDS OF TREATMENT

Standards of Treatment

- Standards of Treatment: are standards of host State behavior.
  - Relative standards: require a comparator for its application
    - General obligation of non-discrimination
    - National Treatment (NT)
    - Most Favored Nation Treatment (MFN)
  - Absolute standards:
    - International Minimum Standard of Treatment (IMS)
    - Fair and Equitable Treatment (FET)
    - Full Protection and Security (FPS)

Standards of Treatment

- Background of relative standards: the idea of non-discrimination (ND)
  - In international investment law this obligation restricts governments from treating an investment / investor disadvantageously.
  - Non-discrimination is a fundamental to international law, found in trade, investment and human rights agreements. Is customary?

Calvo Doctrine

What is the Calvo-Doctrine?

Foreign = National

Calvo Doctrine

What is the Calvo-Doctrine?

=

Foreign National

Foreign

National

Relative Standards

- Both NT and MFN are rules of non-discrimination, but some investment treaties also include a general ND obligation.

- Almost all modern BITs provide for national and MFN treatment, sometimes in the same provision. Similarities between IIAs, but important differences and the text of the particular treaty governs.

- Differences in treaty practice:
  - Do they apply to both investors and investments?
  - Apply to admission /establishment? (pre or post establishment)
  - List activities to which the obligations applies?
  - Provide an express comparator ("in like circumstances")?

NATIONAL TREATMENT

National Treatment Clauses:

BIT between India and Indonesia (1999)	BIT between Hong Kong (China) and New Zealand (1995)
"Article 4 Treatment of Investments […] 3. Each Contracting Party shall, **subject to its laws and regulations**, accord to investment of investors of the other Contracting Party treatment no less favorable than that which is accorded to investments of its investors." (emphasis added)	"Article 4 Treatment of Investments 1. Neither Contracting Party shall in its area subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any other State or, **subject to its laws and regulations**, that which it accords to investments or returns of its own investors. 2. Neither Contracting Party shall in its area subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any other State or, **subject to its laws and regulations**, that which it accords to investments or returns of its own investors." (emphasis added)

National Treatment Clauses:

BIT between Mauritius and Zimbabwe (2000)	BIT between the Russian Federation and Thailand (2002)
"Article 4 Treatment of Investments […] (2) Each Contracting Party shall accord to the **investments** of investors of the other Contracting Party made in its territory a treatment which is no less favourable than that accorded to investments **of its own investors or of investors of any third country**, if the latter is more favourable." (emphasis added)	"Article 3 Treatment of Investments 1. 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 that it accords to investments **of its own investors or to investments of investors of any third State**, whichever is more favourable. 2. Each Contracting Party shall in its territory accord **investors** of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords to **its own investors or investors of any third State**, whichever is more favourable." (emphasis added)

National Treatment Clauses
NAFTA: Article 1102

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

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, **with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors**, of the Party of which it forms a part.

National Treatment Clauses:

CAFTA Article 10.3: National Treatment

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

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

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

COMESA – Investment Agreement (2007)

ARTICLE 17

National Treatment

1. Subject to Article 18, each Member State shall accord to COMESA investors and their investments treatment no less favourable than the treatment it accords, in like circumstance, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory.

2. For greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia:

(a) its effects on third persons and the local community;

(b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;

(c) the sector the investor is in;

(d) the aim of the measure concerned;

(e) the regulatory process generally applied in relation to the measure concerned; and

(f) other factors directly relating to the investment or investor in relation to the measure concerned;

and the examination shall not be limited to or be biased towards any one factor.

India Model BIT (2016)

Article 4: National Treatment

4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances,[2] to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.

4.3 This Article shall not apply to any Law or Measure of a Regional or local Government.

4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State.

4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

Israel – Japan BIT (2017)

Article 2
National Treatment

Each Contracting Party shall in its Territory accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to its own investors and to their investments with respect to investment activities.

National Treatment

- Conventional, not customary obligation.
- Wording and scope varies among different IIAs
  - Not included (in numerous IIAs)
  - «Best efforts » clause to grant NT (e.g. APEC)
  - NT principle subject to domestic law (e.g. BIT between Hong Kong-China and New Zealand)
  - Legally binding NT principle (the most common approach; e.g. BITs, NAFTA, Taiwan and U.S. FTAs)

National Treatment

- NT standard entails that investment or investors of a Contracting Party are entitled to a treatment by the other Contracting Parties which is ***no less favourable*** than the treatment the latter grant to their own investments or investors.

