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THE EVOLVING ROLE OF STATE SOVEREIGNTY IN THE INTERNATIONAL INVESTMENT REGIME

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The evolving role of State sovereignty in the international investment regime – Niccolò Zugliani

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Abstract

The principle of State sovereignty lies at the basis of international law and is inherently tied to its developments. Present times do not escape from contributing to the mutating understanding of State sovereignty and show instances of rupture with the increasing internationalization of competences once reserved to States that emerged during the second half of the 20th century. The last few decades have shown attempts of States to bring powers back to the domestic sphere and their endeavour to regain (if they ever lost) centrality in international law. The present study is prompted by these observations and aims at determining how the understanding of State sovereignty is mutating in the international in-vestment regime. It focuses on one of the most-relevant attributes of State sovereignty, namely the continuous capacity of the State to regulate in the public interest, and analyses its current developments in investment treaty drafting and its changing relevance in investment arbitral jurisprudence. In so doing, the study aims at contributing, through the analysis of the international investment regime, to identification of the mutating understanding of State sovereignty that is taking place in international law.

Sommario

Il principio di sovranità, quale pilastro su cui si fonda il diritto internazionale, riflette e al contempo influenza gli sviluppi di quest'ultimo. Se con la seconda metà del secolo scorso la tendenza degli Stati ad internazionalizzare competenze tradizionalmente associate alla loro sfera sovrana aveva portato alla cosiddetta 'crisi dello Stato', gli ultimi decenni sembrano mostrare il tentativo degli Stati di riappropriarsi di tali poteri e riguadagnare centralità sul piano internazionale. Da tali considerazioni prende spunto il presente lavoro, che mira ad identificare co-me stia mutando il concetto di sovranità Statale nell'ambito del diritto degli in-vestimenti internazionali. Prendendo ad oggetto uno dei tratti cardine della sovranità, quale l'esercizio della potestà normativa degli Stati, ne analizza gli sviluppi nell'ambito dei trattati di investimenti internazionali e della giurisprudenza arbitrale. Il presente lavoro mira così a contribuire, attraverso lo studio del regi-me degli investimenti internazionali, all'analisi sul mutamento del ruolo della sovranità nel diritto internazionale.

LIST OF ABBREVIATIONS

ADR	alternative methods of dispute resolution
ASEAN	Association of South-East Asian Nations
BC	British Columbia
BCV	Central Bank of Venezuela
BIT	bilateral investment agreements
BLEU	Belgian-Luxembourg Economic Union
CAFTA	Free Trade Agreement between Central America, the Dominican Republic and the United States of America
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union
CFIA	Cooperation and Facilitation Investment Agreements
CNEE	Commission of Electric Energy
CSR	corporate social responsibility
DPP	dispute prevention policy
DSB	Dispute Settlement Body
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EU	European Union
FCN	Treaty of friendship, commerce, and navigation
FDI	foreign direct investment
FET	fair and equitable treatment
FIPA	Foreign Investment Promotion and Protection Agreement

FIT	feed-in tariff
FPS	full protection and security
FTC	Free Trade Commission
FWF	Foreign Workers Fee
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HR	human rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICS	investment court system
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	international investment agreement
ILO	International Labour Organization
IMF	International Monetary Fund
IO	international organization
ISA	investor-State arbitration
ISDS	investor-State dispute-settlement system
LGE	General Electricity Law
MAI	Multilateral Agreement on Investments
MFN	most-favoured nation
MIGA	Multilateral Investment Guarantee Agency
MIGA Convention	Convention Establishing the Multilateral Investment Guarantee Agency
MST	minimum standard of treatment of aliens
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization

NIEO	New International Economic Order
OECD	Economic Co-operation and Development
OECD Draft Convention	OECD Draft Convention on the Protection of Foreign Investments
PCIJ	Permanent Court of International Justice
PPA	power purchase agreement
PPI	Producer Price Index
RD	Royal Decree
RDL	Royal Decree Law
RLGE	Regulations of the LGE
SADC	Southern African Development Community
SPR	single presentation requirement
TIP	treaty with investment provisions
TRIMS	Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development
WPT	Windfall Profit Tax Law

WTO	World Trade Organization
WWII	World War II

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INTRODUCTION

Although State sovereignty identifies one of the bedrock principles of the international legal order and has recurrently been at the heart of the debate surrounding international law, it has constantly escaped any attempts of legal scholarship to frame it into precise definitions. In the words of Oppenheim, there exists 'no conception the meaning of which is more controversial than that of sovereignty.'[1] If its core aspects lay steadily at the heart of the international legal system where States still retain the role of primary actors, the contours of State sovereignty have changed and evolved throughout the centuries, following –and yet reflecting– the developments of international law.

Present times do not escape from contributing to the mutating understanding of State sovereignty and show instances of rupture with the tendencies emerged during the second half of the 20th century. The latter were characterized by an increasing internationalization of competences once reserved to the State, with the transferral of powers to the supra-national level and the ensuing contraction of the domain associated with the notion of sovereignty. In a world resolutely steering towards the international dimension and embracing newly-found common values, described in 1992 by Fukuyama as 'the end of history',[2] eminent voices have heralded the crisis –if not the plain irrelevance– of the concept of State sovereignty and have foreseen the transformation of the international order into a new World Law.[3]

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[1] L. Oppenheim, *International Law. A Treatise. Volume I (of 2) Peace. Second Edition* (2nd Edition, 2012), at 110.

[2] F. Fukuyama, *The End of History and the Last Man* (1992).

[3] See, among others, Henkin, 'The Mythology of Sovereignty', in R. S. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1994) 351; Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law', 4 *European Journal of International Law* (1993) 447; Shue, 'Eroding Sovereignty: The Advance of Principle', in R. McKim and J. McMahan (eds.), *The Morality of Nationalism* (1997) 340; S. H. Mendlovitz and R. B. J. Walker, *Contending Sovereignties: Redefining Political Community* (1990). For voices on a World Law, see, e.g., Caldwell, 'Is World Law an Emerging Reality - Environmental Law in a Transnational World Internet Symposium - Issues in Modern International Environmental Law: Perspective', 10 *Colorado Journal of International Environmental Law and Policy* (1999) 227; Delbruck, 'A More Effective International Law or a New

Contrary to these developments, the last few decades have shown a growing mistrust towards internationalization. Instances have ranged from the return of unilateralism in military interventions,[4] to the crisis of multilateralism in international treaty-making,[5] to the backlash against international adjudication,[6] just to mention a few. Attempts to bring powers back to the domestic sphere seem to have revived the role and domain of State sovereignty and are witnessing the endeavour of States to fiercely regain (if they ever lost) centrality in international law.

Particularly affected by the current changes is the field of international economic law, economic globalization being pointed at as one of the triggering factors of the present state of affairs: the stalemate in negotiation rounds in the World Trade Organization (WTO)[7] and the recent crisis of the WTO Appellate Body,[8] alongside the return of trade wars between States, picture the crisis of the international trade system and of the values it represents.

The international investment regime seems not to escape the ongoing trend. Stating that the international regulation of foreign direct investment (FDI) is currently in the midst of a backlash might seem a truism for anyone who is familiar with the recent dynamics of the international investment regime.[9] The

World Law - Some Aspects of the Development of International Law in a Changing International System', 68 *Indiana Law Journal* (1992–1993) 705.

[4] See, as a matter of example, Roberts, 'NATO's 'Humanitarian War' over Kosovo', 41 *Survival* (1999) 102; Kurth, 'Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities', 50 *Orbis* (2006) 87; C. O'Meara, *United States' Missile Strikes in Syria: Should International Law Permit Unilateral Force to Protect Human Rights?*, 18 April 2017, EJIL: Talk!, available at https://www.ejiltalk.org/united-states-missile-strikes-in-syria-should-international-law-permit-unilateral-force-to-protect-human-rights/.

[5] Brunnée, 'Multilateralism in Crisis', 112 *Proceedings of the ASIL Annual Meeting* (2018) 335.

[6] Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197.

[7] See D. A. Gantz, *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (2015), at 30–49.

[8] Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', 22 *Journal of International Economic Law* (2019) 297.

[9] The choice of the term 'regime' in the present work will be explained below.

unprecedented drive that led to the creation of a worldwide net of bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) that promoted a favourable investment climate for foreign investors during the last decade of the 20th century and the first of the 21st century,[10] has gradually faded and turned into diffidence, if not outright hostility. While the cumulative number of international investment agreements (IIAs) is still growing, the pace at which new treaties are being negotiated and concluded has consistently slowed down, with a number of Countries currently re-evaluating their approach to international investment policy-making.[11]

While these changes have been described through a wide array of names by international scholarship, depending on the focus of the observer,[12] they all represent manifestations of State autonomy in the international realm and, as a consequence, expressions of the reach of international law within the State's own boundaries, and can well be described through the lens of State sovereignty. Framing them in such terms allows to draw a parallel between the current transformations taking place in the international investment regime and the ongoing general tendency in

[10] The number of bilateral investment treaties (BITs) has grown steadily, from 385 by 1989 to 2181 by 2002, and to 2807 BITs and 309 other IIAs by 2010. Source: UNCTAD, *World Investment Report 2003* (2003), available at https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=669 (last visited 2 April 2020), at 89; UNCTAD, *World Investment Report 2010* (2010), available at https://worldinvestmentreport.unctad.org/wir2010/ (last visited 2 April 2020), at 100.

[11] See UNCTAD, *World Investment Report 2017* (2017), available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf (last visited 2 April 2020), at 111.

[12] The push-back against the traditional international investment architecture has been given different names in international law scholarship, such as 'reassertion of control' by States, 'return of the State', or 'sovereign backlash'. See: A. Kulick, *Reassertion of Control over the Investment Treaty Regime* (2018); Alvarez, 'The Return of the State', 20 *Minnesota Journal of International Law* (2011) 223; M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration. Perceptions and Reality* (2010). Commentators have also framed the underlined dynamics in terms of exit and voice as options available for States to react to perceived imbalances of international arbitration. See, e.g., Langford, Behn and Fauchald, 'Backlash and State Strategies in International Investment Law', in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (2018) 70; Katselas, 'Exit, Voice, and Loyalty in Investment Treaty Arbitration', 93 *Nebraska Law Review* (2014) 313.

the international panorama. The international regulation of foreign investments may thus serve as an indicator of −as well as embodying a contributing factor to− the mutating role of State sovereignty in international law.

The present study is prompted by these observations and aims at determining whether the current changes in the international investment regime reflect a mutating understanding of State sovereignty, that points to a greater role for State authority and to a more-limited reach of international law than that emerged during the second half of the last century. More precisely, it aims to answer the following research questions: is it possible to identify any instances, in the international investment regime, that allow to detect possible changes in the continuous capacity of the State to exercise its sovereign powers? If so, are new developments heading towards a specific direction, identifiable in the reassertion of the role of the State and, consequently, in a greater relevance for its sovereign prerogatives? If that is the case, is the shift consistent and widespread enough to be classified as a proper tendency or trend?

To answer these questions, the present study will adopt the following methodological choices. At first, it selects an expression of State sovereignty, or an 'actionable legal concept',[13] that be wide enough to reasonably reflect the changing understanding of the principle in the international investment regime, while still making the analysis feasible. Such a concept is here identified with the regulatory capacity of the State, considered as the 'freedom to engage in political, economic, legislative and other regulatory activity as the state sees fit.'[14] The State's regulatory capacity has attracted much attention in recent years and has quickly become one of the most-troublesome areas of the international protection of FDI. To this end, three recent studies carried out by Titi, Mouyal, and Levashova, focus on the 'right to regulate' in international investment law. In Titi's work, the right to regulate constitutes an exception to the obligation to protect investments.[15] Mouyal and

[13] The need for such a preliminary operation in a study on sovereignty is explained by Viñuales, 'Sovereignty in Foreign Investment Law', in *The Foundations of International Investment Law: Bringing Theory into Practice* (2012) 317, at 318.

[14] A. Titi, *The Right to Regulate in International Investment Law* (1st Edition, 2014), at 32.

[15] Titi referso to it as 'the legal right exceptionally permitting the host [S]tate to regulate in

Levashova discuss instead the right to regulate as a direct emanation of the State's sovereign prerogatives and therefore in similar terms to those of the present work. Mouyal discusses the right to regulate from a human rights perspective.[16] Levashova address the right to regulate in relation to the fair and equitable treatment (FET) standard from a *static* perspective.[17] Conversely, the present work adopts a broader notion of the concept than that supported by Titi and focuses on the evolution its understanding, as opposed to Mouyal and Levashova.

The selected expression of State sovereignty will be studied along two lines of enquiry, that correspond the two main components of the international investment regime, namely IIAs treaty making and investment arbitral case law. IIAs, far from being the sole source of international investment law, have become, starting from the second half of the past century, the 'the principal pillar of a new international legal framework for investment'[18] and are now a fundamental source of the international investment regime.[19] They have been concluded by almost all existing Countries over a time span of 70-odd years, and provide a reliable sample of the choices made by States as masters of their treaties. Treaty making then represents a direct indicator of how negotiating States aim to balance the relationship between investment protection and the exercise of their sovereign powers. For this reason, attention will initially be dedicated to the current developments in treaty drafting, to give a comprehensive account of the States' attempts to rebalance in their favour instruments that they considered to be one-sided in favour of FDI. However, if these developments might suggest an easy identification of the changing role of State

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derogation of inter-national commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.' *Ibid.*, at 33.

[16] L. W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016).

[17] Y. Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (2019).

[18] J. W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013), at 332.

[19] Juillard, 'L'évolution Des Sources Du Droit Des Investissements', in *Recueil Des Cours* vol. 250 (1994) 9, at 75 ff.

sovereignty in the international investment realm, they notoriously offer only a partial view of the latter.

The enquiry will therefore move on to the judicial realm and will focus on investor-State arbitration, as only investment arbitral case law can offer an insight of the true operational range of IIA provisions. Its role has reached far beyond the mere settlement of disputes between the parties that was envisaged by treaty drafters,[20] to acquire law-making functions, as noticed by some commentators,[21] and can reflect whether (and in what way) the current changes (both within and outside the international investment regime) affect the interpretation of IIA provisions. Furthermore, unlike the developments in treaty drafting, which influence *pro futuro* changes to the regime, arbitral tribunals are called to give application to old-generation IIAs and can give an account of the different relevance given to the host State's sovereign prerogatives and powers under existing treaties. Ultimately, a comprehensive view of the undergoing dynamics taking place in the international investment regime can only be appreciated through a combined enquiry into its normative and the judicial realm.

The analysis of arbitral jurisprudence will be based on the 'standard of review' (the degree of scrutiny that courts apply when addressing decisions taken by other authorities, or the *deference* paid to the primary decision-maker) employed by arbitral tribunals, which will be adopted as the indicator of the tribunal's consideration of the host State's sovereign prerogatives and ultimately of State sovereignty. While academic literature on the employment of deference by international courts is vast,[22] the possibility of its conceptualization through the standard of review in investment arbitration is argued by some relevant authors such as Schill, Henkels,

[20] Bogdandy and Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority', 26 *Leiden Journal of International Law* (2013) 49, at 71. See, also, S. W. Schill, *The Multilateralization of International Investment Law* (2009).

[21] See, e.g., Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking', 12 *German Law Journal* (2011) 1083; Sweet, Chung and Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration', 8 *Journal of International Dispute Settlement* (2017) 579.

[22] A comprehensive enquiry is carried out in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014).

Vadi, Ortino.[23] However, if current doctrinal efforts have so far mainly focused in creating new operational tools to face current problems in international investment arbitration, little-explored is the possibility to employ a deference-based analysis to give an account of the consideration given to the regulatory authority of the State.

This endeavour has not been carried out yet by international investment scholarship that has, so far, developed along the following lines. Ample scholarly attention has been given to the link between IIA reforms and issues of State sovereignty. This emerges primarily from numerous articles in academic journals and book chapters,[24] as well as reports of international organizations,[25] although it obviously permeates the discourse around the international protection of FDI when approached in general terms.[26] Equally beaten is then the study of international investment arbitration under the lens of State sovereignty, which can be found especially in the work of those authors who have dedicated their attention to

[23] C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015); Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing', 30 *Leiden Journal of International Law* (2017) 71; Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577; V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018).

[24] See, among the sources that will be used in the present work, Alvarez, 'Sovereign Concerns and the International Investment Regime', in K. P. Sauvant, L. Sachs and W. P. F. Schmit Jongbloed (eds.), *Sovereign Investment: Concerns and Policy Reactions* (2012) 258; Guntrip, 'Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law', 65 *International & Comparative Law Quarterly* (2016) 829; Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions', 78 *Modern Law Review* (2015) 793; Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *Journal of International Economic Law* (2003) 841; Shan, 'Calvo Doctrine, State Sovereignty and The Changing Landscape of International Investment Law', in W. Shan, P. Simons and D. Singh (eds.), *Redefining Sovereignty in International Economic Law* (2008) 247; Tienhaara, 'Once BITten, Twice Shy?', 30 *Policy and Society* (2011) 185.

[25] See the UNCTAD's *World Investment Reports* recalled in the following Chapters.

[26] See J. E. Alvarez, *The Public International Law Regime Governing International Investment* (2011); Leben, 'La Théorie Du Contrat d'état et l'évolution Du Droit International Des Investissements', 302 *Recueil de Cours* (2003) 197; M. Sornarajah, *The International Law on Foreign Investment* (4th. ed., 2017).

conceptualize international investment arbitration as a public international law method of dispute resolution, as opposed to a private-law one,[27] but that pervades the literature that has focused on the analysis of the backlash against investment arbitration.[28]

Less-explored is the possibility to conduct a study of the changes that the international investment regime is undergoing in a comprehensive manner. This effort has been carried out in three works, one written by Sornarajah,[29] and in two volumes, one edited by Kulick[30] and the other by Brown and Miles,[31] as well as journal articles.[32] All these works deal with numerous aspects of the so-called return of the State in investment law and investment arbitration, from which they draw general conclusions. However, none of these studies attempts to tackle in a general and structured way the evolving role of State sovereignty in international investment arbitration.

Consequently, this work amply draws from the existing body of international investment literature when laying the methodological foundations of the analysis, that will be thoroughly explained in the relevant Chapters and that will serve to justify the standpoints that, unavoidably, were to be adopted. Concurrently, the

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[27] Limiting to some of the most-relevant books, see E. De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014); G. Van Harten, *Investment Treaty Arbitration and Public Law* (2008); *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013).