- NT applies to any form of treatment whether, legislative, administrative or informal

- Common exceptions to NT:
  - Regional economic integration (e.g. customs or monetary unions)
  - Double taxation agreements
  - Pre-establishment obligations

Elements of non discrimination

1: Comparability of investors

- Identify subjects of comparison
- National *versus* foreigner

2: No less favourable treatment

- Consider the treatment each comparator receives
- Difference must show a less favorable treatment

3: Justifications

- Consider any factors that may justify a differential treatment

STEP 1: basis of comparison

1. Same business or economic sector

…article 1102 [NAFTA] "*invites an examination of whether a non-national investor complaining of less favorable treatment is in the* ***same business sector or economic sector*** *as the local investor…*" **PCB waste**

It is true that different tax regimes were enacted between copper and gold, even though they both attained, percentagewise, very significant tax increases. (…) But this not allow the Tribunal to jump to the conclusion that its failure to do so [adopted a similar legislation] constitutes a breach of the treaty.

Pauschok v. Mongolia

STEP 1: basis of comparison

2. Same economic sector & activity

SECTOR & ACTIVITY	CASE
cigarretes: producers/resellers	**Feldman v Mexico**
cotton commercialization: free market / fixed price governmental programs	**Champion Trading v Egypt**
Package delivering: postal / courier	**UPS v Canada** *** With dissident opinion**
steel producers: with respect to their potential use in a highway project	**ADF v USA**

STEP 1: basis of comparison

3. "**Less like" but available comparators**

"*…it would be as perverse to ignore identical comparators if they were available and use comparators that were less like, as* ***it would be perverse to refuse to find and apply less like comparators when no identical comparators exist***". **Methanol/Ethanol**

Methanex v USA

"*In like situations cannot be interpreted in the narrow sense advanced by Ecuador as the purpose is to protect investors as compared to local producers, and* ***this cannot be done by addressing exclusively the sector in which that particular activity is undertaken***". **Local producers/exporters of flowers, seafood products, and mining**

Occidental v Ecuador

STEP 1: basis of comparison

4. Direct competitors

"*ALMEX and the Mexican sugar industry are in like circumstances. Both are part of the same sector,* ***competing face to face*** *in supplying sweeteners to the soft drink and processed food markets*".

ADM v Mexico

"*We conclude that* ***where the products at issue are interchangeable and indistinguishable from the point of view of the end-users****, the products, and therefore the respective investments, are in like circumstances. Any other interpretation would negate the effect of the non-discriminatory provisions…*"

CPI v Mexico

Sugar/High fructose corn syrup

STEP 1: basis of comparison

- Substantial difference between two approaches:
  - Any investor is comparable (e.g. Occidental v. Ecuador)
  - Only direct investor is comparable (e.g. Pauschok v. Mongolia)

- Tribunals tend to weight the facts of the particular dispute heavily
  - Are financial sector competitors always a relevant comparator? Or they need to have the same market segment? (e.g. *Renée Rose Levy* v. *Peru*)
  - Should the treatment of a claimant subject to environmental assessment be compared all investor subject to it, or only with those that have faced significant opposition by the community and have been subject to a special review? (*Clayton et al.* v. *Canada*)

STEP 2: less favorable treatment

- **Disadvantages must be**
  - real, not hypothetical,
  - de jure or de facto,
  - verifiable

*"The question may be raised whether the equality of treatment accorded by the Respondent to the Investor and to US steel manufacturers and steel fabricators was more apparent than real… **evidence of discrimination, however, is required**".*

ADF v USA

STEP 3: finding legitimate causes for differentiated treatment

"…*the interpretation of the phrase like circumstances in Article 1102 must take into account…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***".

SD Myers v Canada

"…*it is clear that the concept of national treatment as embodies in NAFTA and similar arrangements is designed* ***to prevent discrimination on the basis of nationality, or by reasons of nationality***".

Feldman v Mexico

STEP 3: Finding legitimate causes for differentiated treatment

"Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that*: (i)* ***do not distinguish, on their face or de facto, between foreign-owned and domestic companies****, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA*".

Pope & Talbot v Canada

No equality when it comes to illegality!

Thunderbird v Mexico

STEP 3: Finding legitimate causes for differentiated treatment

- **Burden of proof:**
  - The investor must establish at least a "*prima facie*" case
  - The burden then shifts to the State as to justify any legitimate ground for differentiated treatment

- **Intent:**
  - Highly important for evidence purposes
  - However, no need to prove a "subjective discriminatory intent", as the "effect test" may be enough
  - But necessity of evidence on the negative effect remains

Other relevant elements

- **"In like circumstances" = "Like products"?** Some references to WTO jurisprudence but tribunals have been conscious of the difference (*S.D. Myers* v *Canada*). E.g.: Investors may be producing very different products but the effect of their operations on local environment may be very similar

- **Application in federal systems.**

What is the baseline? (Best in-State treatment?). Burden of proof: Explain differences in treatment.

MOST-FAVOURED NATION TREATMENT

Background

The role of MFN…

- WTO
  - Cornerstone of trade law
- Investment
  - Liberalization? REIO Exceptions
  - Level playing field for investment protection?
  - Multilateralization? controversial

BIT Argentina-Spain (1991)

"*Article 4*
Treatment

[…]
2. ***In all matters subject to this Agreement,*** *this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country.* […]" (non-official translation from Spanish, emphasis added)

BIT Austria-Saudi Arabia (2001)

"*Article 3*

[...]

3. *Each Contracting Party shall accord the investors of the other Contracting Party in connection with the management, operations, maintenance, use, enjoyment or disposal of investments or* ***with the means to assure their rights to such investments*** *like transfers and indemnification or with any other activity associated with this in its territory, treatment not less favourable than the treatment it accords to its investors or to the investors of a third State, whichever is more favourable.*" (emphasis added)

ASEAN Agreement (2009)

ARTICLE 6 MOST-FAVOURED-NATION TREATMENT

1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, ***in like circumstances***, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
2. For greater certainty: (a) **this Article shall not apply to investor-State dispute settlement** procedures that are available in other agreements to which Member States are party…

Brazil – Peru ETEA (2016)

Article 2.6: Most-Favored-Nation Treatment

1. Subject to its laws and regulations in effect on the date of entry into force of this Agreement, and with respect to the provisions contemplated in this Chapter, each Party shall accord to investors of the other Party treatment no less favorable than that accorded In similar circumstances, to investors of a non-Party in connection with the establishment, acquisition, expansion, administration, conduct, operation and sale or other disposition of the investments in its territory.
2. Subject to its laws and regulations in effect at the date of entry into force of this Agreement, and with respect to the provisions contemplated in this Chapter, each Party shall accord to investments of investors of the other Party treatment no less favorable than In similar circumstances, to investments in its territory by an investor of a State that is not a Party in connection with the establishment, acquisition, expansion, administration, conduct, operation and sale or other disposition of investments In its territory.
3. For greater certainty, the treatment referred to in this Article does not apply to Investor-state dispute resolution mechanisms or procedures, or any other dispute settlement mechanism for investment that is stipulated in international trade or investment agreements.

Brazil – Peru ETEA (2016)

5. The Parties reserve the right to adopt or maintain any future measure inconsistent with this Article:
   a) granting differential treatment to countries in accordance with any bilateral or multilateral international treaty in force or subscribed after the date of entry into force of this Agreement in respect of aviation; fishing; or maritime affairs, including rescue (…).
   b) which is related to artisanal fishing;
   c) to accord preferential treatment to persons from other countries under any existing bilateral or multilateral international agreements on cultural industries, including audiovisual cooperation agreements (…) .
   d) to grant to a person of a third party the same treatment accorded by such Party to its national in the audiovisual, publishing and musical sector.
   e) with respect to the enforcement of laws and the provision of social rehabilitation services;
   f) with respect to the provision of the following services, to the extent that they are social services that are established or maintained for reasons of public interest: insurance and security of income, social security services, social welfare, public education, public training, health and child care.
6. This Article does not apply to government procurement, which is understood as the process by which a government obtains goods or services, or any combination of them, for governmental purposes and not for the purpose of commercial sale or resale or for their use In the production or supply of goods or services intended for commercial sale or resale. For greater certainty, this Chapter applies with respect to the investment resulting from such public procurement procedure.

Israel – Japan BIT (2017)

Article 3
Most-Favored-Nation Treatment

1. Each Contracting Party shall in its Territory accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities.

2. For greater certainty, the treatment referred to in this Article does not encompass definitions and international dispute settlement procedures or mechanisms under any international agreement or any written agreement between a Contracting Party and an investor of a non-Contracting Party or its investment that is an enterprise in the Territory of the former Contracting Party.

3. The provisions of paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments the benefits of any treatment under any bilateral or multilateral international agreement which was in force prior to the date of entry into force of this Agreement.

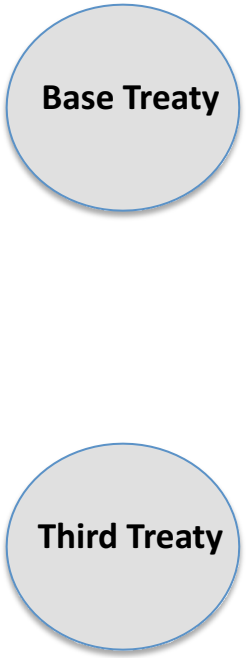
4. The provisions of paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to investors of the other Contracting Party and to their investments any preferential treatment by virtue of any existing or future customs union, economic or monetary union, free trade area or similar international agreements to which the former Contracting Party is a party or may become a party in the future.