[28] The most'relevant example in this regard is Waibel et al. (eds.), *supra* note 12. Numerous journal articles and book chapters have then addressed the topic. See Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality', 42 *Yale Journal of International Law* (2017) 1; Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime Note', 50 *Harvard International Law Journal* (2009) 491; Langford, Behn and Fauchald, *supra* note 12; Ma, 'A BIT Unfair: An Illustration of the Backlash against International Arbitration in Latin America Comment', 2012 *Journal of Dispute Resolution* (2012) 571; Peinhardt and Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment', 7 *Global Policy* (2016) 571.

[29] M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (2015).

[30] Kulick, *supra* note 12.

[31] C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011).

[32] Alvarez, *supra* note 12.

present work will contribute to the existing body of legal scholarship in two ways: it will help shed light on the current changes taking place in the international investment regime by analysing them in a rational and coherent fashion; it will contribute, through the study of the international investment regime, to the identification of the current understanding of State sovereignty in international law.

The present work will adopt the following structure. Chapter I will offer a brief overview of the evolving role of State sovereignty in general terms and in the international investment regime in particular. Initially, it will describe the quest for supranational integration and economic liberalization that has led to the compression of the realm associated to State sovereignty and to the 'crisis' of State sovereignty during the second half of the 20th century. It will then account for the new and opposite tendency that is gaining momentum in the international panorama and that corresponds to the States' attempts to regain competences traditionally linked to State sovereignty once transferred to the international level. In doing so, it will highlight how the development of the international investment regime has aligned to that of the other fields of international law and on the peculiarities that characterize the former under the lens of State sovereignty.

Chapter II will depict the current changes in IIA drafting and will determine whether they actually constitute a trend towards a greater role for State sovereignty. It will expose the growing dissatisfaction with the existing investment law regime and the numerous means by which States attempt to reassert their regulatory powers while keeping the regime in place. It will carry out a quantitative and qualitative survey of the changes currently taking place, focusing on which new formulations are appearing in the investment treaty panorama and their overall presence when confronted with the total number of existing IIAS.

Chapter III will turn to international investment arbitration and will provide the methodology that will be followed in the subsequent Chapters. In a preliminary fashion, it will justify the soundness of the study of investment arbitral jurisprudence from a general point of view. It will then explain the possibility to resort to public-law instruments in the survey of arbitral jurisprudence and the specific concept adopted, namely the deference that emerges by the analysis of arbitral jurisprudence. Furthermore, it will define the limitations of the field of enquiry to

proceedings that stem from alleged violations of the FET standard. Ultimately, it will identify the level playing fields that will allow to detect the changes in the tribunals' approach towards State sovereign measures. These will be found in the same treaty on which proceedings were based or in the same factual circumstances that gave rise to investment claims.

Chapter IV will look into arbitral jurisprudence based on alleged violations of 'qualified' FET provisions. The section will be almost entirely exhausted by proceedings emerged in the framework of the North American Free Trade Agreement (NAFTA) and will then be extended to the remaining proceedings. It will give an account of the peculiarities of the NAFTA framework and will be divided into temporal slots that take account of the release of the Free Trade Commission (FTC) Note in 2001.

Chapter V will turn the attention to arbitral jurisprudence based on 'unqualified' FET clauses by delving into the mini system created by the Energy Charter Treaty (ECT). Within this specific ambit, it will acknowledge the existence of more specific level playing fields that are proceedings stemming from energy reforms adopted by Spain, Czech Republic, and Italy, that will be therefore addressed separately. At the end of the Chapter, the findings will be analysed jointly.

Chapter VI will complete the survey of arbitral jurisprudence based on 'unqualified' FET clauses. It will first bring the attention to the so-called 'Argentine cases', arisen from the 2001 economic crisis that hit Argentina. In this regard, ample justification will be given for the unitary study of arbitral jurisprudence that stemmed from different treaty bases. Finally, the Chapter will address the remaining cases with no other elements of commonality.

CHAPTER I

The evolving role of State sovereignty in international law

1. State sovereignty in international law: an overview − 2. The changing meaning of State sovereignty − 2.1. International economic institutions and their far-reaching activity − 2.2. Economic globalization − 3. State sovereignty in the international investment regime − 3.1. The customary international rules on protection of FDI − 3.2. The debate over sovereignty in international investment law − 3.3. The failure of a multilateral treaty framework − 3.4. The lack of specialized international organizations − 3.5. Investment protection and promotion through international investment treaties: problematic traits − 4. A new understanding of State sovereignty in the international panorama? The 'return of the State' − 5. A selected expression of State sovereignty: regulatory capacity of the State

1. State sovereignty in international law: an overview

The principle of sovereignty reflects the innate relationship between power, autonomy, and law-making, crossing boundaries between the legal, philosophical, and political realms.[1] It lies at the heart of the public law discourse, where it has been developed over centuries in the attempt to conceptualize the power of the sovereign towards its own people, and at the heart of the public international law debate, where it is inherently linked to the existence of the primary subject of international law, namely the State.[2] Its core notion has been identified in the 'highest, final and supreme political and legal authority and power within the territorially defined domain of a system of direct rule.'[3]

[1] Two fundamental strands of theory, represented by Schmitt and Kelsen, describe different understandings of sovereignty. According to Schmitt, law is secondary to factual power, as argued by other legal philosophers such as Austin or Bentham (see C. Schmitt, *Political Theology* [2010]; J. Austin and H. L. A. Hart, *The Province of Jurisprudence Determined* [1998]; J. Bentham and H. L. A. Hart, *Of Laws in General* [1970]). Contrarily, Kelsen understands sovereignty as defined by and within the law (see H. Kelsen, *The Problem of Sovereignty and the Theory of International Law: A Contribution to a Pure Theory of Law* [2020]).

[2] M. N. Shaw, *International Law* (7th Edition, 2014), at 15.

[3] C. W. Morris, *An Essay on the Modern State* (1998), at 177–178.

Legal scholarship has attempted to organize the different expressions of the power of the sovereign. While susceptible of numerous declinations,[4] the principle is traditionally identified with an internal aspect (or '*internal* sovereignty'), where the sovereign is the supreme authority within its own jurisdiction,[5] and an external one ('*external* sovereignty'), where the sovereign engages in equal relations with other sovereign entities.[6] Together describe the legal personality of the State.[7]

'Internal' sovereignty manifests itself through the power of the Government to wield authority over the individuals living in the territory of the State,[8] to freely dispose of its territory, and to perform the activities deemed necessary or beneficial to its own population.[9] It encompasses the power to enact legal commands (jurisdiction to prescribe), the power to pronounce upon legal disputes (jurisdiction to adjudicate) and the power to ensure though coercive means that legal commands are complied with (jurisdiction to enforce).[10] As put in the *Island of Palmas* arbitral

[4] See, e.g., S. Besson, *Sovereignty*, 2011, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?rskey=pORLl3&result=1&prd=EPIL (last visited 26 March 2018); Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', 47 *Political Studies* (1999) 431; Nagan and Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', 43 *Columbia Journal of Transnational Law* (2004–2005) 141, at 143–145.

[5] Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years (Volume 186)', *Collected Courses of the Hague Academy of International Law* (1984), at 20; M. St. Korowicz, *Introduction to International Law* (1959), at 157.

[6] Jackson, 'Introduction: Sovereignty at the Millennium', 47 *Political Studies* (1999) 423, at 425.

[7] See, J. Crawford, *Brownlie's Principles of Public International Law* (8th Edition, 2012), at 203 ff.; although see the critical view of Henkin, 'The Mythology of Sovereignty', in R. S. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1994) 351.

[8] PCIJ, *S.S. Lotus (France v. Turkey)*, 9 July 1927, P.C.I.J. (Series A) No. 10, at 18–19: '[F]ailing the existence of a permissive rule to the contrary – [a State] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'.

[9] A. Cassese, *International Law* (2001), at 89.

[10] A. Tanzi, *Introduzione al Diritto Internazionale Contemporaneo* (5th Edition, 2016), at 205.

award, although in a rather circular fashion, it is 'the right to exercise therein, to the exclusion of any other State, the functions of a State'.[11]

'External' sovereignty reflects the notions of independence and equality. Independence entails the freedom of the State to act in the international field as it deems necessary or beneficial to its own good.[12] Equality describes the State's governing authority as not legally dependent on any higher one and standing on equal grounds with other States, according to the maxim *par in parem non habent imperium*.[13] Sovereign equality operates on a formal legal ground (while on the ground of political relations it is widely recognized as fictional) and implies the reciprocity of rights and duties, as well as forming the basis for the principle of non-discrimination among States in international law.[14] It operates regardless of the different character of States in terms of their territorial extent, geographical particularities, population size, religious and cultural imprints, political systems, and other factors.[15]

The distinction between the two facets of the principle responds to a need for clarity, although it does not reflect a separation in the nature of State sovereignty: internal and external sovereignty describe different reflections of a unitary concept and connect to each other in a continuum.[16] Accordingly, obligations that stem from the international behaviour of the State can reverberate through the different dimensions of State sovereignty.[17] They can display effects on the State's external

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[11] PCA, *Island of Palmas Case (United States v. The Netherlands), Award*, Reports of International Arbitral Awards (R.I.I.A.) Vol.2, 4 April 1928 829, at 838.

[12] Besson, *supra* note 4.

[13] Loughlin, 'Why Sovereignty?', in R. Rawlings, P. Leyland and A. L. Young (eds.), *Sovereignty and the Law. Domestic, European, and International Perspectives* (2013) 34, at 34.

[14] J. Kokott, *States, Sovereign Equality*, April 2011, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113 (last visited 25 February 2019).

[15] Preuß, 'Equality of States - Its Meaning in a Constitutionalized Global Order Symposium: Post-Conflicting Studies and State-Building', 9 *Chicago Journal of International Law* (2008–2009) 17, at 18.

[16] On the link between internal and external sovereignty, see Eckes, 'The Reflexive Relationship between Internal and External Sovereignty', 18 *Irish Journal of European Law* (2015) 33; Morris, *supra* note 3, at 223 ff.

[17] On the relationship between the two dimensions of State sovereignty, see Eckes, *supra* note 16.

relationships, such as the rules regulating the use of force in international relations.[18] Alternatively, they can affect the State's ultimate authority and competence over all people and all things within its territory.[19] Such a basic notion of international law can be summarized in the words of the Permanent Court of International Justice (PCIJ) in the 1923 *Nationality Decrees* case, according to which

> '[…] it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.'[20]

While the exact contours of the principle of sovereignty have always been difficult to grasp, it is widely accepted that in its classic conception it was portrayed as absolute, inalienable, and indivisible.[21] In the international realm, this reflected in the Westphalian State, intended as a 'political organization based on the exclusion of external actors from authority structures within a given territory'.[22] However, absolutistic conceptions have long been relegated to the past by the diffusion

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[18] See, e.g., the prohibition of the use of force, now codified at Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art.2(4).

[19] Some commentators name the external or internal reach of international sovereignty as, respectively, 'international external sovereignty' and 'international internal sovereignty'. See Besson, *supra* note 4.

[20] PCIJ, *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, PCIJ Series B n.4, 7 February 1923 (National Decrees), at para. 41.

[21] As identified in 1576 by Bodin in his De Republica. See Besson, *supra* note 4. Absolutistic conceptions of sovereignty dominated the legal theory during the 16th and 17th century, gradually shifting from ideas of sovereignty that was not bound by anything (see: T. Hobbes, *De Cive* [1642]) to visions that admitted limitations to it (see: S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* [1744]). If such visions identified the sovereign with the monarch, a dramatic change took place with J. Locke, *Two Treatises on Government* (1689)and was further elaborated in the following centuries: neither the monarch, and later the Parliament, or the people, was originally sovereign in a State but the State itself, and all supreme powers of the government derived from the sovereignty of the State. See, also, L. Oppenheim, *International Law. A Treatise. Volume I (of 2) Peace. Second Edition* (2nd Edition, 2012), at 113–114.

[22] S. D. Krasner, *Sovereignty: Organized Hypocrisy* (2001), at 4.

of ideas such as the divisibility of sovereignty and the restriction in the exercise of sovereign powers by Constitution or positive law.[23] Although, conceptually, this constituted a dramatic shift from the early doctrines on sovereignty, as noted by some authors, absolute sovereignty was merely a fiction that came to be recognized as the foundation of international relations: neither in the relationship with the people subject to the sovereign, nor in the relationship with other States, power was ever really unbound and not shared with anyone.[24]

Sovereignty has always been inherently tied with the State's normative capacity in the international legal order. To this end, the State has been defined as truly sovereign only when subject to international law.[25] Nowadays, such interconnection is fully expressed by the United Nations (UN) Charter: after stating the sovereign equality of its Member States, the Charter describes sovereignty as being *within* and *subject* to international law, at Art. 2(2).[26] Traditionally, and until the 20th century, international law was conceived as reflecting the relationship between equally supreme actors, meaning that sovereign actors were bound solely by those limitations that they had previously agreed on.[27] The consensual approach, as summarized by the PCIJ in the *Lotus* case, provided that:

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[23] Oppenheim, *supra* note 21, at 111; Morris, *supra* note 3, at 204 ff.

[24] Bodley, 'Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia Notes', 31 *New York University Journal of International Law and Politics* (1998–1999) 417, at 419–420. As aptly suggested, even Bodin considered the sovereign as bound by the laws of God or Nature. See Alvarez, 'State Sovereignty Is Not Withering Away: A Few Lessons for the Future', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 26. See also Lauterpacht, 'Sovereignty-Myth or Reality?', 73 *International Affairs* (1997) 137.

[25] P. Dailleir and A. Pellet, *Droit International Public* (6th Edition, 1999), at 421.

[26] UN Charter, *supra* note 18, Art.2(2): 'All Members, in order to ensure to all of them the right and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.' Such a formulation was adopted to blunt the principle of sovereignty and to move away from its absolutistic understanding, as it would otherwise undermine the foundations upon which the existence of the system of the UN Charter was based. See Müller and Kolb, 'Article 2(2)', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* 2. ed. (2002) 91, at 94.

[27] Schrijver, 'The Changing Nature of State Sovereignty', 70 *British Yearbook of International Law*

> '[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law […].'[28]

So intended, the most relevant sources of international obligations were an emanation of State sovereignty, expressed through consent. Customary rules stemmed from the State's belief that a repeated behaviour (*diuturnitas*) depended on a legal obligation (*opinio iuris*).[29] In a similar fashion, the limitation of freedom accepted through the conclusion of international agreements derived from a willing choice of the State that was, in and of itself, not an abandonment of sovereignty, but an exercise of the latter exchanged for perceived greater benefits:[30] as stated already by the PCIJ in the *Wimbledon* case,

> 'any convention creating an obligation […] places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'[31]

2. The changing meaning of State sovereignty

The exact contours of State sovereignty have constantly mutated, progressively wearing down the traditional constructions of the principle.[32] The phenomenon has been described through the overarching term 'globalization':[33] while exceeding the

(2000) 65, at 71.

[28] ICJ, Lotus case, *supra* note 8, at 18.

[29] T. Treves, *Customary International Law*, November 2006, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393 (last visited 29 November 2018).

[30] P. J. Martinez-Fraga and R. Reetz, *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era* (2015), at 124.

[31] Wimbledon case PCIJ, *'SS Wimbledon' (France, Italy, Japan, and the UK v. Germany)*, PCIJ Rep Series A No 1, 7 August 1923 15, at 25.

[32] Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', 47 *International Organization* (1993) 139, at 174.

[33] '[G]lobalization —including both the globalisation of markets and the globalisation of values and opinion (human rights)— [has been associated] with the transfer or allocation of sovereignty or sovereign powers to international institutions or governance mechanisms.' Howse, 'Sovereignty,

boundaries of the legal realm, the term indicates a process that, 'by eroding sovereignty, is loosening the State's monopoly on legal production and enforcement.'[34]

Globalization has redefined the sense of the key actors and issue areas of international law, challenging to the ability of the State to assert power. To mentioned but a few, non-State actors, such as international organizations (IOs), individuals, or non-governmental organizations (NGOs) have gained relevance in the international panorama.[35] The inherent power of States to wage war has found increasing limitations starting from the early years of the 20th century, when procedural

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Lost and Found', in W. Shan, P. Simons and D. Singh (eds.), *Redefining Sovereignty in International Economic Law* (2008) 61, at 61.

[34] F. Mégret, *Globalization*, February 2009, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e939 (last visited 25 February 2019). See, also, Cox, 'Globalization, Multilateralism and Social Choice', 13 *United Nations University - Work in Progress Newsletter* (1990).

[35] The primary example is the creation of international organizations (IOs) with law-making power under international law (see, e.g., H. G. Schermers and N. M. Blokker, *International Organizations or Institutions, Membership*, January 2008, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e505 (last visited 1 March 2019)). A similar transfer of sovereign rights can be seen in processes of regional integration, where an outstanding case is the European Union (EU), that has reached a level of integration that has given rise to doubts about the very concept of territorial sovereignty and resembles the structure of a State itself (see: Ruggie, *supra* note 32; Van Staden and Vollaard, 'The Erosion of State Sovereignty: Towards a Post-Territorial World?', in *State, Sovereignty, and International Governance* (2002) 165, at 179). To a lesser extent, the reconsideration of the role of State sovereignty is determined by the growing role in international law of actors disconnected from States and State participation. Non-governmental organizations (NGOs) may influence the decisions of Member States in IOs and international conferences by bringing technical expertise and by raising issues during the decision-making process, when admitted to the latter (see S. Hobe, *Non-Governmental Organizations*, March 2010, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e968 (last visited 1 March 2019); Suy, 'New Players in International Relations', in *State, Sovereignty, and International Governance* (2002) 373). Also, the role of individuals can further represent the mutating understanding of State sovereignty: international law has abandoned the classic view according to which individuals were just subject to international law, to consider them as subjects of international law (see, among others, K. Parlett, *The Individual in the International Legal System* (2011), at 353 ff).

obstacles,[36] peaceful dispute-resolution methods,[37] or limitations of the grounds that entitled a State to declare war were first introduced,[38] later poured into the UN Charter.[39]

Obligations stemming from the international behaviour of the State have then increasingly affected the State's ultimate authority and competence over all people and things within its territory.[40] Instances of this shift could already be seen during the 19th century, when the absolute doctrine of State immunity, based on the premise that equal and independent States exercising exclusive sovereign powers within their territories were insulated from interference by another State and its courts,[41] was first questioned by Italian and Belgian courts through the restrictive doctrine of State immunity.[42] Several fields of international law, from human rights protection to humanitarian intervention or international criminal law, to mention but a

[36] See, for instance, the Hague Peace Conferences of 1899 and 1907. B. Baker, *Hague Peace Conferences (1899 and 1907)*, November 2009, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e305?prd=OPIL (last visited 27 October 2020).