Most-Favoured Nation (MFN)

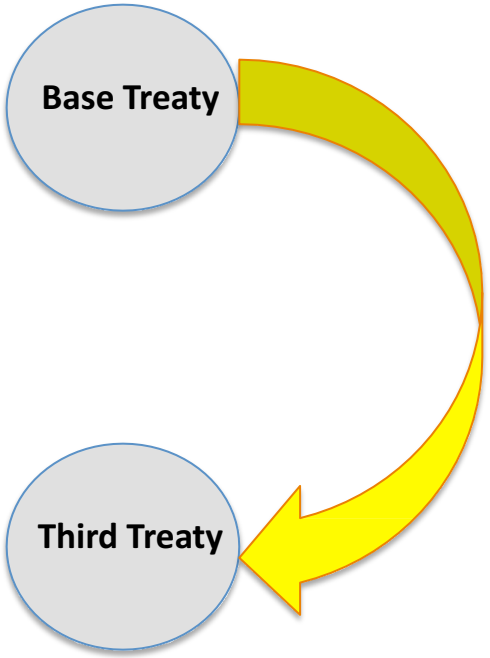
- Standard entails that investment or investors of a Contracting Party are entitled to a treatment by the other Contracting Parties which is no less favourable than the treatment the latter grants to investments or investors of any other third State.

- Links IIAs by ensuring that each Contracting Party grants investments and/or investors the best treatment granted to any other investments/investors of any other country
  - Impact in terms of harmonization of norms and disciplines
  - Levels the playing field in international negotiations
  - Conventional, not customary obligation
  - Important for smaller countries

MFN



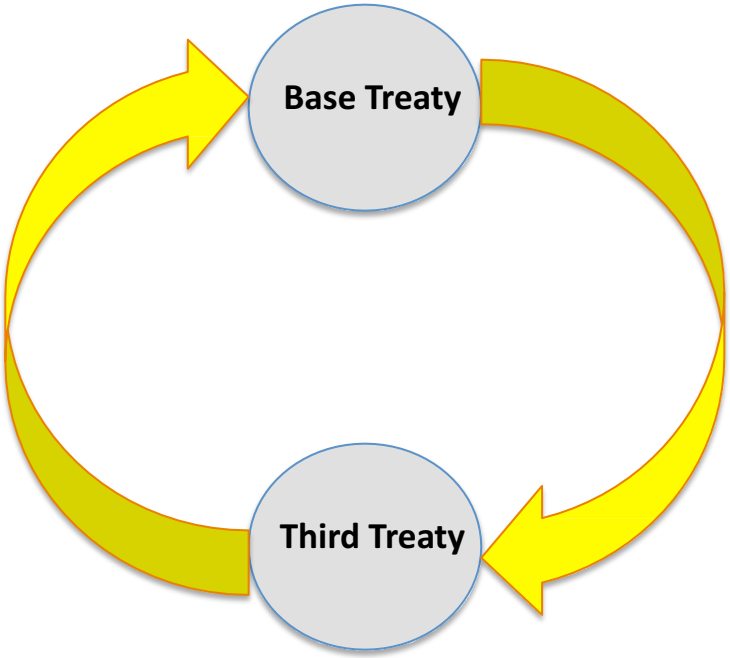
MFN



MFN clause

MFN

Incorporation of more favourable treatment



MFN clause

MFN: Rationale and Effects

- Countries tend to have several IIAs which differ in their contents. With more than 3.000 IIAs, practical impact of MFN can be significant.

- MFN can lead to obligations applying to different contexts than originally envisaged by the Contracting Parties. Countries must fully understand impact of MFN when negotiating and implementing IIAs.

- The scope of MFN provision is given by its wording (e.g. in “all matters”, or in “like circumstances”)

- Issues of comparability, level of treatment, justification and intent in MFN are the same as in NT.

MFN: Main Issues

- MFN treatment issues arise in investment treaties in four different ways:

  (1) **Differences in host State treatment between two foreign investors from different States**: if investors are in like circumstances they cannot be treated differently (one taxed at 10% and one taxed at 50%)

  (2) **To import more favorable substantive rights from other BIT:** another treaty provides better standards of treatment—obtain benefit of FET clause in another BIT through MFN

  (3) **To obtain more favorable procedural rights from other BIT:** Argentinean BITs – some with a requirement to submit dispute to local courts for 18 months and some allow direct access to international arbitration

  (4) **To obtain access to international arbitration or expand the scope of an investor state arbitration clause**. Highly debatable

world trade institute

MFN and ISDS

nccr trade regulation
swiss national centre of competence in research

- Does MFN applies to dispute settlement procedures?
  - Broad language used in MFN clause leads to apply MFN to ISDS procedures
  - Limitations:
    - *Ejusdem generis* principle: MFN clause can only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates
    - Public policy considerations as fundamental conditions for the acceptance of the agreement

MFN: Dispute Settlement

- ***Maffezini v. Spain (2000)***

  "From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle".