[37] See H.-J. Schlochauer, *Bryan Treaties (1913-14)*, August 2007, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e14 (last visited 27 October 2020).

[38] See W. Benedek, *Drago-Porter Convention (1907)*, January 2007, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733 (last visited 27 October 2020).

[39] See, e.g., UN Charter, *supra* note 18, Art.2(4): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' and Chapter VII.

[40] On the relationship between the two dimensions of State sovereignty, see Eckes, *supra* note 16. The interconnection between the two realms is a postulate of international law that was summarised by the PCIJ in Nationality Decrees, *supra* note 20.

[41] H. Fox and P. Webb, *The Law of State Immunity* (3rd Edition, 2013), at 26.

[42] *Ibid.*, at 151 ff.

few,[43] have then shown the capacity of international governance to reach within the domestic realm of States.

The inclusion of the State's authority in a system of international cooperation became an uncontested feature of the international legal order during the second half of the 20th century and marked the abandonment of the absolute character of the consensual principle.[44] In present days, consent as the basis of international law

[43] Fields traditionally reserved to the State sovereign power are being increasingly regulated in the international sphere. As a matter of example, States are considered as being subject to international rules irrespective of any choice with regard to the adherence to such rules, jus cogens and obligations erga omnes being the primary example. Within the category of jus cogens norms, international law includes the protection of fundamental human rights and violations such as genocide, ethnic cleansing, torture (just to mention a few) that can trigger the State's responsibility. See ILC, *Draft Articles on Peremptory Norms of General International Law (Jus Cogens)*, A/CN.4/L.936 (2019). See also, among others, Loughlin, 'The Erosion of Sovereignty', 45 *Netherlands Journal of Legal Philosophy* (2016) 57, at 72; Schermers, 'Different Aspects of Sovereignty', in *State, Sovereignty, and International Governance* (2002) 185; Hameed, 'Unravelling the Mystery of Jus Cogens in International Law', 84 *British Yearbook of International Law* (2014) 52. In the field of human rights, grave violations of the latter are able to overcome the principle of non-intervention in the internal affairs of the State. The current interpretation of article 2(7) of the UN Charter triggers the 'responsibility to protect' of the international community when national authorities do not face (or are the perpetrators of) grave violations of human rights of their nationals. See, among others, Nagan and Hammer, *supra* note 4; Slaughter, 'Sovereignty and Power in a Networked World Order Commemorative Issue - Balance of Power: Redefining Sovereignty in Contemporary International Law', 40 *Stanford Journal of International Law* (2004) 283; T. G. Weiss and D. Hubert, *The Responsibility to Protect - Research, Bibliography, Background* (2001). Another intrusion into the domestic sphere of control of States has then taken place through the formation of international criminal courts that prosecute activities carried out within the State territory but that are considered to arise to the international level due to their gravity. (See, e.g., Bodley, *supra* note 24; Bergsmo and Yan, 'On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law', in M. Bergsmo and L. Yan (eds.), *State Sovereignty and International Criminal Law* (2012) 1).

[44] The consensual approach to international law has undergone alternate fortunes during the 20th century. See the different approach adopted in the jurisprudence of the ICJ in ICJ, *Colombian-Peruvian asylum case*, ICJ Reports 1950 p.266, 20 November 1950; ICJ, *Fisheries case*, (Judgment) I.C.J. Reports 1951, p. 116, 18 December 1951; For an overview of the doctrinal debate, see Hertogen, 'Letting Lotus Bloom', 26 *European Journal of International Law* (2015) 901.

is certainly valid:[45] States still retain their power to make or terminate their international treaties,[46] and can oppose to the formation of international customary law or depart from it giving rise to a new customary rule.[47] However, the once absolute character of State consent is now considered in a system where interdependence, community interests, and international governance mitigate its reach.[48] In the words of judge Alvarez,

> '[t]his principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors [...] which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States [...]'.[49]

The reshaping of the role of States in their international relations and the abandonment of the traditional notion of State sovereignty in favour of a more limited one, embedded in the system of international law, has led numerous scholars to question the very essence of State sovereignty in the contemporary world, claiming

[45] Watson, 'State Consent and the Sources of International Obligation', 86 *Proceedings of the Annual Meeting (American Society of International Law)* (1992) 108; Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', 29 *Michigan Journal of International Law* (2007) 71. This has been upheld on recent occasions by the ICJ itself. See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) I.C.J. Reports 1996, p. 226, 8 July 1996; ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion) I.C.J. Reports 2010, p. 403, 22 July 2010.

[46] A. Titi, *The Right to Regulate in International Investment Law* (1st Edition, 2014), at 32.

[47] See, among others, J. A. Green, *The Persistent Objector Rule in International Law* (2016), The Persistent Objector Rule in International Law. Specifically, on the relevance of the persistent objector rule in the international investment realm, see Dumberry, 'The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor–State Arbitration?', 23 *Leiden Journal of International Law* (2010) 379.

[48] See Crawford, *supra* note 7, at 432; W. Friedmann, *The Changing Structure of International Law* (1964), at 60 ff; Singh, 'The Absence of a Sovereign Legislature and Its Consequences for International Law', 12 *Malaya Law Review* (1970) 277.

[49] ICJ, *Fisheries case, Individual Opinion of Judge Alvarez*, I.C.J. Reports 1951, p. 144, at 152.

that sovereignty is in decline,[50] waning,[51] that it needs to be abandoned[52] or even that it is always been a myth.[53]

Such a characterization has been rejected by an equally consistent strain of international legal scholarship,[54] which considers the idea of a 'crisis' of sovereignty misleading: while sovereignty has lost the absolute traits that characterized its understanding under traditional international law (although with dissenting voices), the reshaping of sovereignty is identified with a new dimension of the latter. The new dimension still holds State sovereignty as a pivotal concept of international law, although it involves a greater role of the international community and a greater interdependence between the various international actors, and witnesses the shift of powers once confined to the absolute dominion of States to the international dimension.

Given the focus of the present work, an account of the dynamics depicted above will be given through a brief description of the international economic realm in general, before delving into the field of international investment.

2.1. International economic institutions and their far-reaching activity

The growing reach of international law within the State's boundaries, as well as the compression of States' powers beyond those originally conferred, can be appreciated in the functioning of the major international economic institutions,

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[50] See S. H. Mendlovitz and R. B. J. Walker, *Contending Sovereignties: Redefining Political Community* (1990), at 61–78; Shue, 'Eroding Sovereignty: The Advance of Principle', in R. McKim and J. McMahan (eds.), *The Morality of Nationalism* (1997) 340.

[51] Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law', 4 *European Journal of International Law* (1993) 447.

[52] See Henkin, *supra* note 7.

[53] Lauterpacht, *supra* note 24; Schreuer, *supra* note 51.

[54] See, among others, Jackson, 'Sovereignty: Outdated Concept or New Approaches', in W. Shan, P. Simons and D. Singh (eds.), *Redefining Sovereignty in International Economic Law* (2008) 3; Jenning, 'Sovereignty and International Law', in *State, Sovereignty, and International Governance* (2002) 27; Schrijver, *supra* note 27; Alvarez, *supra* note 24; Morris, 'Sovereignty and Executive Power', in C. Finkelstein and M. Skerker (eds.), *Sovereignty and the New Executive Authority* (2018) 85; Cassese and Condorelli, 'Is Leviathan Still Holding Sway over International Dealings?', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 14.

namely the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the WTO.[55]

All major economic IOs present highly unequal decision-making structures. The latter potentially hamper the sovereignty of their member States as they alter the exchange of powers that takes place when a State joins an IO. In theoretical terms, the transferal of sovereign prerogatives to the specific institution should be levelled out by the acquisition by the State of 'rights of international decision-making'[56] through the membership in the organization. The unanimous approval of the acts of the IO should then allow the organization to operate while providing a form of decision-making that is protective of State sovereignty and equality.[57] However, unanimity in decision-making gives every Member State a right of veto, thereby hampering the capacity of international institutions to respond with sufficient efficacy and flexibility to situations that would have required them to take normative action.[58]

The IMF and World Bank do it by openly deviating from the *consensus* rule.[59] In the IMF, the voting weight of Member States is linked to a system of quotas that represents the capital stock subscribed by the State, giving overwhelming voting power to most-developed Countries. In addition, the executive body, namely the

[55] Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations', 43 *Netherlands Yearbook of International Law* (2012) 99, at 119; Stein, 'International Integration and Democracy: No Love at First Sight', 95 *American Journal of International Law* (2001) 489, at 490–491.

[56] Jenning, *supra* note 54, at 36.

[57] Schrijver, *supra* note 27, at 71; F. X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (2000), at 140.

[58] P. Klein, *International Organizations or Institutions, Decision*, March 2007, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1709 (last visited 7 March 2019).

[59] The only other major exception to this principle is the functioning of the most important IO, namely the UN, where the executive power is conferred to a deciding body such as the UN Security Council (UNSC), constituted by a restricted number of Members where the Permanent Members enjoy veto power by reason of their status and are entitled to adopt decisions binding on the totality of the IO's membership. See UN Charter, *supra* note 18, Chapter VII.

Executive Board, although recently reformed with the abolition of reserved seats for industrialized Countries and the reduction of representation of major European Countries,[60] still allows the vast majority of Members little-to-none decision-making power in the IO. [61]

Similarly, in the World Bank, each Member has a voting power allocated on the basis of the subscribed capital paid in.[62] Unlike the IMF, the system did not undergo any major reforms and the governing body, namely the Board of Executive directors, remains with 5 members over 12 nominated by the five members with the largest shares. Additionally, the president has, to date, always been expressed by the United States (US).

A different structure is that of the WTO, which presents itself as a purely intergovernmental IO, based on the *consensus* principle. The adoption of WTO agreements requires exhausting rounds of negotiations the outcome of which must be agreed on by all members.[63] Though formally respectful of State sovereignty, the original structure shows some *caveats*: on the one hand, the consensus mechanism was bound to fail in practice, due to the impossibility to reach decisions between a large number of participants. The IO has therefore continued the practice followed during the General Agreement on Tariffs and Trade (GATT)[64] of holding informal

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[60] IMF, *Press Release No. 16/25: Historic Quota and Governance Reforms Become Effective*, 27 January 2016, IMF, available at https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr1625a (last visited 7 March 2019). For an overview of the traditional structure of the Executive Board, see M. Herdegen, *Principles of International Economic Law* (2nd Edition, 2016), at 515.

[61] S. Schlemmer-Schulte, *International Monetary Fund (IMF)*, October 2014, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e492 (last visited 7 March 2019).

[62] Articles of Agreement of the International Bank for Reconstruction and Development, vol. 2 UNTS 134, Art.IV(3)(a); see S. Schlemmer-Schulte, *International Bank for Reconstruction and Development (IBRD)*, October 2014, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e475 (last visited 7 March 2019).

[63] P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (3rd Edition, 2013), at 136 ff.

[64] General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade

consultations involving a restricted number of powerful actors and other actors upon invitation (the so-called 'green room' meetings),[65] the outcome of which is presented for acceptance to the rest of the membership with no possibility of modification.[66] If Member States formally enjoy veto power due to the consensus rule, the actual functioning of the organization limits the possibility to resort to it.

The normative activity of economic IOs has then a broad capacity to penetrate the 'domestic' realm of States. Especially smaller and poorer Countries, can find themselves in need of economic aid, that will be provided through programs of the IMF or the World Bank in exchange for respect of financial plans imposed by the above-mentioned institutions, with the temporary loss of the capacity to make sovereign choices in those areas.[67]

This emerges in the *conditionality* process, which denotes the practice of IOs of making aid and co-operation agreements with recipient States conditional upon the observance of various requirements, such as good governance, respect for human rights, democracy, peace and security.[68] Conditionality became associated with the so-called Washington Consensus, which stands for a number of reform goals pursued by the IMF and the World Bank (among the other Washington-based financial institutions) in the context of financial assistance and which includes, among other things, liberalization of trade, exchange rates, and foreign investment, tax reforms, deregulation and privatization.[69]

Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 (1994), 1 January 1995.

[65] See, among others, Jones, 'Green Room Politics and the WTO's Crisis of Representation', 9 *Progress in Development Studies* (2009) 349, at 350.

[66] Pedersen, 'From the Trenches', 5 *World Trade Review* (2006) 103, at 106.

[67] Schrijver, *supra* note 27, at 77.

[68] Pinelli, *Conditionality*, November 2013, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1383 (last visited 2 April 2019); A. Shah et al., OECD, *Development Assistance and Conditionality: Challenges in Design and Options for More Effective Assistance* (2017), available at /paper/Development-assistance-and-conditionality%3A-in-and-Shah-Allain/31e17643b8f1ec2dc11bd8f6aa737706777879f8 (last visited 30 November 2020).

[69] Williamson, 'What Should the World Bank Think about the Washington Consensus?', 15 *The World Bank Research Observer* (2000) 251, at 252–253. See also Bagwell and Staiger, 'Domestic Policies, National Sovereignty, and International Economic Institutions', 116 *Quarterly Journal of*

In the case of the IMF, upon borrowing money from the IO, Countries must commit to implement specific economic and financial programmes that should redress the balance of payments. These commitments do not constitute a legal obligation, for the IMF's continued lending (hence the term conditionality). Conditionality has sparked criticisms with regard to the restriction of sovereignty of borrowing States: economic and social policies are strictly tied with programmes decided by the institution and have been accused of imposing short-lived economic reforms, unemployment, and social problems.[70]

The World Bank operates in a similar fashion, especially when issuing development policy loans to low-income Countries, where the borrowing Country issues a 'letter of development policy' containing the measures for economic reforms by the Country soliciting the loan.[71] The widening in the scope of financial aids, the imposition of western economic views, the requirement that borrowing States undergo structural institutional reforms have all been considered as indicators of the intrusion of such IOs in the sovereignty of borrowing States.[72]

The judicial activity of economic WTO then shows an additional capacity to affect State sovereign prerogatives. Generally speaking, the reach of international courts already constitutes another intrusion in the State domestic sphere of control, balanced by the fact that they operate on a treaty-based adjudicative regime that presupposes and is expression of State sovereignty.[73]

Economics (2001) 519.

[70] Herdegen, *supra* note 60, at 529. In this regard, the presence of domestic actors that can stop new legislation (so-called veto players) has been linked to the likelihood of developing States to seek agreements with the IMF. More precisely, Governments currently in control of foreign policymaking seek to delegate authority to an international body in order to constrain their successors. See Vreeland, 'Why Do Governments and the IMF Enter into Agreements? Statistically Selected Cases', 24 *International Political Science Review / Revue Internationale de Science Politique* (2003) 321.

[71] Herdegen, *supra* note 60, at 534.

[72] Williams, 'Aid and Sovereignty: Quasi-States and the International Financial Institutions', 26 *Review of International Studies* (2000) 557, at 568 ff. Contra, see Leiteritz, 'Sovereignty, Developing Countries and International Financial Institutions: A Reply to David Williams', 27 *Review of International Studies* (2001) 435.

[73] Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State', 56 *The International and Comparative Law Quarterly* (2007) 371, at 379.

In the WTO context, however, the positive consensus mechanism developed during the GATT 1947 for the adoption of Panel and Appellate Body reports by the Dispute Settlement Body (DSB) has been substituted by a system based on negative consensus.[74] Such structure has been considered in conflict with the principle that no international decision should be imposed against the will of any State.[75] Furthermore, the creation of a mechanism that prevents the WTO Parties to veto *ex post* the decisions of the IO has been considered as compromising the sovereignty of the Member States.[76]

2.2. Economic globalization

Arguably, the most outstanding contribution to and most evident consequence of globalization has been the expansion and integration of the world economy. Such an aspect will be here merely sketched, due to the different focus of the present work, although it cannot be overlooked due to the importance of the phenomenon and its deep entanglement with its legal counterpart. In the world of economic exchanges, globalization can be defined as 'the ongoing worldwide integration of capital, currency, goods, people, advanced technologies, and ideas that are moving across national borders at an accelerating pace.'[77]

Economic globalization as the contemporary economic phenomenon has been boosted since the 1970s, when the liberalization of States' domestic policies led to

[74] With respect to the DSB's decision to adopt an Appellate Body report, see Understanding on Rules and Procedures Governing the Settlement of Disputes, vol. 1867 U.N.T.S. 154, 33 I.L.M. 1144, Annex 2, 1 January 1995, Art.17(14): 'An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members [...]'.

[75] Zamora, 'Voting in International Economic Organizations', 74 *The American Journal of International Law* (1980) 566, at 573–574; see also Footer, 'Role of Concensus in GATT/WTO Decision-Making Symposium: Institutions for International Economic Integration', 17 *Northwestern Journal of International Law & Business* (1996–1997) 653, at 659.

[76] Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *Journal of International Economic Law* (2003) 841, at 847. On the current crisis of the WTO dispute-settlement system, see Paragraph 2.4 below, footnote 230.

[77] Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (1995), at 288.

the disengagement of the Government from the management of the domestic economy, deregulation, privatization of state-owned enterprises, and cutbacks in social welfare programs.[78] As such, the economic globalization process has been, to a large extent, fostered and carried out by States in response to the increasing demands to expand domestic production, commercial outflow and development.[79] In seeking to encourage these fields, States have entered global governance institutions, thereby making concessions in regard to their political authority, as seen above. At the same time, States have agreed on the reduction of tariff barriers, the opening of capital markets, and the ease of restrictions on foreign investment, thereby limiting their ability to interfere with domestic markets.[80]

A wide variety of factors, such as the velocity of economic transactions, the bargaining power of multinational enterprises, the functioning of the market, has contributed to –and increased the pace of– the changing understanding of State internal sovereignty: [81] sectors once under the control of the State have been subject to processes of liberalization and privatization, reducing the power and influence of the State in a wide array of sectors, among which welfare, social security, education.[82] The very production of goods and commodities has been inserted in a production chain that is not limited by State boundaries, due to the improvements in communication and transportation.[83]

As a consequence, the traditional notion of sovereignty that considered the State as having exclusive jurisdiction over its territory has become problematic in the global economy, where different regimes and forces influence the policies and

[78] Smith, Solinger and Topik, 'Introduction', in D. A. Smith, D. J. Solinger and S. C. Topik (eds.), *States and Sovereignty in the Global Economy* (2007) 1, at 5.

[79] D. Rodrik, *The Globalization Paradox* (2011), at 67 ff.

[80] See, e.g., Wade, 'What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'', 10 *Review of International Political Economy* (2003) 621.

[81] Stein, *supra* note 55, at 492.