  "…the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts".

MFN : Dispute Settlement

Cases where tribunals rejected to “import” other ISDS from other BITs

- ***Salini v. Jordan* (2004)**: Some BITs provide expressly that the most-favoured-nation treatment extends to the provisions relating to settlement of disputes; others do not contain such a provision, but refer to “all rights” contained in the agreement, or to “all matters” subject to the agreement; and in the BIT before the tribunal, the MFN clause does not include any provision extending its scope of application to dispute settlement, nor does it envisage “all rights or all matters covered by the agreement”

  - Situation is different from Maffezini
  - BIT explicitly refers to domestic forum
  - MFN clause does not apply to “all matters covered by the agreement”

MFN : Dispute Settlement

- ***Plama v. Bulgaria (2005).*** Decision on Jurisdiction adverts to the notion that MFN treatment involves “substantive protection to the exclusion of the procedural provisions relating to dispute settlement"
  - Agreement to arbitrate must be clear and unambiguous, and cannot incorporated by reference to another IIA unless parties explicitly state otherwise
  - How can it be determined which ISDS is more favourable?

- **Impregilo v. Argentina (2011).** Award notes that the MFN clauses in BITs vary and this has led to different interpretative results (although it finds, by a majority, a "massive volume of case-law" which indicates that, at least when there is an MFN clause applying to 'all matters' regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated)

MFN : Dispute Settlement

- ***MMEA and AHSI v. Senegal (2016)***
  - A company incorporated in Luxembourg, argued that, in the absence of a BIT between Senegal and Luxembourg, it was entitled to benefit from the Netherlands–Senegal BIT.The case related to aircraft ground-handling services in Senegal, which would qualify as a “service supplier” under the WTO GATS.
  - The tribunal ruled that it could not be established that Senegal had clearly and unequivocally consented to arbitration with respect to investors from Luxembourg, as Article II of the GATS was silent on international arbitration or dispute resolution in general and did not contain any type of consent to arbitrate.

MFN : Dispute Settlement

- **Mesa Power v. Canada (2016)**
  - Under the reservations and exceptions of the NAFTA, procurement is excluded from ISDS. the claimant argued that the NAFTA's MFN clause should be read to allow it to take advantage of the protections provided in other Canadian treaties in which there was no limitation in situations involving procurement.
  - The tribunal rejected the argument on the grounds that an MFN provision cannot be used to expand the subject-matter scope of the base treaty
  - "For an MFN clause in a base treaty to allow the importation of a more favorable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be under the treaty to claim through the treaty"

MFN : Substantive Rights

- ***MTD Equity Bhd v. Chile* (2004)**
  - Key question for the Tribunal was whether Chile's obligation to rezone land where foreign investment took place following the approval by the Foreign Investment Commitment (FIC – composed by several Ministries including the one with competence on zoning issues), was part of its duty to provide FET, even though the Chile - Malaysia BIT did not contain such a provision with respect to zoning.
  - The Tribunal examined relevant provisions of Chile's BITs with Croatia and Denmark. Both included an obligation to award necessary permits subsequent to approval of an investment. The Tribunal accepted that, by virtue of the Treaty's MFN clause, such obligations were part of the FET standard under the Chile-Malaysia-BIT.
  - The Tribunal concluded that approval of an investment by the FIC for a project that was against the urban policy of the government was a breach of the FET obligation by Chile.

MFN : Substantive Rights

- ***Bayindir v. Pakistan (2009)***
  - Allows the importation of FET in a BIT that did not include such standard in the treaty, only a mention in the preamble.

- ***Garanti Koza v. Turkmenistan (2016)***
  - Award points out the difficulties the claimant faces relying on expropriation provisions in other treaties because:

    (i) it appears to seek to mix provisions of different treaties to create a custom-made treaty provision that does not appear in any treaty entered into by the respondent; and

    (ii) it has not demonstrated treatment under the other BIT provisions would be more favourable; further the tribunal rejects claimant's effort to use MFN to import other treatment standards, finding again that it has failed to explain how they would provide more favourable treatment

MFN : Substantive Rights

- ***Içkale v. Turkmenistan (2016)***
  - Claimant seeks to import the FET, FPS, non-discrimination and umbrella clause protections from other investment treaties concluded by Turkmenistan.
  - According to the tribunal, the words “treatment accorded in similar situations” in the applicable MFN provision suggested that the MFN obligation required a comparison of the factual situation of the investments for the purpose of determining whether the treatment accorded to investors under the base treaty could be said to be less favourable than that accorded to investments of the investors of any third State.
  - It was not enough that standards of protection included in other investment treaties might create legal rights for investors under those treaties because differences between applicable legal standards could not be said to amount to “treatment accorded in similar situations”. The claimant was required to demonstrate actual treatment, which, in the circumstances of the case, it could not.