[82] M. van Creveld, *The Rise and Decline of the State* (1999), at 190.

[83] Wallerstein, 'States? Sovereignty? The Dilemmas of Capitalists in an Age of Transition', in D. A. Smith, D. J. Solinger and S. C. Topik (eds.), *States and Sovereignty in the Global Economy* (2007) 20, at 21.

decision-making of a State.[84] States aim to achieve satisfactory levels of national development by drawing upon the capital and intellectual resources of the international economy, making it clear that isolation or autarchy are no longer viable alternatives in the contemporary world.[85]

Those who support the reshaping of State sovereignty do not consider economic globalization and national sovereignty antithetical forces: States are still the primary rulers within their own territory and dictate their own national economic policies through national legislations. As such, they can foster or put limitations in the entry of foreign capitals in their own territory, adopt protective (or protectionist) measures or liberalize their markets.[86] For this reason, some authors have argued that, if globalization in the economic realm has changed the way power is distributed among States and international actors and the degree to which a State controls the activities of individuals, it cannot be said to have seriously challenged the concept of State sovereignty, reflecting a mutating understanding of the latter instead.[87]

3. State sovereignty in the international investment regime

The dynamics depicted above appear in the international investment regime with the peculiarities that differentiate them from the other fields of international economic law. States have jealously sought to retain control over economic activities, such as FDI, that are intimately tied to their domestic development policies.

A heated debate has sparked during the 1960s and 1970s over the limits of the economic and political self-determination of States and the scope of the customary international rules on protection of FDI. The clash of conflicting paradigms led to contested resolutions adopted by the United Nations General Assembly (UNGA), as well as to the failure of all attempts to conclude multilateral agreements with substantive provisions or to constitute IOs with substantive powers in the field of

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[84] Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance', 6 *Indiana Journal of Global Legal Studies* (1998–1999) 425, at 426.

[85] Michael Reisman, 'International Arbitration and Sovereignty', 18 *Arbitration International* (2002) 231, at 233.

[86] Van Staden and Vollaard, *supra* note 35, at 168.

[87] Van Harten, *supra* note 73, at 376.

FDI regulation. Hence, the creation of the investment regime has been carried out, with some notable exceptions identified in multilateral conventions containing procedural rules, through bilateral or regional treaties, where States could potentially retain better control over the concessions and commitments made to their counterpart(s).[88]

The international investment regime then shows with greater clarity the effects of international obligations within the State's internal sphere of control, or –in other words– on its *internal* sovereignty, as they deal with the treatment of aliens and alien property within the territory of the State. Within this scope, international investment law has been defined as a 'surrender of sovereignty' by the State.[89]

The relationship between international rules and the exercise of internal authority lies at the heart of the present work. As will be seen in the next Chapters, it is the linchpin around which the whole international investment regime operates and generates some of its most troublesome aspects. The study of State sovereignty that will be carried out in the next Chapters will consequently adopt international rules in the field of foreign investment protection as the necessary starting point, focusing however on the reflections that such rules produce on the State's ability to display its authority within its territory, and therefore on the internal dimension of State sovereignty.

3.1. The customary international rules on protection of FDI

The international investment regime, although currently dominated by investment treaties, has evolved over customary international law rules on the treatment of aliens and of diplomatic protection. Their origins can be traced back to the 18th century, when the idea that an injury to an individual was an injury to the State was

[88] Wimbledon case, *supra* note 31, at 25. See also Martinez-Fraga and Reetz, *supra* note 30, at 124.
[89] M. Sornarajah, UNCTAD, *Right to Regulate and Safeguards*, UNCTAD/ITE/IIA/2003/4 (2003), The Development Dimension of FDI: Policy and Rule-Making Perspectives, available at https://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (last visited 17 October 2018), at 205. In the words of Klager, '[t]he various qualifications of external sovereignty also affect the initially absolute internal sovereignty of states, leading to a progressive internationalisation of internal law and a diminishing of what is commonly called the domaine réservé of [S]tates.' S R. Klager, *'Fair and Equitable Treatment' in International Investment Law* (2011), at 156.

first theorised and rules on the protection of aliens abroad started to be elaborated.[90] However, it was during the 19th and 20th centuries, with the formation of new States in the Eastern hemisphere and the independence of former colonial territories in North and South America that the economic activities of individuals from western Countries outside their colonial context intensified.[91] Under customary international law, a State is under no obligations to admit aliens in its territory and it has unrestricted power to limit their entry.[92] Once admitted, the issue of the treatment owed by the host State to the aliens arises.

As to the content of the protection granted to aliens by customary international law, from the end of the 19th century until the 1940s two conflicting views were dominating the international scene.

One doctrine evolved among European Countries and the US, which claimed that some principles contained in their domestic legal systems –such as individual liberty, respect for private property also against the action of Governments, respect for contractual obligations– had spilled over into the relationship of the international society[93] and entered international law. Aliens were granted a minimum standard of treatment (MST), namely a minimum set of principles with regard to the treatment of aliens and their properties that States needed to respect regardless of their domestic legislation and practices.[94] Accordingly, if the legal system of the

[90] E. Vattel, *The Law of Nations, or the Principles of Natural Law* (1758).

[91] C. F. Amerasinghe, *Diplomatic Protection* (2007), at 13–14. The protection of nationals abroad did not arise in the context of colonisation, given that colonies constituted territories subjugated to the territorial sovereignty of the colonising State and populations enjoyed fewer rights than the colonisers. See J. A. Kämmerer, *Colonialism*, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e690 (last visited 30 November 2018).

[92] A. Reinisch, *Recent Developments in International Investment Law* (2009), at 19. For a dissenting voice that criticizes such a comprehensive approach and advocates a more limited power of exclusion of the State, see Nafziger, 'The General Admission of Aliens under International Law', 77 *The American Journal of International Law* (1983) 804.

[93] Amerasinghe, *supra* note 91, at 14.

[94] J. W. Salacuse, *The Law of Investment Treaties* (2010), at 47.

host State did not reach the standards generally accepted by civilized nations, the foreigner would still enjoy the treatment provided for by international law.

The very content of the MST has always been in constant evolution. In the years preceding WWII, the focus on the MST was on denial of justice.[95] In 1910, the US Secretary of State Eliuth Root elaborated on the MST in terms of rights in the judicial process.[96] A few years later, in 1926, the US–Mexico General Claims Commission in the *LFH Neer and Pauline Neer* (*Neer*)[97] case attempted to define the MST by means of analogy from rules on denial of justice, releasing a much-cited award by investor-State arbitral tribunals that read:

> ' […] 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.'[98]

After the Russian revolution of 1917 and the wave of Mexican expropriations, the protection of aliens from expropriation became a fundamental component of the MST.[99] In the already-cited correspondence between Eduardo Hay and Cordell

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[95] See J. Paulsson, *Denial of Justice in International Law* (2009).

[96] Root, 'Basis of Protection to Citizens Residing Abroad', 4 *American Journal of International Law* (1910) 517, at 521–522: 'There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any [C]ountry is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any [C]ountry's system of law and administration does not conform to that standard, although the people of the [C]ountry may be content or compelled to live under it, no other [C]ountry can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens'.

[97] Mexico/USA General Claim Commission, *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, Reports of International Arbitral Awards 60.

[98] *Ibid.*, at 61–62.

[99] Before the 1920s and 1930s, the safeguards regarding protection of property were quite rudimentary and had been addressed in only few cases involving British and American nationals. See Fawcett, 'Some Foreign Effects of Nationalization of Property', 27 *British Year Book of International Law* (1950) 355, at 357.

Hull, the US Secretary of State argued that 'when aliens are admitted into a Country the Country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations.'[100] The standard of customary law at the time was summarized in what came to be known as Hull formula, which stated that

> 'the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.'[101]

Although during the 1920s the PCIJ confirmed the existence of 'rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights', State practice before the WWII was still much ambiguous, given the opposing view expressed by States at the Conference for the Codification of International Law which met at the Hague in 1930.[102]

As to the means to enforce the protection of aliens offered by customary international law, the latter did not give aliens or companies the right to press claims directly against the host State, nor it did provide them with any other enforcement mechanism. The position of European States and the US was that, should local courts not provide for the MST to foreigners –and local courts were often unsympathetic to aliens– there would be State responsibility, and the home State would be regarded as sufficiently injured through the alien to intercede on its behalf.[103]

Aliens could seek redress for violations of the MST through the home State's diplomatic protection subject to the political choice of the Government to protect

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[100] 'Official Documents: Mexico-United States', 32 *Supplement to the American Journal of International Law* (1938) 181, at 198.

[101] *Ibid.*, at 193.

[102] At the 1930 Hague Conference, at the question of whether there would be State responsibility in case of enactment of legislation infringing vested rights of foreigners highlighted the disagreement of States on the matter: four States gave affirmative answers, five States gave affirmative answers with different qualifications to the principle, five States did not give direct answers or preferred to leave the issue open, six States gave negative answers. See: M. Paparinskis, *The international minimum standard and fair and equitable treatment* (2013), at 61.

[103] M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2000), at 139.

its nationals and to the previous exhaustion of local remedies,[104] although it was often carried out through a show of military force to collect foreign debts (the so-called 'gunboat diplomacy'), that boiled down to power-based relationships between States.[105] Such abuses were faced through mixed claims commissions, international arbitral tribunals –such as the one established by the Drago-Porter Convention of 1907– or through international judicial means, with the institution of the PCIJ after World War I, which heard important investment disputes in the 1920s.[106]

The second and opposing doctrine, represented by many jurists from Europe and South America as well as State practice of South American Countries, supported the principle of equality, also referred to as the standard of national treatment. According to such view, aliens could only expect equality of treatment under local laws and were subject to the benefits and burdens stemming therefrom,[107] in accordance with the principle of territorial jurisdiction and equality of States. A foreigner who voluntarily operated in a Country thus accepted to be subject to the laws of the host Country, understanding the risks inherent in such situation. Among the most-authoritative expressions of this view[108] is the statement made in 1938 by the Mexican Foreign Minister Eduardo Hay in his correspondence with the US Secretary of State Cordell Hull, according to whom

> 'the foreigner who voluntarily moves to a [C]ountry which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is going

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[104] See J. Dugard, *Diplomatic Protection*, May 2009, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1028 (last visited 12 March 2019).

[105] R. D. Bishop, J. T. Crawford and M. W. Reisman (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd Edition, 2005), at 3.

[106] PCIJ, *The Mavrommatis Palestine Concessions (Judgment)*, PCIJ Rep. Series A - No.2, 30 August 1924; PCIJ, *Case Concerning the Factory at Chorzow (Jurisdiction)*, 26 July 1927; PCIJ, *The Oscar Chinn case*, Series A/B - No.63, 12 December 1934.

[107] As a matter of example, among the rights that an alien should have in the host State are not included political rights. See I. Brownlie, *Principles of Public International Law* (5th Edition, 1998), at 526.

[108] See also *The Deutsche Amerikanische Petroleum Gesellschaft oil tankers (USA, Reparation Commission)*, Vol.II, p.777-795, 5 August 1926, at 794–795.

to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk […]'[109]

The most important formulation of this position was that of the Argentine Foreign Minister Carlos Calvo, who argued that the rules on the MST and the protection of property were developed by strong powers to protect their investors in weaker States, serving the interests of a restricted block of States and not reflecting international law.[110] As a consequence, not only aliens were not entitled to any rights or privileges not accorded to nationals, but also they were not entitled to seek redress only before local authorities. The principle of sovereign equality implied freedom of the State from interference in any form by other States and international law did not allow States to display force or exercise diplomatic protection for alleged injuries suffered by aliens, absent denial of justice.[111]

3.2. The debate over sovereignty in international investment law

The opposing views clashed in the aftermath of WWII during the de-colonization period, as they reflected opposing interests in the international panorama: developed States were trying to preserve the western view that granted foreign investors (predominantly from developed to developing Countries) guarantees based on the MST (whose content was identified with their view, as indicated above) on the one side, while developing States felt their economic sovereignty was being denied by rules that justified intervention on the basis of an external standard that they did not contribute to create.

The debate over sovereignty, also with regard to the protection of foreign investment received considerable attention in the UNGA, where newly-formed States constituted the majority of members and attempted to recover their sovereignty in the economic and political sphere through a series of UNGA Resolutions.[112] The

[109] Official Documents: Mexico-United States, *supra* note 100, at 188.

[110] Sornarajah, *supra* note 103, at 141.

[111] See Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge of International Law', 40 *The American Journal of International Law* (1946) 121; the Calvo doctrine was theorized in C. Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens* (5th Edition, 1896).

[112] R. Khan, *Decolonization*, May 2011, Max Planck Encyclopedia of Public International Law,

issue was not theoretical, since between the 1960s and the mid-1970s more than 60 newly independent Countries engaged in almost 900 nationalizations or takeovers of foreign enterprises.[113]

Early Resolutions adopted by the UNGA recognized the need for newly-formed States to gain economic control of their lands in order to achieve an effective political independence and asserted the right of States to control their own economies through the notions of economic and political self-determination.[114] They were not specific in content, asserting the right of self-determination over natural resources as stemming from the principle of State sovereignty,[115] and the right of developing States to retain the benefit of the exploitation of their natural resources of which they had been deprived in the past.[116]

As a matter of example, Resolution 523 (VI) of 1952 considered that 'commercial agreements shall not contain economic or political conditions violating the sovereign rights of the under-developed [C]ountries, including the right to determine their own plans for economic development.'[117] Still, self-determination was resisted by developed Countries as it provided a justification for developing States to redraw concession agreements made during the colonial period.[118]

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available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e922 (last visited 13 March 2019).

[113] UN General Assembly, Permanent sovereignty over natural resources - Report of the Secretary-General, UN Doc. A/9716, 20 September 1974, p. 2, Annex, Table 1.

[114] N. Schrijver, *Natural Resources, Permanent Sovereignty Over*, June 2008, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1442 (last visited 14 March 2019).

[115] See UN General Assembly, Right to Exploit Freely Natural Wealth and Resources, A/RES/626 (VII), 21 December 1952; Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination, A/RES/1314 (XIII), 12 December 1958.

[116] UN General Assembly, United Nations Development Decade, A/RES/1710 (XVI), 19 December 1961.

[117] UN General Assembly, Integrated Economic Development and Commercial Agreements, A/RES/523 (VI), 12 January 1952, Preamble, para.1(b).

[118] Sornarajah, *supra* note 103, at 142.

A compromise between the two conflicting views was reached with Resolution 1803 (XVII) of 14 December 1962, titled 'Permanent sovereignty over natural resources',[119] which recognized the interests of developed States by requiring foreign capitals not to be subject to discriminatory treatment and by affirming that 'foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith',[120] thereby stating the binding character of foreign investment agreements. On the issue of compensation for nationalization or expropriation of property, there was no reference to the Hull formula but the indication that 'the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.'[121]

Such a formula favoured developing States by requiring *appropriate* compensation,[122] but at the same time accepted the application of an international law standard governing foreign investment. Being adopted by a vote of 87 to 2 with 12 abstentions, Resolution 1803 (XVII) has been viewed as the last consensus over the issue of expropriation under international law,[123] although the text let many issued agreed on as unsettled.[124]

The consensus reached with Resolution 1803 (XVII), even on those terms of ambiguity, eroded over the next years, when developing Countries became more assertive in their efforts to reshape customary international law and started eroding many principles of international law on the protection of foreign investment accepted hitherto.

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[119] UN General Assembly, 'Permanent sovereignty over natural resources', Res. 1803 (XVII), 14 December 1962.

[120] *Ibid.*, Art.8.

[121] *Ibid.*, Art.4.

[122] Although on the indeterminacy of the term 'appropriate', see, among others, Schwebel, 'The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources', 49 *American Bar Association Journal* (1963) 463.

[123] Norton, 'A Law of the Future or a Law of the Past--Modern Tribunals and the International Law of Expropriation', 85 *American Journal of International Law* (1991) 474, at 478.

[124] O'Keefe, 'The United Nations and Permanent Sovereignty over Natural Resources', 8 *Journal of World Trade Law* (1974) 239, at 281.

The dichotomy between their political status as sovereign nations formally equal to all other members of the international community and their lack of economic means, exacerbated by the creation of financial international institutions under control of developed Countries (IMF and World Bank above all), resulted in the challenge to customary law in general and customary protection of property in particular, considered as unduly preventing developing Countries from defining and regulating domestic economic systems in accordance with their interests.[125] In the UN, this new scenario determined the creation of the United Nations Conference on Trade and Development (UNCTAD) as a forum where developing Countries could cooperate in the common cause of a new world order, as a counterweight to the recently formed OECD that represented the common interests of the advanced industrial Countries.[126]

Resolutions adopted in the 1970s reaffirmed State sovereignty over natural resources omitting language concerning the guarantee of compensation for foreign investors and omitting any reference to international law.[127] Resolution 3201 of 1974 followed this approach while establishing the New International Economic Order (NIEO), by stating that

> '[t]he new international economic order should be founded on […] Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right […]'[128]

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[125] See G. Sacerdoti, *New International Economic Order (NIEO)*, September 2015, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1542 (last visited 14 March 2019).

[126] UNCTAD, *UNCTAD at 50, a Short History*, UNCTAD/OSG/2014/1 (2014), at 19.

[127] See UN General Assembly, 'Permanent sovereignty over natural resources', Res. 3171(XXVIII), A/RES/3171, 17 December 1973.

[128] UN General Assembly, Declaration on the Establishment of a New International Economic

The situation was further exacerbated by the adoption in the UNGA of the Charter of Economic Rights and Duties of States[129] with the opposition of developed Countries. The Charter gave no assurance to developed States that economic transaction –especially long-term commitments such as international investment– would be subject to a predictable stable regime.[130] The most-contested provision was article 2(2)(c), which granted States the right to expropriate foreign property.[131] The provision was silent on the traditional principle according to which a taking of property must not be discriminatory, disconnected compensation from any reference to international law and subjected it to the compensation deemed appropriate by the State.[132] It asserted the right of States to regulate incoming investments and the exclusive competence of domestic courts to settle disputes arising from them.[133] It denied the inviolability of contracts by stating that '[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.'[134]

Order, A/RES/S-6/3201, 1 May 1974, Art.4(e).

[129] UN General Assembly, 'Charter of Economic Rights and Duties of States', Res. 3281 (XXIX), A/RES/29/3281, 12 December 1974.

[130] See White, 'A New International Economic Order Symposium on the New International Economic Order: Part Two: Towards a New International Economic Order', 16 *Virginia Journal of International Law* (1975–1976) 323, at 335.

[131] UN General Assembly, *supra* note 129, Art.2(2)(c): 'Each State has the right [t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means'.