Implications of MFN

Positive implications	Negative implications
- increasing investment by improving investment environment	- since no multilateral system, can be selectively included in treaties
- same treatment as other countries	- vaguely drafted and unpredictable
- alternative to shell companies or jurisdiction shopping and disincentives to jurisdiction shopping	- substantive or procedural provisions? If procedural included may be detrimental
- facilitate standardization in order to achieve multilateral treaty	- different between inward and outward interests and capital importer country may be at disadvantage
- host country: level the playing field	- not based on reciprocity and investor gets better treaty; host state would have negotiated differently before giving more protection
- automatic updating of treaties	- not based on negotiation process
- facilitates negotiation process	- unpredicted restriction of host state policy space
- free ride on negotiations	- creates imbalance of power between investor and states à investor de facto unilateral change treaty
- no rationale for discriminating between different countries	- prevents concession made fearing that benefits would be extended
- compensates for unequal bargaining power	- prevents adaptation of treaty to specific contexts and cannot tailor- make treaties and not account for real differences between states
- reduces transaction costs of treaties	- evolution of system: towards more protection

For the negatives implications, some countries are proposing to abandon MFN (e.g. India 2016 Model BIT)

Standards of Treatment

- **Relative Standards:**
  - National Treatment (NT)
  - Most-Favoured Nation Treatment (MFN)
- **Absolute Standards:**
  - International Minimum Standard of Treatment (IMS)
  - Fair and Equitable Treatment (FET)
  - Full Protection and Security (FPS)

Standards of Treatment

- Absolute standards do not require a comparator for its application. Are rules of non-discrimination?

- Almost all investment treaties provide a general minimum or "baseline" standard of treatment for State conduct, sometimes in the same provision. How they interact?:
  - FET/ FPS as autonomous standard of treatment
  - FET and FPS treatment in accordance with international law = the customary international minimum standard of treatment of aliens

- Similarities between IIAs, but important differences and the text of the particular treaty governs.

world trade institute

nccr trade regulation
swiss national centre of competence in research

INTERNATIONAL MINIMUM STANDARD

UNIVERSITÄT BERN

International Minimum Standard

- Historical origin: customary international law (CIL)
  - State responsibility for the protection of aliens and their property
  - CIL results from a general and consistent practice of States that they follow from a sense of legal obligation.

- US-Mexico "General Claims Commission"
  - *Neer* (1926) and *Roberts (1926)* cases

International Minimum Standard

"… the propriety of governmental acts should be put to the test of international standards… the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial "

(*Neer Case)*

International Minimum Standard

- Absolute standard: detached from host country's domestic legislation
- Implication: National Treatment for aliens is not enough
- 1960s-1970s, developing countries demand the establishment of a New International Economic Order (NEIO)
- Existence of Minimum Standard of Treatment under CIL subject of controversy
- 1990s: standard becomes part of numerous bilateral investment agreements (BITs) and preferential trade agreements (PTAs) with investment chapters

US-Panama BIT (1982)

Article II.2:

- Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law.

US-Czech Republic BIT (1991)

Article II.2(a):

- Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

NAFTA (1992)

Article 1105:

Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

DR CAFTA (2004)

Article 10.5: Minimum Standard of Treatment[1]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

[1] Article 10.5 shall be interpreted in accordance with Annex 10-B.

DR CAFTA (2004)

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Annex 10-B

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

TPP (2016)

Article 9.6: Minimum Standard of Treatment[15]

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.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

   (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

[15] Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law).

TPP (2016)

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

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.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

International Minimum Standard

- IMS tends to be bundled to FET and FPS
  - Explicit clarification in IIAs that the obligation undertaken by the Contracting Parties is to accord covered investments FET and FPS treatment *in accordance with customary international law*
  - IMS includes the standards of fair and equitable treatment and full protection and security
  - Some convergence in practice, or autonomous standards?

world trade institute

nccr trade regulation
swiss national centre of competence in research

FAIR AND EQUITABLE TREATMENT

UNIVERSITÄT BERN

Fair and Equitable Treatment

BIT between Algeria and Indonesia (2000)	BIT between Brazil and the Netherlands (1998)	BIT between China and Qatar (1999)
"Article II Promotion and Protection of Investment […] 2. Investments of investors of either Contracting Party shall at all times be accorded **fair and equitable treatment** and shall enjoy **adequate protection and security** in the territory of the other Contracting Party." (emphasis added)	"Article 3 1) Each Contracting Party shall ensure **fair and equitable treatment** of 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. Each Contracting Party shall accord to such investments **full security and protection**. " (emphasis added)	"Article 3 1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded **fair and equitable treatment** and shall **enjoy protection** in the territory of the other Contracting Party." (emphasis added)

CETA

Article 8.10

Treatment of investors and of covered investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.