[132] Salacuse, *supra* note 94, at 73.

[133] Sornarajah, *supra* note 103, at 144.

[134] UN General Assembly, *supra* note 129, Art.2(1). See also Brower and Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law', 9 *International Lawyer (ABA)* (1975) 295.

3.3. The failure of a multilateral treaty framework

The disagreement over the scope of customary international law of state responsibility for injuries to aliens and their property led States to turn to international treaties to give protection to their nationals investing abroad, especially following WWII. IIAs traditionally find their predecessor in friendship, commerce, and navigation (FCN) treaties that belonged to the US treaty practice.[135] However, BITs were originally developed by European States, as the US have lingered on FCN treaties after World War II (WWII),[136] and followed the European practice only in the 1970s. IIAs developed on a bilateral basis, the first example being the BIT concluded between Germany and Pakistan in 1959, which entered into force in 1962.[137]

This notwithstanding, attempts to set up a multilateral framework on the protection of investment have followed one another, due to the disagreement over the scope of protection provided for by international law and the opposing views emerged in the UNGA. Developed Countries fostered the conclusion of a multilateral framework, in line with the general post-WWII trend of establishing international institutions inclusive of all major powers and aiming at remedying the limitations of customary law through a stable treaty framework.[138]

Economic reasons were also at the origin of such an attempt, as multilateral instruments avoid the compliance costs imposed by different instruments and

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[135] A. Paulus, *Treaties of Friendship, Commerce and Navigation*, March 2011, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1482 (last visited 22 March 2019). On the substantial treatment usually provided for by FCN treaties see, among others, Walker, 'Modern Treaties of Friendship, Commerce and Navigation Symposium: Law and International Agreements', 42 *Minnesota Law Review* (1957–1958) 805.

[136] Although FCN treaties have evolved over time: if before WWII rules on investments were not a prominent feature, the so-called second generation of such treaties contained more details on foreign investments. See Vandevelde, 'The Bilateral Investment Treaty Program of the United States', 21 *Cornell International Law Journal* (1988) 201.

[137] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 28 April 1962.

[138] S. W. Schill, *The Multilateralization of International Investment Law* (2009), at 32.

facilitate greater market liberalization and deeper economic integration.[139] This approach was ostracized by developing Countries, as they had no desire to participate in multilateral agreements that would restate their bargaining weakness and introduce in treaty form the customary system they had been trying to dismantle.[140]

The scepticism towards a multilateral framework, however, is not a prerogative of the immediate aftermath of WWII, since efforts to conclude international conventions with substantive investment protection have periodically been carried out throughout the whole second half of the 20th century.

In addition to the failure of the Havana Charter for an International Trade Organization in 1948,[141] which contained only embryonic rules on foreign investment protection,[142] the most important attempts to multilateralism have been formulated within the Organisation for Economic Co-operation and Development (OECD).[143] Among the failed attempts, the most far-reaching ones were the failed Draft Convention on the Protection of Foreign Property (OECD Draft Convention),[144] first elaborated in 1962 and then reissued with minor revisions in 1967 after its adoption by the OECD Council, and the failed Multilateral Agreement on Investment (MAI), whose negotiations started in 1995 and terminated in 1998.

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[139] D. Collins, *The Multilateral Agreement on Investment in Services: Scope and Obligations* (2013), at 134–135.

[140] Sornarajah, *supra* note 103, at 145.

[141] United Nations Conference on Trade and Employment, 'Havana Charter for an International Trade Organization', E/CONF.2/78, 24 March 1948.

[142] *Ibid.*, Art.12(2): 'Members therefore undertake […] (i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and (ii) to give due regard to the desirability of avoiding discrimination as between foreign investments […]'.

[143] For an overview of the numerous attempts to reach consensus over a multilateral convention dealing with the substantive treatment of foreign investors and investments, see C. Brown, *Commentaries on Selected Model Investment Treaties* (2013), at 6 ff.

[144] 'Organisation for Economic Co-Operation and Development: Draft Convention on the Protection of Foreign Property', 2 *International Legal Materials* (1963) 241; 'Organisation for Economic Co-Operation and Development: Draft Convention on the Protection of Foreign Property', 7 *International Legal Materials* (1968) 117.

The OECD Draft Convention followed the wave of nationalizations that took place in the aftermath of WWII and provided for the FET of the property of the nationals of the other Parties and most constant protection and security,[145] protection from direct and indirect unlawful expropriation subject to due process, non-discrimination, and 'just compensation', as well as a dispute-settlement system.[146] The Convention drew extensively from previous attempts to provide a multilateral substantive regulation, the Abs-Shawcross Draft in particular, which focused exclusively on property. [147]

The Convention failed to gain sufficient support among less-developed members of OECD,[148] the main points of disagreement being the content of international law of which the Convention intended to be declaratory.[149] The first one was the FET of properties, which conformed to the MST when national treatment would not meet the international standard.[150] The second one was the protection from unlawful expropriation under customary international law, that reflected the formulation of US BITs and required compensation according to the Hull formula for the expropriation to be legitimate.[151]

In the much-more recent attempt carried out by the OECD with the MAI,[152] sovereignty issues were still at the basis of the failure to reach consensus over a

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[145] OECD Draft Convention (1967), *supra* note 144, Art.1(a).

[146] *Ibid.*, Art.7.

[147] See Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary', 9 *Journal of Public Law* (1960) 147. On proposals that constituted the basis for the formations of such Draft Conventions, see, among others, Metzger, 'Multilateral Conventions for the Protection of Private Foreign Investment', 9 *Journal of Public Law* (1960) 133; Fatouros, 'An International Code to Protect Private Investment - Proposals and Perspectives', 14 *University of Toronto Law Journal* (1961–1962) 77.

[148] United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, UN Doc ST/CTC/65 (1988), at 7.

[149] 'Council of Europe: Opinion on O.E.C.D. Draft Convention on Protection of Foreign Property Other Documents', 3 *International Legal Materials* (1964) 133, at 136.

[150] OECD Draft Convention (1967), *supra* note 144, at 244.

[151] *Ibid.*, at 251–252.

[152] OECD, The Multilateral Agreement on Investments: Draft Consolidated Text, DAFFE/MAI(98)7/REV1, 22 April 1998.

final text, although for different reasons due to the mutated circumstances. The MAI was negotiated in an era of massive expansion of IIAs and included substantive standards contained in the overwhelming majority of investment treaties: it included a broad definition of investment, national treatment and most-favoured nation (MFN) treatment, FET and full and constant protection and security, protection from unlawful direct and indirect expropriation subject to 'payment of prompt, adequate and effective compensation',[153] and an investor-State dispute settlement system.

This notwithstanding, disagreement characterized the negotiations of MAI. Developing Countries were absent from the proceedings and generally opposed to a multilateral instrument framed by developed Countries, manifesting their fears of losing sovereign control over an intrusive process such as foreign investment.[154] In addition, OECD Members could not achieve consensus on numerous substantive issues. The US and the European Union (EU) Members clashed on the introduction of a discipline concerning the rights of owners of illegally expropriated property to pursue claims against its current owners. Specifically, the US wanted to ensure the extraterritorial application of the Helms-Burton Act (that allowed US nationals whose properties were nationalized in Cuba to sue the new owners of the properties expropriated before US courts).

Furthermore, issues arose on the EU's proposal to introduce an exception for regional organizations, on France and Canada's proposal to introduce the so-called cultural industries exception to preserve and promote cultural and linguistic diversity, and on the introduction of environmental and labour standards.[155] Finally, the MAI encountered the strenuous opposition of several NGOs and academics that

[153] *Ibid.,* Art.4(2.1)(d).

[154] M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., 2010), at 259.

[155] Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now Foreign Law Year in Review: 1999', 34 *International Lawyer (ABA)* (2000) 1033, at 1047–1048.

mainly feared that the draft could weaken the protection of the environment[156] and of labour standards.[157]

Consequently, the current investment treaty framework witnesses the lack of multilateral treaties containing substantive rules on foreign investment. To date, the only existing multilateral treaties with (limited) significance on investment are those concluded in the GATT/WTO framework.[158]

The General Agreement on Trade in Services (GATS)[159] grants MFN treatment and national treatment to services provided 'by a service supplier of one Member, through commercial presence in the territory of any other Member',[160] which account for a large share of foreign investment. The relevance of the GATS is diminished by the limitation of the standards of treatment only to the specific commitments made by the Parties, as they are not general in scope.[161]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[162] provides standards of protection limited in their scope to intellectual property, which often falls within the definition of investment in IIAs.

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[156] See Graham, 'Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations', 31 *Cornell International Law Journal* (1998) 599.

[157] Kelley, 'Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations Note', 39 *Columbia Journal of Transnational Law* (2000–2001) 483, at 496. See, among others, Compa, 'The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection National Treatment of Foreign Investment: Exceptions and Conditions', 31 *Cornell International Law Journal* (1998) 683.

[158] Although the GATT has only a limited significance for this area of law. The only complaint based on the GATT regarding investment measures took place in GATT Panel Report, *Canada - Administration of the Foreign Investment Review Act*, L/5504, BISD 30S/140, 7 February 1984, where the US challenged the effects on trade of the enforcement of Canada's Foreign Investment Review Act that instituted screening procedures for incoming in-vestments. See also Paterson, 'The GATT and Restrictions on Foreign Investment: The United States Challenge to Canada's Foreign Investment Law', 1 *UCLA Pacific Basin Law Journal* (1982) 224.

[159] General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), 1 January 1995.

[160] *Ibid.*, Art.1(2)(c).

[161] Sornarajah, *supra* note 154, at 254.

[162] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement

The Trade-Related Investment Measures (TRIMS) Agreement[163] deals directly with FDI, with the aim of banishing investment measures that adversely affect trade in goods, thereby removing one constraint upon the flow of FDI. However, the TRIMs Agreement merely reiterates the GATT scheme, adding no real protection or remedies to foreign investors by stating that 'no member shall apply any TRIM that is inconsistent with the provisions of Article III (on national treatment) and Article XI (on quantitative restrictions) of GATT 1994.'[164] The little innovation provided thereby explains the failure of the Agreement.[165]

3.4. The lack of specialized international organizations

The perception that States have of international investment as a delicate field of governmental policies clearly emerges in the institutional structure, or lack thereof, surrounding foreign investment. Unlike other fields of international economy such as trade or finance, States have not agreed on the creation of IOs that can impose substantive obligations over their Member States relating to the treatment of foreign investment.

The most prominent IOs involved in investment issues are the International Centre for Settlement of Investment Disputes (ICSID or the Centre), established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[166] and the Multilateral Investment Guarantee Agency (MIGA), established in 1986 by the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention).[167]

Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), 1 January 1995.

[163] Agreement on Trade-Related Investment Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186, 1 January 1995.

[164] *Ibid.*, Art.2(1).

[165] Civello, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization Note', 8 *Minnesota Journal of Global Trade* (1999) 97, at 98.

[166] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, vol. 575 U.N.T.S. 159, 14 October 1966.

[167] Convention Establishing the Multilateral Investment Guarantee Agency, vol. 1508 U.N.T.S. 99, 12 April 1988.

The ICSID provides institutional support and a procedural framework for the settlement of disputes between foreign investors and host States through international arbitration. While not arbitrating investment disputes itself, the Centre offers standard clauses and rules of procedure, provides institutional support for the conduct of proceedings, assures the non-frustration of proceedings and facilitates the award's recognition and enforcement.[168] The ICSID convention does not touch upon substantive issues, giving jurisdiction to the Centre to 'any legal dispute arising directly out of an investment',[169] while leaving to the specific instrument (be it a treaty, an investor-State contract, or a State's national investment law) the definition of what constitutes an investment, the law applicable to the dispute and the substantive protection granted to the latter.

In addition, the ratification of the ICSID Convention does not *per se* entail that the Parties accept the jurisdiction of the Centre, requiring host States and foreign investors to specifically *consent* to resort to ICSID arbitration.[170] The success of the ICSID Convention, currently signed by 162 States and ratified by 154,[171] is due, among other things, to the absence of direct substantive obligations that could be seen as limiting the sovereignty of Member States in general and the ensuing neutrality vis-à-vis the sovereignty of capital importing Countries in particular.[172]

A similar situation takes place in the case of the MIGA, which promotes FDI by offering insurance against non-commercial risks to foreign private investors

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[168] C. Schreuer, *International Centre for Settlement of Investment Disputes (ICSID)*, May 2013, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e33 (last visited 9 March 2019).

[169] ICSID Convention, *supra* note 166, Art,25.

[170] See Broches, 'Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction', 5 *Columbia Journal of Transnational Law* (1966) 263; ICSID Convention, *supra* note 166, Art.25(1).

[171] Source: *Database of ICSID Member States*, ICSID Official Webpage, available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited 9 March 2019).

[172] Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Volume 136)', *Collected Courses of the Hague Academy of International Law* (1972), at 348; Schill, *supra* note 138, at 47.

investing in developing Countries, providing information about investment opportunities and technical assistance for Countries to develop strategies to promote investment.[173] The MIGA supplements the activities of the World Bank and other financial institutions to encourage the flow of investments:[174] though operating in a different way if compared to the ICSID, in similar fashion to the Centre the MIGA Convention does not contain any substantive obligation on the treatment of foreign investment and this is considered as one of the reasons for its success,[175] since the creation of an insurance framework was considered to involve fewer restrictions on State sovereignty.[176]

3.5. Investment protection and promotion through international investment treaties: problematic traits

The most-common way resorted to by States to protect and promote FDI is the conclusion of BITs. Although, recently, the latter has lowered its pace and States are increasingly resorting to regional (or mega-regional) investment treaties, BITs are still prominent: to date, States have concluded more than 3,300 BITs,[177] and more than 30 regional organizations have concluded treaties with investment provisions.[178]

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[173] S. W. Schill, *Multilateral Investment Guarantee Agency (MIGA)*, June 2014, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e520 (last visited 10 March 2019).

[174] MIGA Convention, *supra* note 167, Art.2.

[175] Currently there are 181 States Parties to the MIGA Convention. Source: *Member Countries*, 10.03.2019, MIGA Official Webpage, available at https://www.miga.org/our-impact (last visited 10 March 2019).

[176] Schill, *supra* note 138, at 49.

[177] UNCTAD, *World Investment Report 2018* (2018), available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf (last visited 2 April 2020), at 88.

[178] Source, UNCTAD, *International Investment Agreements by Country Grouping*, Investment Policy Hub, available at https://investmentpolicyhub.unctad.org/IIA/IiasByCountryGrouping#iiaInnerMenu (last visited 2 April 2021).

Although BITs find their genesis in bilateral relationships, their substantive content is remarkably similar.[179] Their recurrent structure includes the determination of the scope of application of the treaty, followed by substantive provisions, that in most cases do not depart much from the OECD draft recalled above. IIAs offer protection from unlawful expropriation; FET of foreign investors; full protection and security; national treatment and most-favoured nation treatment, as well as the prohibition of arbitrary treatment.[180]

The rise of international investment treaties is paradoxical if analysed under the lens of State sovereignty. In the years following WWII, and in the disagreement between developed and developing Countries over the scope of international law, developed States were seeking for alternative ways to protect the activities of their own investors in developing Countries, which, on the other hand, needed foreign capitals to flow into their economies.[181] The very nature of investment activities (long term commitment of conspicuous capitals, the assumption of economic risks by the investor, the unbalanced relationship between a sovereign State and a private investor) that bears the risk, in the post-establishment phase, of a change of the original investment terms by the host State to its favour and to the detriment of the investor,[182] makes FDI particularly vulnerable to domestic changes.

The so-called 'first generation' of IIAs, which involved almost exclusively agreements between developed and developing Countries, aimed to provide the maximum level of protection of FDI. Interestingly, BITs granted protection that was higher than the national treatment of developing Countries, and that often embraced the famous Hull formula, ostracized in international for a by the very same developing Countries. In addition, the latter rushed to conclude BITs with such traits in the very years they were opposing to the same provisions in the UNGA and in multilateral investment treaties. An identical approach was then reflected in

[179] S. P. Subedi, *International Investment Law: Reconciling Policy and Principle* (2008), at 84.

[180] According to the classification provided for by R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Edition, 2012).

[181] UNCTAD, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2 (2000), at 1.

[182] Schill, *supra* note 138, at 3.

treaties negotiated among developing Countries since the late 1970s,[183] and has characterized investment agreements of the so-called 'second generation' of BITs.

The reasons for the acceptance at the bilateral level of obligations that were being rejected at the multilateral one have been framed in different terms by scholars. Among them, the greater likeliness of developing Countries to negotiate higher standards on a case-by-case basis,[184] the special benefits that developing Countries enjoy under such treaties,[185] the lack of alternatives to FDI for developing States,[186] economic reasons such as the expected return on investment[187] or the greater economic advantage in having a global regime of treaties worded using closely similar substantive terms have been suggested,[188] have been pointed out as possible reasons.

Under the lens of State sovereignty, although the obligations on the State parties to BITs were formally reciprocal, power relations emerged in the bargaining process,[189] with developing Countries accepting the clauses imposed by developed ones. In particular, the conclusion of BITs and the enforcement of property rights were part of the reform plan included in the much-criticized Washington Consensus, – a consensus between the IMF, the World Bank and the US Treasury on the policies for developing States' economic development and stabilization– as seen above.[190]

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[183] The first example being the Agreement between the Islamic Republic of Pakistan and the Socialist Republic of Romania on the Mutual Protection and Guarantee of Investment of Capital (1978), (terminated).

[184] Sornarajah, *supra* note 154, at 211.

[185] Dolzer, 'New Foundations of the Law of Expropriation of Alien Property International Law of Expropriation', 75 *American Journal of International Law* (1981) 553, at 567.

[186] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 48.

[187] Elkins, Guzman and Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', 60 *International Organization* (2006) 811, at 822.

[188] S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009), at 96.

[189] Schill, *supra* note 138, at 10.

[190] Newcombe and Paradell, *supra* note 186, at 48.

The conclusion of international agreements *per se* does not pose particular problems from the point of view of State sovereignty, as indicated by the above-mentioned Wimbledon dictum.[191] Through international treaties, States accept obligations in addition to those expressed by customary international law in relation to the exercise of their sovereign rights:[192] this holds true also for international investment treaties.[193] As such, if international instruments impose limitations on the exercise of State sovereign powers, such limitations are exchanged for perceived greater benefits arising from bilateral or multilateral agreements.[194] Moreover, after assuming international obligations, States retain their power to terminate their international treaties, to renege on them, or to terminate them outright.[195]

Problematic, in this regard, is the identification of the commitments that bind the host State towards FDI. As seen in Paragraphs 3.1. and 3.2. above, exact scope of the customary protection of foreign investment is all but established. In addition, IIAs aim at providing the maximum level of protection of foreign investment and investors by means of the so-called standards of investment protection. Unlike legal rules, that differentiate legal from illegal behaviour in clear terms, standards are general legal criteria that require an additional hermeneutic activity.[196] While the normative reach of a rule is identifiable before a specific conducts takes place, the content of a standard is determined only after the conduct has taken place.[197]

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[191] Wimbledon case, *supra* note 31, at 25.

[192] See, already, Myers, 'Treaty Violation and Defective Drafting', 11 *American Journal of International Law* (1917) 538: 'A treaty [...] is a solemn undertaking in derogation of the sovereignty of the [S]tate'.

[193] Gazzini, 'Bilateral Investment Treaties', in T. Gazzini and E. De Brabandere (eds.), *International Investment Law. The Sources of Rights and Obligations* (2012) 99, at 113.

[194] Martinez-Fraga and Reetz, *supra* note 30, at 124.

[195] Titi, *supra* note 46, at 32.

[196] Schaefer, 'Legal Rules and Standards', 33 *UCLA Law Review* (1985) 379, at 381 ff.

[197] Ortino, 'Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making', 28 *ICSID Review: Foreign Investment Law Journal* (2013) 152, at 154. See also Kaplow, 'Rules Versus Standards: An Economic Analysis', 42 *Duke Law Journal* (1992–1993) 557, cited in the text.

The vagueness and ambiguity of many of the core rights conferred on investors has left ample leeway to arbitral tribunals to define what State activities fall under the protection of the relevant IIA, in a manner not necessarily envisaged by the treaty drafters. This translated, according to numerous commentators, States, and members of the civil society, in a pro-investor bias in the reasoning of arbitral tribunals, that have issued overly expansive interpretations of investment treaties,[198] thereby extending State's commitments beyond their actual limits.[199]

The expansion in the scope of treaty provisions has taken place both from a jurisdictional point of view and from a substantive one. As to the expansion in their jurisdiction, arbitral tribunals have sometimes adopted broad approaches in the definition of investor or investment, extending the consent of the parties to arbitration to new categories not originally contemplated by the signatory Parties.[200]

One example is the case *Tokios Tokeles v. Ukraine*,[201] based on the 1994 Lithuania-Ukraine BIT. When called to determine whether the investor was a national of the other contracting State, as required by Art. 25 of the ICSID Convention, the tribunal adopted a strictly formalistic approach in the interpretation of the BIT, according to which investor was 'any entity established in the territory of the Ukraine in conformity with its laws and regulations'.[202] The tribunal considered the company as established in Lithuania and the investment as having an international character, although nationals of Ukraine owned ninety-nine percent of the shares of the

[198] See, among others, G. Van Harten, *Public Statement on the International Investment Regime - 31 August 2010*, 31 August 2010, Public Statement on the International Investment Regime, available at https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (last visited 2 November 2020); T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (2013), The Interpretation of International Investment Law, at 8; T. H. Yen, *The Interpretation of Investment Treaties* (2014), at 9.

[199] Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in K. P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (2008) 51, at 55–73.

[200] M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (2015), at 136.

[201] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[202] Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments (1994), 3 June 1995, Art.1(2)(b).

company and comprised two-thirds of its management. According to commentators[203] and to the president of the tribunal himself,[204] such interpretation was blatantly exceeding the intended meaning of the BIT.[205]

As to the expansion of substantive scope of substantive treaty obligations, the case of the protection of investor's legitimate expectations as a component of the FET of FDI is indicative. The protection of investor's legitimate expectations has for long not found a basis in treaty texts, having a judicial genesis instead. Among the first tribunals to refer to legitimate expectations in the context of FET is the one in the *Tecmed v. Mexico* case,[206] which considered the FET as requiring 'the [c]ontracting 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'.[207] The tribunal cited no authority to support such inclusion, as did subsequent tribunals that based their arguments on precedent arbitral awards only.[208]

Based on such premises, tribunals have stressed that the protection granted by means of the FET clause included the protection of investor's legitimate

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[203] Sornarajah, 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration', in C. A. Rogers and R. P. Alford (eds.), *The Future of Investment Arbitration* (2009) 273, at 280.

[204] Prosper Weil, Dissenting Opinion, Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, 29 April 2004.

[205] Another famous example in this regard is the case *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, where the tribunal retained jurisdiction against a US company on the argument that its jurisdiction could be premised on the nationality of an intermediate hold-ing company, in the case at hand a Dutch one, constituted after problems arose with the investment and when a claim before an arbitral tribunal was already foreseeable. See also, commenting on the specific case, Gramont, 'After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia', 3 *Transnational Dispute Management (TDM)* (2006), available at https://www.transnational-dispute-management.com/article.asp?key=850 (last visited 3 April 2019).

[206] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (TECMED v. Mexico).

[207] *Ibid.*, at para 154.

[208] See, among others, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at para 602.

expectations when the State had entered into contractual commitments with the foreign investor,[209] when the State had made informal representations to the investor,[210] or even based on the general legislative framework in place at the time the investment was made.[211] This last approach has been criticized as extending too much the protection provided for by the FET standard,[212] as it fettered the very right of a Government to make changes to its policies without exposing itself to claims to damages by those affected by such changes.

In second-generation IIAs, the employment of standards of investment protection was then coupled with the creation of a dispute-resolution mechanism that, in the vast majority of cases, allowed foreign investors to file a lawsuit against the host State directly before an international arbitral tribunal.[213]

Such a feature was a departure from the customary rule that required the previous exhaustion of local remedies to resort to international jurisdiction,[214] and was imported from investor-State contracts.[215] Investors had begun including international arbitration clauses in their contracts with States in order to avoid resorting to local courts, that might be affected by bias, corruption or inefficiency. This risk was perceived with more urgency starting from the wave of nationalizations, breaches of contracts, and imposition of regulatory control that characterized the assertion of

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[209] See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004. Although on the difference between legitimate expectations protected under the treaty and purely contractual expectations, see *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

[210] See *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

[211] *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL / LCIA Case No. UN3467, Final Award, 1 July 2004, at para 183.

[212] See, among others, Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', 28 *ICSID Review - Foreign Investment Law Journal* (2013) 88; Sornarajah, *supra* note 203, at 289.

[213] The traits of the ISDS system will be addressed in detail at Chapter III below.

[214] ICJ, *Interhandel Case (Switzerland v. United States of America) (Preliminary Objections)*, I.C. J. Reports I959, p. 6, 21 March 1959, at 27.

[215] S. N. Kinsella and N. D. Rubins, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (2005), at 262 ff.

economic sovereignty by developing States and the implementation of socialist economic policies in the 1950s,[216] and led to the inclusion of ISDS clauses in investment contracts notwithstanding the traditional distrust of developing States towards international arbitration.[217]

The adoption of the ICSID Convention in 1965 opened the floor for the inclusion of ISDS clauses in BITs, which increased dramatically during the 1980s and which was, by the 1990s, an ever-present feature of BITs, pouring into FTAs with investment provisions.[218] ISDS clauses offered a privileged avenue to foreign investors, that were not required to previously exhaust local remedies or to seek for the uncertain diplomatic protection of their home State, and that could consequently directly file a claim before an international arbitral tribunal, because of the open consent given by the State through the treaty.[219]

The combination of indeterminate substantive rights that could be interpreted expansively by arbitral tribunal and of the ISDS mechanism embedded within IIAs (with the typical traits of investment arbitration that will be addressed below in Chapter 3), have led to the unwarranted expansion of the State's commitments contained in IIAs.[220] This distortion has, according to some, affected the very power of States to enact policies in the public interest within their own territory, defined as 'regulatory chill'. The latter indicates the phenomenon whereby regulatory progress is dampened in areas –or specific measures– that might affect foreign investors as the lawmakers foresee the arising of possible investor-State disputes.[221]

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[216] Newcombe and Paradell, *supra* note 186, at 24.

[217] See Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism Symposium: International Law and the Developing World: A Millennial Analysis', 41 *Harvard International Law Journal* (2000) 419.

[218] R. Polanco Lazo, *The Return of the Home State to Investor-State Disputes* (2018), at 29.

[219] C. H. Schreuer, *Investment Disputes*, May 2013, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e517?prd=MPIL (last visited 2 November 2020).

[220] Langford and Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?', 29 *European Journal of International Law* (2018) 551, at 552.

[221] Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011) 606, at 607.

Consequently, although in a different fashion from the other fields of international economic law, the investment regime has shown its capacity, notwithstanding the States' strenuous attempts to retain control over foreign activities within their own territory, to compress the State's sovereign prerogatives. The expanding reach of arbitral tribunals' interpretations was only potential during the exponential growth of the number of IIAs during the second half of the 20th century, which still reflected the power-based relationship between contracting States seen above. However, it was during the last decade of the last century and the first decade of the present century that investment arbitration exploded, exposing the interference of the international investment regime with the State's exercise of its sovereign powers.

4. A new understanding of State sovereignty in the international panorama? The 'return of the State'

The drive toward internationalization that characterised the international activity of States during the second half of the 20th century seems to be losing momentum. This can be noted already in the doctrinal debate: if, during the 1990s, scholars were dealing with the increasing degree of international integration by foreseeing the transformation of the international order into a new World Law,[222] these ideas have been abandoned. The evolution of international relationships shows the unwillingness of States to carry on with the liberal approach and with the transferral of powers to the supranational level that was considered necessary after WWII.

In the last two decades, challenges have been brought to multilateralism and international law as conceived in the previous century, and attempts to bring back to the realm of State's authority ambits that were considered as pertaining to the international sphere can be seen in different areas of international practice.[223]

[222] See, among others, Delbruck, 'A More Effective International Law or a New World Law - Some Aspects of the Development of International Law in a Changing International System', 68 *Indiana Law Journal* (1992–1993) 705; Caldwell, 'Is World Law an Emerging Reality - Environmental Law in a Transnational World Internet Symposium - Issues in Modern International Environmental Law: Perspective', 10 *Colorado Journal of International Environmental Law and Policy* (1999) 227.

[223] Brunnée, 'Multilateralism in Crisis', 112 *Proceedings of the ASIL Annual Meeting* (2018) 335.

Examples in this regard are manifold and range from the return of unilateralism in military interventions to the crisis of international institutions.

As to the former, if the end of the cold war had witnessed the operation of humanitarian intervention under Chapter VII of the UN Charter, though not without criticism,[224] starting from the early 2000s States have attempted to bypass the mechanisms and grounds provided by the UN Charter, unilaterally taking action on various occasions. From the American and British intervention in Iraq in 2003, which proved unsubstantiated,[225] to the more recent Turkish and American operations in the Syrian conflict, recent cases reflect the desire of States to be unfettered in their foreign policy.[226]

But examples in this regard are numerous: from the recent approach of the US in the fight against terrorism, that shows the State's quest for supreme authority on the measures related to the ongoing anti-terrorist campaign and the refusal of any intrusion by the UN;[227] to measures short of the use military force, such as economic

[224] For a survey of which interventions were previously authorised by the UNSC, which were subsequently authorised, and the debate arisen thereof, see Roberts, 'The So-Called 'Right' of Humanitarian Intervention1', 3 *Yearbook of International Humanitarian Law* (2000) 3. See also Valek, 'Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter Student Note', 26 *Michigan Journal of International Law* (2004–2005) 1223; Roberts, 'NATO's 'Humanitarian War' over Kosovo', 41 *Survival* (1999) 102.

[225] Talentino, 'US Intervention in Iraq and the Future of the Normative Order', 25 *Contemporary Security Policy* (2004) 312, at 322; Kurth, 'Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities', 50 *Orbis* (2006) 87.

[226] See, among others, European Parliament, *Turkey's Military Operation in Syria and Its Impact on Relations with the EU*, 11 November 2011, European Parliament Think Tank, available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA%282019%29642284&utm_source=dlvr.it&utm_medium=facebook; C. O'Meara, *United States' Missile Strikes in Syria: Should International Law Permit Unilateral Force to Protect Human Rights?*, 18 April 2017, EJIL: Talk!, available at https://www.ejiltalk.org/united-states-missile-strikes-in-syria-should-international-law-permit-unilateral-force-to-protect-human-rights/.

[227] See Acharya, 'State Sovereignty After 9/11: Disorganised Hypocrisy', 55 *Political Studies* (2007) 274; Reid, 'Fighting States of Subjection: The Biopolitical Stakes of the Liberal War on Terror', in A. Houen (ed.), *States of War since 9/11: Terrorism, Sovereignty and the War on Terror* (2014) 187.

sanctions recently adopted by single States and regional organizations against human rights violators without the umbrella of Chapter VII of the UN Charter.[228]

In the context of trade law, disagreements over the reciprocal concessions by the most powerful States have led to the stalemate in the negotiations of the WTO Doha Round. The Ministerial Conference has produced no outcome since 2001 and negotiating Countries have failed to agree on whether they should keep the negotiations going.[229]

Indicative of the reassertion of the primacy of the State is then the current backlash against international courts. Examples can be found in the attempts by African Governments to restrict the jurisdiction of three similarly situated sub-regional courts, namely the Court of the Economic Community of West African States (ECOWAS), the East African Court of Justice (EACJ), and the Southern African Development Community (SADC) Tribunal, in response to politically controversial rulings.[230] A number of Countries have left the Inter-American Court of Human Rights (IACtHR),[231] while the WTO's Appellate body has, at the time this thesis is being written, stopped operating due to the exhaustion of term of existing members and the refusal of the US to approve the appointment of new persons to the vacant Appellate Body seats.[232]

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[228] See the many cases recalled in M. Dawidowicz, *Third-Party Countermeasures: A Progressive Development of International Law?*, 30 June 2016, Questions of International Law QIL - QDI, available at http://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/ (last visited 3 November 2020).

[229] Herwig, 'The WTO and the Doha Negotiation in Crisis?', 44 *Netherlands Yearbook of International Law* (2014) 161; WTO, *WTO Members Secure 'historic' Nairobi Package for Africa and the World*, 19 December 2015, World Trade Organization, available at https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm (last visited 15 April 2019).

[230] Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *European Journal of International Law* (2016) 293.

[231] Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197.

[232] J. Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (2019). On the topic, see the numerous contributions contained in *'In Clinical Isolation.' Is There a Meaningful Place for the World Trade Organization in the Future*

Furthermore, not only new regional or global powers have arisen in the international arena, such as China or India, adopting critical approaches against international structures they perceive as the product of a western-world order. As a matter of example, China and Russia have recently released a joint declaration in which they restate their view of international law based on sovereign-based principles such as sovereign equality, non-intervention, and State immunity.[233] Also within western States, populistic sentiments have been given increasing voice and have, in recent years, risen to power, carrying out their agenda against foreign forces,[234] from

of International Economic Law? Archives, QIL QDI, available at http://www.qil-qdi.org/category/zoom-out/in-clinical-isolation-is-there-a-meaningful-place-for-the-world-trade-organization-in-the-future-of-international-economic-law/ (last visited 30 November 2020). Among the many, see, in particular: L. Borlini, *A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency*, 31 January 2020, QIL QDI, available at http://www.qil-qdi.org/a-crisis-looming-in-the-dark-some-remarks-on-the-reform-proposals-on-notifications-and-transparency/ (last visited 30 November 2020); G. Sacerdoti, *The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?*, 30 January 2019, QIL QDI, available at http://www.qil-qdi.org/the-stalemate-concerning-the-appellate-body-of-the-wto-what-way-out/ (last visited 30 November 2020).

[233] The Ministry of Foreign Affairs of the Russian Federation, and The Ministry of Foreign Affairs of the People's Republic of China, *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, 25 June 2016, available at https://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698 (last visited 3 November 2020).

[234] R. F. Inglehart and P. Norris, Social Science Research Network, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, SSRN Scholarly Paper, ID 2818659 (2016), available at https://papers.ssrn.com/abstract=2818659 (last visited 3 November 2020).

economic globalization to international institutions, such as the European institutions,[235] the IMF,[236] the Human Rights council,[237] just to mention a few.[238]

The growing mistrust against internationalization and globalization, and the attempts of States to bring powers back to the domestic sphere have been described through terms such as such as 'reassertion of control' by States,[239] 'return of the State',[240] or 'sovereign backlash'.[241] Regardless of the exact term employed, all formulations indicate the revival of the role of State sovereignty and are disclosing the endeavour of States to fiercely regain (if they ever lost) centrality in international law.

The international investment regime is not immune from the global tendency. Discontent against the main traits of the international protection of FDI has led some States to reject international investment regulation altogether: Italy withdrew from the ECT with effect from 1 January 2016,[242] while Russia had earlier

[235] The most famous example in this regard is the case of Great Britain leaving the EU. Among the extensive literature on the topic, see, e.g., F. Fabbrini, *The Law & Politics of Brexit* (2017), The Law & Politics of Brexit.

[236] See, e.g., the recent case of Greece. P. Thomsen, *The IMF and the Greek Crisis: Myths and Realities*, 30 September 2019, International Monetary Found, available at https://www.imf.org/en/News/Articles/2019/10/01/sp093019-The-IMF-and-the-Greek-Crisis-Myths-and-Realities (last visited 3 November 2020).

[237] 'United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism About Its Border Policy', 112 *American Journal of International Law* (2018) 745.

[238] See, e.g., Cozier, 'The US Withdrawal from the Paris Agreement: A Global Perspective', 7 *Greenhouse Gases: Science and Technology* (2017) 774.

[239] A. Kulick, *Reassertion of Control over the Investment Treaty Regime* (2018).

[240] See, among others, Alschner, Lalani and Polanco Lazo, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration', in *The Role of the State in Investor-State Arbitration* (2014); Alvarez, 'The Return of the State', 20 *Minnesota Journal of International Law* (2011) 223; Barrow, 'The Return of the State: Globalization, State Theory, and the New Imperialism', 27 *New Political Science* (2005) 123; Delwaide, 'The Return of the State?', 19 *European Review* (2011) 69; Polanco Lazo, *supra* note 218.

[241] See, e.g., Alter, Gathii and Helfer, *supra* note 230; Madsen, Cebulak and Wiebusch, *supra* note 231. As to the specific field of international investment law and arbitration, see, above all, M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration. Perceptions and Reality* (2010).