2. 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.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

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

FET: Why such controversy?

- Lacks precise meaning
- Not a duty to achieve an specific result: Obligation of conduct
- IIAs with various wordings
  - Semantic interpretation
  - Historical interpretation linked to CIL

- Content of the standard
  - Linked to international law or CIL?
  - Whether a violation of any obligation of an IIA entails a violation of the standard
- Majority of treaties provide for fair and equitable treatment (FET) and most IIA claims rely on a breach of FET

Experience under NAFTA

- Different cases: trend to expand application of the standard
  - *Metalclad (2000)*
    - Mexico violated transparency obligations in NAFTA
    - "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA"
      - *Award set aside by Supreme Court of British Columbia*

Experience under NAFTA

- *S.D. Myers (2000)*
  - The tribunal considers that a breach of article 1105 occurs only when its shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to unacceptable from the international perspective
- *Pope & Talbot (2001)*
  - The international law standard is the minimum to which a host State must abide. The goal of investor protection must demand a higher-than minimum standard.
  - FET and FPS concepts entail a treatment beyond what required under international law ("presence of "fairness" elements that are additive to the requirements of international law)

Experience under NAFTA

Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001)

Minimum Standard of Treatment in Accordance with International Law

1 Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

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

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).

Experience under NAFTA

- After interpretative note of NAFTA's Free Trade Commission
  - Mondev (2002)
    - "*Neer and like arbitral awards were decided in the 1920s… To the modern eye, what is unfair or inequitable need not to equate with outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith…*"
  - Waste Management II (2004)
    - *The standard is infringed "..if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*"

Divergences by NAFTA tribunals

***Glamis Gold v. United States* (2009):**

"*616: … The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)".*

Merrill & Ring Forestry L.P. v. Canada (2010)

"*210. A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as opinio juris. In the end, the name assigned to the standard does not really matter.*

211. … the Tribunal is satisfied that fair and equitable treatment has become a part of customary law".

Other Cases / Other IIAs

- Several tribunals have held that **FET has a meaning independent of the minimum standard of treatment**, based on wording of the specific provision with reliance on the expressed purpose of the IIA, which in most cases is to promote and protect investments.
  - *See: Maffezini vs. Spain; Middle East Shipping v. Egypt; SGS vs. Philippines; Occidental vs Ecuador; Siemens vs. Argentina; Enron vs. Argentina; Saluka v. Czech Republic*

- Still, some tribunals have applied a somewhat more restrictive approach following reasoning in *Neer* and linking standard to customary international law
  - *See: Alex Genin vs. Estonia (requires bad faith)*

- Other tribunals interpret the FET standard and link it with customary international law but note that CIL has evolved since the *Neer* case
  - *See: Lemire v. Ukraine (No need for bad faith. Convergence between the plain meaning approach and the evolving content of CIL. CIL operates not as a ceiling but as a floor).*

Elements of FET

Factual Elements of breach of FET

(1) Abuse of authority, bad faith, coercion, harassment or intimidation

- threats, misrepresentations
- pressure amounting to coercion
- politically motivated harassment
- conduct intended to injure the investor or investment
- outrageous/shocking treatment

(2) Arbitrariness

- grossly unfair, unjust, idiosyncratic
- based on individual discretion, prejudice
- manifest irrationality
- serious administrative negligence
- mere illegality under domestic law is insufficient; the act must be contrary to *the* rule of law, not just *a* rule of (domestic) law
- Significant inconsistency in administrative acts and court decisions
- Violating the requirements of transparency, even-handedness and non-discrimination

Content of FET standard

(3) Denial of justice

- unwarranted delay or obstruction of access to courts
- failure to remedy defects in due process
- manifestly unjust judgment/clearly improper and discreditable court decision that no independent and impartial judge could make
- investment treaty tribunals are not appeal courts
- requirement to exhaust local remedies to correct judicial errors in lower courts
- a lack of due process that results in an outcome that offends judicial propriety
- lack of procedural fairness/propriety – failure to notify of hearing etc.
- administrative decisions based on clearly inappropriate/illegal consideration

Content of FET standard

(4) Discrimination

- unjustifiable and arbitrary distinctions
- lack of even-handedness of treatment
- targeted conduct motivated by bad faith
- often overlaps with arbitrariness

(5) Lack of Due diligence

- failure to exercise due diligence in the protection of foreign investors and investment
- failure to investigate/prosecute criminal acts against foreigner

Content of FET standard

(6) Transparency (lack of)

- is the legal framework readily apparent?
- can state decisions affecting investor be traced to the legal framework?