[242] *Italy*, 31 July 2015, International Energy Charter, available at

withdrawn its provisional application to the same treaty as a signatory.[243] South Africa, Indonesia, and India, among others, have started to unilaterally terminate their respective BITs,[244] and the number of IIA terminations continues to rise.[245]

The rejection of the international protection of FDI altogether entails not being subject to international obligations and bringing back to the State the adjudication of investment disputes. However, only few States have, so far, taken this route. The vast majority of States is still holding up to the international investment regime,[246] showing numerous attempts to recalibrate the protection of foreign investment in favour of the State, as will be seen in the next Chapter, thereby portraying a different and broadened understanding of the realm of State's powers.

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https://www.energycharter.org/who-we-are/members-observers/countries/italy/ (last visited 3 April 2020).

[243] *Russian Federation*, 11 February 2019, International Energy Charter, available at https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/ (last visited 3 April 2020).

[244] L. E. Peterson, *South African Government Releases Draft Paper Reviewing Its BIT Program, and Calling for Major Revisions to Approach*, 17 July 2009, Investment Arbitration Reporter, available at https://www.iareporter.com/articles/south-african-government-releases-draft-paper-reviewing-its-bit-program-and-calling-for-major-revisions-to-approach/ (last visited 3 April 2020); *Indonesia Ramps up Termination of BITs – and Kills Survival Clause in One Such Treaty – but Faces New $600 Mil. Claim from Indian Mining Investor*, 20 November 2015, Investment Arbitration Reporter, available at https://www.iareporter.com/articles/indonesia-ramps-up-termination-of-bits-and-kills-survival-clause-in-one-such-treaty-but-faces-new-600-mil-claim-from-indian-mining-investor/ (last visited 3 April 2020); A. Ross, *India's Termination of BITs to Begin*, 22 March 2017, Global Arbitration Review, available at https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin (last visited 3 April 2020).

[245] In 2017, 'For the first time, the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into force (15).' However, this was also determined by the increasing conclusion of multilateral IIAs, that create more treaty relationships between countries than single BITs. See ', *supra* note 177, at 88. See then UNCTAD, *World Investment Report 2019* (2018), available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf (last visited 4 April 2020), at 100.

[246] UNCTAD, *supra* note 245, at 99; Voon, Mitchell and Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights', 29 *ICSID Review - Foreign Investment Law Journal* (2014) 451.

If such developments offer a *de lege lata* perspective of the undergoing changes in the investment regime, a mutating understanding of the State's sovereign prerogatives can be simultaneously witnessed in the jurisprudence of arbitral tribunals. The latter act unfettered from the recent developments in IIAs, since the vast majority of investor-State proceedings have been, so far, based on old-generation treaties. Consequently, changes in arbitral jurisprudence express different and extra-juridical factors, making the analysis of arbitral awards particularly suited to indicate the mutating relevance of State sovereignty currently taking place in the international investment regime.

5. A selected expression of State sovereignty: the regulatory capacity of the State

Finally, an overarching and all-embracing concept such as that of sovereignty imposes the parameter, or 'actionable legal concept',[247] that expresses the idea of State sovereignty and allows to analyse it.[248]

Among the numerous manifestation of the principle of State sovereignty, one that has attracted much attention in recent years and that has shown the capacity of the international investment regime to fetter the State's action beyond the limits originally envisaged by treaty drafters is the regulatory authority of the State. The concept is wide-ranging: it embraces the State's legislative power, legislation being 'one of the most obvious forms of the exercise of sovereign power'.[249] It then encompasses the actions of the executive power,[250] be they a reflection of the Government's norm-creating activity or political action, or of its administrative branching.[251] As such, it encompasses one of the most-important functions of the State,

[247] Viñuales, 'Sovereignty in Foreign Investment Law', in *The Foundations of International Investment Law: Bringing Theory into Practice* (2012) 317, at 318.

[248] Vaughan Lowe expresses the same idea by referring to 'implications' of sovereignty. See Lowe, 'Sovereignty and International Economic Law', in W. Shan, P. Simons and D. Singh (eds.), *Redefining Sovereignty in International Economic Law* (2008) 77, at 82.

[249] PCIJ, *Legal Status of Eastern Greenland (Denmark v Norway)*, PCIJ Rep Series A/B No 53, 5 April 1933, PCIJ Rep Series A/B No 53, at 48.

[250] Morris, *supra* note 54.

[251] Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory

namely that of determining what are the public welfare objectives of its action and the means to achieve them.[252] In the words of one commentator, it can be considered as the 'freedom to engage in political, economic, legislative and other regulatory activity as the [S]tate sees fit.'[253]

The State's regulatory authority has been identified by a stream of legal scholarship with the formula 'right to regulate' that has encountered recent fortune in the international investment debate. 'Right to regulate' has encompassed a gamut of different notions, all with individual nuances. Some commentators have defined it as 'an expression referring to the regulatory aspects of (internal) sovereignty accounts for the protection of citizens' public interest undertaken by [S]tates',[254] thereby adopting a broad notion that matches the concept analysed in the present work.[255]

Carve-Outs', 50 *Vanderbilt Journal of Transnational Law* (2017) 355, at 373; L. W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016), at 8; Rutgers, 'Public Administration and the Separation of Powers in a Cross-Atlantic Perspective', 22 *Administrative Theory & Praxis* (2000) 287, at 297.

[252] Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit', *Vanderbilt Journal of Transnational Law* (2008) 775, at 807. See also UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, at 33: '[t]he right to regulate is an expression of a [C]ountry's sovereignty. Regulation includes both the general legal and administrative framework of host [C]ountries [... as well as] effective implementation of rules, including the enforcement of rights'.

[253] Titi, *supra* note 46, at 32.

[254] Y. Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (2019), at 44.

[255] A similar broad concept has been adopted by Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper', 2 *OECD Working Papers on International Investment* (2017), at 13–14: 'Under most treaties, practically all national law can be subject to the international law constraints in investment treaties. The range of measures under review or at issue can include relevant provisions of national constitutions, legislation adopted by Parliaments, legislation adopted by federal states or provinces, regulations of many kinds, as well as the application of the law in individual cases. Claims arising from these different types of regulation can raise different policy issues. This section will address some issues arising from arbitral review of legislation, administrative measures and domestic courts.'

Other commentators have considered this concept as describing a right to regulate *lato sensu*,[256] claiming that the term has acquired a specific meaning in international investment law and that it now refers to 'the legal right exceptionally permitting the host [S]tate to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.'[257] This right is usually related to the presence of specific exceptions in the treaty text or to defences under customary international law.[258] In this connotation, 'right to regulate' indicates a much-narrower meaning than the ability of the State to exercise legislative and regulatory powers within the boundaries of its international obligations.

In other circumstances, the formula 'right to regulate' has been resorted to specifically indicate the discretion that the State enjoys in the admission of foreign investment. The Charter of Economic Rights and Duties of mentions the right to regulate foreign investment in its Art.2(2)(a) by providing that

> '[e]ach State has the right [t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.'[259]

However, the phrasing has not received unanimous approval. Some have criticized the vagueness of the term.[260] At the same time, other scholars have referred to the above-mentioned concepts without resorting to the formula 'right to regulate'. The expression of the sovereign power of the State has been defined by some

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[256] Titi, *supra* note 46, at 32.

[257] *Ibid.*, at 33. See also G. Becker, UNCTAD, *Policies to Promote the Development Dimension of FDI*, UNCTAD/ITE/IIA/2003/4 (2003), The Development Dimension of FDI: Policy and Rule-Making Perspectives 141, available at https://unctad.org/system/files/official-document/iteiia20034_en.pdf (last visited 17 October 2018).

[258] See Titi, *supra* note 46.

[259] UN General Assembly, *supra* note 129, Art.2(2)(a).

[260] S. Lester, *Talk of a 'Right to Regulate' Is Hurting the Trade Debate*, 21 July 2015, Cato Institute, available at https://www.cato.org/publications/commentary/talk-right-regulate-hurting-trade-debate (last visited 16 November 2020).

as ‘capacity to regulate’,[261] while others have referred to the ‘sovereign right of nations to govern their own affairs.’[262]

A different stream of legal scholarship have resorted to the concept of public authority to better describe the link with State sovereignty. Some commentators have identified the sovereign action of the State whenever it ‘has acted in its sovereign capacity, exercising its governmental or public power or authority.’[263] Similarly, the State’s action subject to the scrutiny of investment arbitral tribunals has been referred to as an ‘exercise of public authority’.[264]

Since the term ‘right to regulate’ in its narrow understanding has been defined as ‘a nascent concept in the field of international investment law’,[265] the expression will be here avoided and terms such as regulatory authority and power will be preferred instead.[266] The latter seem to better express the exercise of the State’s internal sovereignty and jurisdiction,[267] and will be used in the present work. Accordingly, investment arbitral disputes that arise from the exercise of regulatory authority will be defined as regulatory disputes.[268] As such, regulatory authority does not differ here from the formula ‘right to regulate’ as devised by part of the international scholarship.[269]

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[261] B. Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate* (2011).

[262] Brower and Blanchard, 'What’s in a Meme - The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States', 52 *Columbia Journal of Transnational Law* (2013–2014) 689, at 725.

[263] I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (2011), at 170.

[264] G. Van Harten, *Investment Treaty Arbitration and Public Law* (2008), at 70.

[265] Titi, *supra* note 46, at 33.

[266] As used by authors such as Vicuña, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', 5 *International Law FORUM Du Droit International* (2003) 188; Viñuales, *supra* note 247.

[267] Mills, 'Rethinking Jurisdiction in International Law', 84 *British Yearbook of International Law* (2014) 187.

[268] Borrowing the definition devised by Van Harten, *supra* note 73, at 376.

[269] Gaukrodger, *supra* note 255; Levashova, *supra* note 254.

The State's regulatory authority is a settled concept in customary international law,[270] and does not stem from international agreements.[271] As an attribute of State's internal sovereignty, it entails the State's power to act within its own territory without being subject to the control of other States.[272] It operates, as seen above, within the limits and restrictions posed by international law.[273]

International jurisprudence has long elaborated and applied the inherent legal authority to regulate as an exercise of the State's sovereignty over a specific territory.[274] As a matter of example, the International Court of Justice (ICJ), in its recent case *Territorial and maritime dispute (Nicaragua v Colombia)*, recalled that

> '[…] acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities […]'.[275]

The regulatory authority of the State has arisen as one of the most-debated aspects of international investment law, being the expression of State sovereignty that bears the greater risk of being unwarrantedly fettered by investment arbitral

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[270] Martinez-Fraga and Reetz, *supra* note 30, at 126–128. Martinez-Fraga refers to the doctrine of public purpose, specifying that it is referred to with a wide range of formulations, such as police powers, security, permanent sovereignty over natural resources, public interest, just to mention a few.

[271] H. Mann, UNCTAD, *The Right of States to Regulate and International Investment Law: A Comment*, UNCTAD/ITE/IIA/2003/4 (2003), The Development Dimension of FDI: Policy and Rule-Making Perspectives 211, available at https://unctad.org/system/files/official-document/iteiia20034_en.pdf (last visited 17 October 2018), at 216.

[272] Levashova, *supra* note 254, at 25; Mouyal, *supra* note 251, at 31; Cheng, 'Power, Authority and International Investment Law', 20 *American University International Law Review* (2004–2005) 465, at 486; UNCTAD, *World Investment Report 2003* (2003), available at https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=669 (last visited 2 April 2020), at 145.

[273] Mouyal, *supra* note 251, at 32.

[274] See already PCIJ, *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)*, PCIJ Rep Series A No 7, 25 May 1926, at 21–22.

[275] ICJ, *Territorial and maritime dispute (Nicaragua v Colombia), Judgment*, I.C.J. Reports 2012 624, at para. 80.

tribunals in the application of the international obligations. International responsibility has been claimed and assessed for all the different manifestations of the State's regulatory authority. Not only the exercise of the State's legislative powers, be it unprompted or carried out to comply with international obligations;[276] acts of the executive branch's agencies or instrumentalities that interfered directly with FDI,[277] or indirectly,[278] have been subject to the scrutiny of arbitral tribunals.

The balance between investment protection and State regulatory authority is not, however, a recently emerged issue, as it could be found, among other things, in the debate within the UNGA over the appropriate amount of compensation that should follow an exercise of lawful expropriation. The demanding compensation requirements supported by developed Countries were seen by developing Countries as unduly fettering their inherent sovereign right to regulate and control –even to the point of nationalization– the use and ownership of property within their borders.[279] More precisely, the inability to provide the suggested compensation was seen, by developing States, as depriving them of the lawful exercise of their policies.[280]

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[276] As to the first scenario, see, among the many, the several cases brought against Spain for the enactment of Laws and Royal Decree Laws that had ultimately repealed the incentive regime for the production of renewable energy previously in place. See, Chapter V, para.3 below. As to the second scenario, see, e.g., *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

[277] See, e.g., *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction, Liability, 17 March 2015.

[278] *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL Final Award, 15 November 2004.

[279] While developed Countries supported the hull formula, as seen at Paragraph 3.3.1. above, developing Countries were in favour of the more-radical approach employed in UN General Assembly, *supra* note 117, Preamble, para.1(b): 'commercial agreements shall not contain economic or political conditions violating the sovereign rights of the underdeveloped [C]ountries, including the right to determine their own plans for economic development.'

[280] Lauterpacht, 'International Law and Private Foreign Investment', 4 *Indiana Journal of Global Legal Studies* (1997) 259, at 263.

The link between all forms of domestic regulation and the State's sovereign powers has been, at times, referred to with the term *police powers*,[281] borrowed from the American constitutional doctrine, where it indicated the realm of sovereign powers of the federated States which the federal Government could not interfere with.[282] In the international investment realm, the doctrine of police powers has been, however, limited to the context of the protection from unlawful expropriation, where it generally refers to 'measures that justify a [S]tate action that would otherwise amount to a compensable deprivation or appropriation of property.'[283] In the words of the tribunal in *TECMED v. Mexico*,

> '[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.'[284]

If in the early years of contemporary international investment arbitration, regulatory disputes were relatively infrequent,[285] in recent years investment claims have increasingly targeted host State's regulatory measures. More than any other type of proceedings, regulatory disputes have been considered one of the primary causes of the 'chilling effect' of IIAs, namely the avoidance of States Parties to investment agreements to enact public policies or to adopt future governmental conducts for fear of future liability.[286] At the same time, State regulatory authority has

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[281] Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20 *ICSID Review - Foreign Investment Law Journal* (2005) 1, at 26.

[282] Denny, 'The Growth and Development of the Police Power of the State', 20 *Michigan Law Review* (1921) 173.

[283] Newcombe, *supra* note 281, at 26. See also Zamir, 'The Police Powers Doctrine in International Investment Law', 14 *Manchester Journal of International Economic Law* (2017) 318.

[284] TECMED v. Mexico, *supra* note 206, at para.119. See also *Methanex Corporation v. United States of America*, UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, at Part IV, ch. D, para. 7; *Saluka Investment BV (The Netherland) v. The Czech Republic*, PCA, Partial Award, 17 March 2006, at para.262.

[285] Van Harten, *supra* note 73, at 376.

[286] Among the many authors that have written on the regulatory chill, see Broude, Haftel and Thompson, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach', in A. Roberts et al. (eds.), *Comparative International Law* (2018) 527; L. Cotula, *Do Investment Treaties*

been one of the primary subjects in the efforts of States to rebalance investment protection with their exercise of sovereign powers in new-generation IIAs, as will be seen in the next Chapter.

While it is clear that the application of IIAs can affect the State's freedom of action, since it can interfere with the exercise of State powers in the various branches of a State's jurisdiction,[287] it is equally uncontested that, by binding themselves through international agreements, States do not aim to give up their freedom to exercise sovereign powers and pursue policies in the public interest.[288] As argued by some commentators, no State will bind itself to international obligations that limit its power to enact public policies and change domestic legislations.[289]

Looking at the fortunes of the State's regulatory powers in treaty drafting and investment arbitral jurisprudence can therefore offer an insight of what is the relevance currently attributed to some of the most-basic State sovereign prerogatives and, with a reasonable approximation, to the role of State sovereignty in general. The next Chapters will look at how the changes in the delicate balance between State regulatory powers and international obligations reflect the mutating relevance of State sovereignty in the international investment realm.

Unduly Constrain Regulatory Space?, 24 November 2014, Questions of International Law QIL - QDI, available at http://www.qil-qdi.org/investment-treaties-unduly-constrain-regulatory-space/ (last visited 27 November 2020); Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty', 64 *International Studies Quarterly* (2020) 1; Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration', in A. J. van den Berg (ed.), *Arbitration: The next Fifty Years* (2012) 170, at 170; Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?', 24 *Journal of International Arbitration* (2007) 469; Zamir and Barker, 'The Trans-Pacific Partnership Agreement and States' Right to Regulate under International Investment Law', 45 *Denver Journal of International Law and Policy* (2016–2017) 205, at 207.

[287] Klager, *supra* note 89, at 158.

[288] *Ibid.*, at 159.

[289] Mann, *supra* note 271, at 216.

CHAPTER II

Safeguarding State sovereignty in international investment treaties

1. Introduction − 2. Methodology − 3. Voice tactics: influencing the interpretation of arbitral tribunals – 3.1. Adding declaratory right to regulate provisions – 3.2. Including new-generation exceptions to rebalance IIAs' obligations – 3.2.1. New-generation general exceptions – 3.1.2. New-generation essential security exceptions – 3.3. Clarifying substantive provisions – 3.3.1. Protection from unlawful expropriation – 3.3.2. Fair and Equitable Treatment of FDI – 3.4. Including human rights language in IIAs – 4. Exit tactics: restricting the field of action of arbitral tribunals – 4.1. The shrinking definition of investment under IIAs – 4.2. Disengaging from the investor-State dispute-settlement system – 8. Conclusion

1. Introduction

The first development in the relevance given to the State's regulatory authority that will be here analysed concerns the changes in the drafting of new-generation IIAs as opposed to older-generation ones. As said above in Chapter 1, Paragraph 3.5., the international investment regime was originally built to offer resolute protection to FDI, reflecting the imbalanced relationship between developed capital-exporting Countries and developing capital-importing Countries.[1] Most first-generation IIAs followed a neo-liberal approach and focused solely on the protection and promotion of investment, making the promise of stability of the host State's regulatory framework one of the basic assumptions lying behind objectives of first-generation IIAs.[2] Although the original built-in bias was harshly criticised by developing States during the negotiations of multilateral investment treaties (and ultimately led to their failure), it survived and was poured into BITs that, even when negotiated between developing States, found a template in the very same failed multilateral attempts.[3]

[1] Juillard, 'The Law of International Investment: Can the Imbalance Be Redressed?', in K. P. Sauvant (ed.), *Yearbook of International Law and Politics 2008-2009* (2009) 273, at 273.