(7) Stable and predictable legal and business environment (failure to ensure)

- roller-coaster effect of continuing legislative changes?
- overlap with legitimate expectations

(8) Legitimate expectations (failure to protect)

- investor expectations arising from reliance on the legal framework, undertakings, representations and commitments at the time of the investment
- investor must demonstrate reliance on state-created expectation
- evisceration of the arrangement in reliance upon which the investor was induced to invest
- expectations must be reasonable, legitimate
- legitimate expectations do not shielded the investor from ordinary business risks
- investors cannot expect the regulatory regime not to change over time

Legitimate Expectations

- **EDF v. Romania (2009)**

"The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life.

Except where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable".

Legitimate Expectations

- **El Paso v. Argentina (2011)**

"There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total.

Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze"

Legitimate Expectations

- **Micula v Romania (2013) – dissenting opinion of Georges Abi Saab**

"3 - …To deserve the qualifier 'legitimate', the 'expectations' must be based on some kind of legal commitment. Under general international law, responsibility cannot ensue without a prior breach of a legal obligation. The conduct or representation of the government has to bear the makings of an identifiable legal commitment towards the specific investor, before we can speak of breach…"

Legitimate Expectations

- **Gold Reserve v. Venezuela (2014)**

"…Legitimate expectations are created when a State's conduct is such that an investor may reasonable rely on that conduct as being consistent. Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner…

….The investor's legitimate expectations are based on undertakings and representations made explicitly by the host State…"

Legitimate Expectations

- **Philip Morris v. Uruguay (2016)**

"Changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change"

Legitimate Expectations

- **Eli Lilly v. Canada (2017)**

"Claimant argues that its asserted expectations were reasonably based on the traditional utility requirement in Canadian patent law, as well as the grant of the Strattera and Zyprexa Patents. In this regard, the Tribunal notes that all patentees, including Claimant, understand that their patents are subject to challenge before the courts on the ground that the invention does not satisfy one or more patentability requirements"

"…although Claimant may not have been able to predict the precise trajectory of the law on utility, it should have, and could have, anticipated that the law would change over time as a function of judicial decision-making. The record in this case shows that the law did in fact undergo a reasonable measure of change and development".

world trade institute

nccr trade regulation
swiss national centre of competence in research

FULL PROTECTION AND SECURITY

UNIVERSITÄT BERN

Full Protection and Security

- Each Contracting Party shall accord to such investments full physical security and protection. *Dutch Model, Art. 3(1)*

- Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

  Swiss Model, Art. 4(1)

Full Protection and Security

- A requirement to exercise due diligence—not an absolute guarantee of protection

- Applies to protection of physical assets or personnel by police/armed forces.
  - ***Rompetrol v. Romania (2013)***. Award finds that measures taken by Romanian anti-corruption and criminal prosecution authorities against two Rompetrol's executives, including arrest, detention, travel-ban and wire-tapping. The Tribunal found that there had been a pattern of disregard by the prosecutorial and investigation agencies for the procedural rights of Rompetrol's executives, but…did not consider that Romania's breach of the BIT had caused any actual economic loss and failed on in its claim for moral damages.

  - ***Biwater Gauff* v. *Tanzania* (2008)**. Award finds that even if no force was used in removing the management from the offices or in the seizure of claimant's premises, these acts were unnecessary and abusive and amounted to a violation by the respondent of its obligation to ensure full protection and security.

Full Protection and Security

- Some cases suggest it also extends to **legal security**: obliges the host state to have a system capable of protecting and securing the investment (i.e. protection of legal rights)

- ***CME* v. *Czech Republic* (2001),** Partial Award by a majority, finds a breach because State actions and inactions were targeted to remove the security and legal protection of the claimant's investment (e.g. change of its situation as exclusive TV service provider)

- ***Siemens* v. *Argentina* (2007)** Award holds that the initiation of the renegotiation of a contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the full protection and legal security of respondent's investment

Full Protection and Security

- But the case law leans more to reject such broad interpretation:

- ***CSOB* v. *Slovak Republic* (2004).** Award finds that taking a contrary position to previous State practice would not comply with the obligation to provide full protection and security.

- ***Toto Costruzioni* v. *Lebanon* (2012).** Award holds that, in the absence of a stabilization clause or similar commitment, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction

world trade institute

nccr trade regulation
swiss national centre of competence in research

Questions?

rodrigo.polanco@wti.org

u b

UNIVERSITÄT BERN