[2] F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (2019), at 5–6.

[3] Echandi, 'What Do Developing Countries Expect from the International Investment Regime?', in

It is uncontested that, even though earlier IIAs did not explicitly acknowledge the continuous regulatory capacity of the State in pursuance of its policy objectives,[4] the absence of specific reference to the State's sovereign prerogatives did not wipe out the State's regulatory power, that finds its genesis, as already noted, in the very essence of the State.[5] As put by Lauterpacht, 'one aspect of foreign investment which [investors] must accept is the right of the local sovereign to regulate the conduct of business within its territory'.[6] Consequently, even under traditional clauses, States retained their sovereign power to enact legislation and pursue policies in the public interest.[7]

However, the imbalance in favour of FDI protection exposed the capacity of IIAs to unwarrantedly fetter the State's regulatory action when international investment arbitration surged.[8] Investment arbitration quickly became one of the most-contested traits of the international investment regime, crossing the boundaries of international investment law insiders and spilling over into the discontent of civil society.[9] The global financial and economic crisis that broke out in September 2008

J. E. Alvarez and K. P. Sauvant (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 3, at 8.

[4] Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13 *Journal of International Economic Law* (2010) 1037, at 1045.

[5] H. Mann, UNCTAD, *The Right of States to Regulate and International Investment Law: A Comment*, UNCTAD/ITE/IIA/2003/4 (2003), The Development Dimension of FDI: Policy and Rule-Making Perspectives 211, available at https://unctad.org/system/files/official-document/iteiia20034_en.pdf (last visited 17 October 2018), at 216.

[6] Lauterpacht, 'The Drafting of Treaties for the Protection of Investment Section I: General Aspects of the Problem', 3 *International and Comparative Law Quarterly Supplementary Publication* (1962) 18, at 27.

[7] R. Klager, *'Fair and Equitable Treatment' in International Investment Law* (2011), at 159.

[8] See, J. E. Alvarez, *The Public International Law Regime Governing International Investment* (2011), at 253 ff; Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions', 78 *Modern Law Review* (2015) 793. See also Hathaway, 'International Delegation and State Sovereignty', 71 *Law and Contemporary Problems* (2008) 115, at 126.

[9] See, e.g., Mann, 'Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?', in J. E. Alvarez and K. P. Sauvant (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 22; M. Sornarajah, *The International Law on Foreign Investment* (4th. ed., 2017), at 34.

then acted as an amplifier of the growing dissatisfaction with the main traits of the investment regime,[10] and emphasized the importance of the State's regulatory action to safeguard the economy and public services.[11]

In the last two decades, numerous States have started to re-evaluate their network of IIAs to regain part of the control of the investment framework that they considered lost under the so-called first and second-generation texts.[12] While developed Countries were at the forefront of this shifting paradigm,[13] an important impulse came from the UNCTAD, which elaborated a 'reform package' that encouraged the conclusion of so-called 'new-generation' IIAs[14] that is currently being followed, as monitored by the UNCTAD's Annual Reports, by an increasing number of Countries.[15] According to the reform package, the promotion of FDI remains a primary objective of IIAs, although it must be coupled with instruments that avoid

[10] The UNCTAD, in its Reform Packages, places the expansionary attitude of IIAs in the timespan between the 1950s and 2007, identifying 2008 as the turning point in the States' attitude towards investment treaty drafting. See *UNCTAD's Reform Package for the International Investment Regime, 2018 Edition* (2018), available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf (last visited 13 March 2021). See, also, UNCTAD, *World Investment Report 2015* (2015), available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last visited 2 April 2020), at 124.

[11] '[I]n times of economic crises, governments often have to adopt quick measures that are likely to hurt, inadvertently or intentionally, the rights and interest of foreign investors', Dupont and Schultz, 'Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration', 19 *Swiss Political Science Review* (2013) 564. .

[12] See, among others: United States, The White House, *Presidential Executive Order Addressing Trade Agreement Violations and Abuses*, 29 April 2017, available at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-addressing-trade-agreement-violations-abuses/ (last visited 24 May 2018).

[13] See the debate that took place in the US and Europe already in 2002: Kleinheisterkamp, *supra* note 8, at 797 ff. See also the restrictive approach adopted by the U.S. Model Bilateral Investment Treaty (2004) when compared to the previous U.S. Model Bilateral Investment Treaty (1984).

[14] See UNCTAD, World Investment Report 2015, *supra* note 10.

[15] UNCTAD, *World Investment Report 2020* (2020), available at https://unctad.org/system/files/official-document/wir2020_en.pdf (last visited 13 March 2020), at 112.

the imbalances that took place with the first-generation instruments and that have led to a diminished trust in the investment environment.[16]

In addition to being a fundamental source of the international investment regime,[17] IIAs constitutes a direct indicator of how negotiating States aim to balance the relationship between investment protection and the exercise of sovereign powers. The techniques applied by drafting States to safeguard their regulatory authority will be at focus in the present Chapter, which will look into new-generation provisions in order to answer the following research questions: what are the developments that can point to the changing relevance of State regulatory authority in IIAs? Do these developments consistently aim towards a reassertion –or an expansion– of the State's regulatory power?

This analysis will give account of the current negotiating behaviour of States and will reflect their approach in laying new legal bases for FDI protection. As such, it will offer a partial view of the changes that the international investment regime is currently undergoing. The application of new-generation IIAs will depend, in the first place, on their actual entry into force for the signatory States, or, in the case of Model BITs, on the adherence of the final text to the model provided. Their operation will then have to be tested in practice and might or might not display the effects intended by the drafting Parties, depending on the interpretation that arbitral tribunals will give to new treaty texts. This notwithstanding, the present enquiry will reflect the approach that the primary actors in the international arena, namely States, are expressing when it comes to the relevance of their sovereign prerogatives, and will offer an insight of the future operation of investor-State relationships and disputes.

[16] UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, at 30.

[17] Juillard, 'L'évolution Des Sources Du Droit Des Investissements', in *Recueil Des Cours* vol. 250 (1994) 9, at 75 ff.

2. Methodology

In order to answer the research questions indicated above, the necessary justifications over the method and limitations employed in the present Chapter must be provided.

First, the scope of the analysis will be limited to the changes taking place in IIA treaty making. The focus on the investment treaty panorama is not a repudiation of the other legal sources that regulate international investment, investment treaties being complemented by the domestic investment laws of the host State (where present) and by investment contracts (if concluded by the host State and the investor).[18] Far from ignoring the relevance of these instruments, limiting the scope of the present study to IIAs finds justification in the aim of the present study to detect how the selected expression of State sovereignty is given different consideration in the international panorama. Domestic investment laws and domestic regulatory systems are an exercise of the law-making authority of States in accordance with their constitutional arrangements[19] and, should they interfere with the State's continuous capacity to regulate in the public interest, the solution of the contrast will be a matter of domestic law, and will not elevate breaches of investment treatment provided therein to the international level, if not in specific circumstances.[20] Even if that were the case, the analysis of domestic investment laws does not easily allow to detect potential changes towards the regulatory space granted to the host State. Although 149 Countries have, so far, enacted investment legislations and many are currently adopting or amending investment regulations to better protect their national security

[18] For an extensive overview of the sources of international investment law, see J. W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013).

[19] *Ibid.*, at 34.

[20] As in the case of alleged denial of justice sparked from the behaviour of domestic courts seized by the investor following the enactment of regulatory action by the State. See, e.g., the case Feldman v. Mexico, as described in J. Paulsson, *Denial of Justice in International Law* (2009), at 110 ff. However, on the international relevance of domestic investment legislation and on the debate over its characterization, see Hepburn, 'Domestic Investment Statutes In International Law', 112 *American Journal of International Law* (2018) 658.

interests,[21] with a proper boom determined by the recent Covid-19 crisis,[22] only a handful of States have modified their existing investment laws in a way that allows a comparison between earlier and later regulations.[23] Furthermore, different approaches in different national legislations may well reflect different traditions in the regulation of foreign activities in their territory, without actually indicating any changing attitude of States. Investment contracts, on the other hand, have long remained mostly undisclosed and, notwithstanding recent efforts to make them available, do not offer a sufficient sample to carry on a study which aspires to draw general conclusions.[24]

Conversely, States have drafted IIAs for almost 70 years, with a total number that, to this date, amounts to 2654 treaties in force over a total of 3284 instruments concluded and not terminated by States.[25] Starting from the Germany-Pakistan BIT of 1962, 3759 treaties have been negotiated (considering treaties in force, signed but not yet entered into force, and terminated) and are public and available through the UNCTAD's database *Investment Policy Hub*, which provides their full text in

[21] See OECD, *Investment Screening in Times of COVID-19–and Beyond*, 7 July 2020, OECD Policy Responses to Coronavirus (COVID-19), available at http://www.oecd.org/coronavirus/policy-responses/investment-screening-in-times-of-covid-19-and-beyond-aa60af47/; UNCTAD, *World Investment Report 2016* (2016), available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (last visited 2 April 2020), at 98.

[22] See, among the many, European Commission, *Coronavirus: Commission Issues Guidelines to Protect Critical European Assets and Technology in Current Crisis*, 25 March 2020, available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2124; Department for Business, Energy & Industrial Strategy, *New Powers to Protect UK from Malicious Investment and Strengthen Economic Resilience*, 11 November 2020, UK Government Website, available at https://www.gov.uk/government/news/new-powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience.

[23] A number that encompasses both investment laws and FDI screening laws. Source: *Investment Laws Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 12 March 2021).

[24] See the database recently set up by the Columbia Center on Sustainable Development that, although a laudable effort that is increasing its coverage, currently contains only 120 investor-State contracts. Columbia Center on Sustainable Investment, *Open Community Contracts*, available at https://opencommunitycontracts.org/ (last visited 12 March 2021).

[25] UNCTAD, World Investment Report 2020, *supra* note 15, at 106.

the official langage(s) and categorizes them.[26] The availability of sources from a great number of Countries over a timespan of several years well allows to compare old-generation texts with new ones and to identify changes in the protection of the State regulatory power and to quantify such changes in order to detect if any trend exists.

Second, linking the developments of treaty drafting with the reassertion of sovereign space by States requires a clarification of the dual role that both States and investment arbitral tribunals play in the international investment regime. On the one hand, States are the 'masters of the treaty',[27] and act in their public international law role of treaty makers and international regime shapers when drafting IIAs; in the other hand, States are litigants, when acting as respondents in investor-State arbitration.[28] Arbitral tribunals, though their exact nature in the international investment regime is debated,[29] display a primary adjudicatory function of international disputes, as well as a law-making function in that they craft the meaning of

[26] *Investment Policy Hub*, available at https://investmentpolicy.unctad.org/ (last visited 23 March 2021).

[27] Among the many that have adopted this formula, see, e.g., Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577, at 581; UNCTAD, *World Investment Report 2013* (2013), available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last visited 2 April 2020), at 107.

[28] By resorting to a well-known classification in political science, States can be seen as both principals, when acting as Parties to the treaty, and litigants, when acting as respondents in investment arbitration. See Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *American Journal of International Law* (2010) 179, at 182; Langford, Behn and Fauchald, 'Backlash and State Strategies in International Investment Law', in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (2018) 70, at 74.

[29] The debate over the qualification of arbitral tribunals as agents of the treaty Parties or as trustees is still ongoing, and can be seen, among others, in Alter, 'Agents or Trustees? International Courts in Their Political Context', 14 *European Journal of International Relations* (2008) 33; Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (2004–2005) 631; Posner and Yoo, 'Judicial Independence in International Tribunals', 93 *California Law Review* (2005) 1; Roberts, *supra* note 28, at 185–187.

otherwise undefined standards of investment protection, by developing and using a precedent-based frameworks of argumentation and justification.[30]

While much of the State's authority as a sovereign is limited when acting as respondent in investment proceedings,[31] States can, when acting as masters of the treaty, materialize their discontent towards the investment regime through an ample range of State behaviours:[32] the two main avenues have been classified, resorting to the terminology originally coined by Hirschman for the marketplace, into *exit* and *voice*,[33] corresponding, respectively, to a break with the regime and to the attempt of changing the regime by seeking reforms thereto, through treaty drafting and treaty amendment.[34] Exit tactics have been, so far, resorted to by few Countries only[35] and, though their frequency has accelerated in the most recent past, still constitute an extremely rare event in the international investment regime.[36] Consequently, although the present Chapter recognizes that these examples contribute to the existence of a trend towards the reassertion of State sovereignty in the

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[30] See Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking', 12 *German Law Journal* (2011) 1083; Sweet, Chung and Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration', 8 *Journal of International Dispute Settlement* (2017) 579. The relevance of the use of precedent in the current analysis will be dealt with in Chapter 3.2. below. For a general discussion on the law-shaping role of international courts, see I. Venzke, *The Practice of Interpretation: A Theoretical Perspective* (2012).

[31] Langford, Behn and Fauchald, *supra* note 28, at 86 ff. Although, for the relevance of State authority in arbitral proceedings, see Chapter 3 and following.

[32] Kulick, 'Reassertion of Control: An Introduction', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2017) 3, at 24; Langford, Behn and Fauchald, *supra* note 28, at 76–86.

[33] Albert. O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Frims, Organizations, and States* (1970).

[34] Langford, Behn and Fauchald, *supra* note 28, at 76; Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', 29 *ICSID Review - Foreign Investment Law Journal* (2014) 372, at 377; Roberts, *supra* note 28, at 191.

[35] As seen above in Paragraph 1. and *supra*, Chapter 1, Paragraph 4.

[36] K. Gordon and J. Pohl, *"Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World*, February 2015, OECD Working Papers on International Investment 2015/02, available at http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf.

international investment regime, it will focus on the efforts to modify the regime, namely voice tactics and so-called hybrid ones, that offer a much-broader sample upon which the study can be conducted.

Voice tactics, aside from constituting an obvious exercise of the State's sovereign prerogatives,[37] are aimed at influencing the interpretation of arbitral tribunals to recalibrate the balance between the rights accorded investors and a State's right to regulate in the public interest.[38] This can take place by modifying the legal basis upon which investment arbitral tribunals are called to decide alleged infringements of the treatment of FDI, or by resorting to additional devices that follow the adoption of the treaty text.[39]

The latter include unilateral declarations and interpretative joint declarations that can influence investment arbitration under Art. 31(3)(a) of the VCLT.[40] Regardless of the debate over the limits in the application of these instruments,[41] this possibility has so far been taken up in extremely rare cases,[42] such as the joint interpretative declaration signed in 2018 between Colombia and India with regard to

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[37] Gazzini, 'Bilateral Investment Treaties', in T. Gazzini and E. De Brabandere (eds.), *International Investment Law. The Sources of Rights and Obligations* (2012) 99, at 113; A. Titi, *The Right to Regulate in International Investment Law* (1st Edition, 2014), at 32.

[38] Alvarez, 'Contemporary International Law: An Empire of Law or the Law of Empire', 24 *American University International Law Review* (2008–2009) 811, at 834.

[39] Gordon and Pohl, *supra* note 36, at 32.

[40] Vienna Convention on the Law of Treaties, 1155 UNTS 33, 27 January 1980, Art. 31(3)(a): 'There shall be taken into account, together with the context: [...] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

[41] See T. Gazzini, *Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties*, 17 August 2020, EJIL: Talk!, available at https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/ (last visited 17 March 2021); S.-W. Lee, *States' Right to Interpret a Treaty and Whether It Should Be Binding in a Pending Case*, 3 August 2020, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2020/08/03/states-right-to-interpret-a-treaty-and-whether-it-should-be-binding-in-a-pending-case/ (last visited 17 March 2021).

[42] See UNCTAD, Trade and Development Board, *Recent Developments in the International Investment Regime: Taking Stock of Phase 2 Reform Actions*, TD/B/C.II/42 (2019), available at https://unctad.org/system/files/official-document/ciid42_en.pdf, at 5 ff.

their 2009 BIT,[43] or the one signed between Bangladesh and India in 2017 with regard to their 2009 BIT.[44] While some recent IIAs explicitly provide that interpretations given through dedicated treaty bodies be binding on arbitral tribunals,[45] this option has been turned to even more rarely.[46] Consequently, even though their increasing presence offers another element in support of the reassertion of State sovereignty in the international investment regime, the present Chapter will focus on voice tactics that modify the legal basis upon which arbitral tribunals will be called to operate.

As to these last avenue, amending treaty language can take place through the inclusion in IIAs of clauses that explicitly restate the State's regulatory authority, usually referred to as 'right to regulate' provisions, in the treaty text or in the treaty preamble; by excluding policy areas from the protection of FDI by means of

[43] Government of India, Ministry of Externals Affairs, *Joint Interpretative Declaration between India and Colombia Regarding the Agreement for the Promotion and Protection of Investments between India and Colombia, Signed on November 10th 2009*, 10 November 2009, available at https://www.mea.gov.in/TreatyDetail.htm?3453.

[44] Government of India, Ministry of Externals Affairs, *Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments*, 4 October 2017, available at https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf. See further cases examined by C. Olarte-Bacares, E. Prieto-Rios and J. P. Pontón-Serra, *Are Interpretative Declarations Appropriate Instruments to Avoid Uncertainty? The Cases of the Colombia–France BIT and the Colombia–Israel FTA – Investment Treaty News*, 19 December 2020, Investment Treaty News, available at https://www.iisd.org/itn/en/2020/12/19/are-interpretative-declarations-appropriate-instruments-to-avoid-uncertainty-the-cases-of-the-colombia-france-bit-and-the-colombia-israel-fta-carolina-olarte-bacares-enrique-prieto-rios-juan-ponton-se/ (last visited 17 March 2021).

[45] See, e.g., Agreement between the United States of America, the United Mexican States, and Canada (2018), 1 July 2020, Art. 30(2)(2)(f), Footnote 1: 'For greater certainty, interpretations issued by the Commission are binding for tribunals and panels established under Chapter 14 (Investment) and Chapter 31 (Dispute Settlement)'; Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Viet Nam (2015), 20 December 2015, Art.36(2).

[46] The most-famous case being the NAFTA Free Trade Commission, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, that will be addressed in Chapter 4 below.

exceptions; by narrowing down the scope of standards of protection of foreign investment so to avoid broad interpretations.[47] These areas are also considered by the UNCTAD as focal to preserve the State's regulatory space.[48] In doing so, States attempt to rein in treaty interpretation within the boundaries of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) that, although often recalled by arbitral tribunals, have not always been applied in a coherent or consistent fashion.[49]

Also within treaty drafting are then hybrid tactics, which combine exit and voice traits.[50] These include restrictions to the jurisdiction of arbitral tribunals through limitations to the definition and admission of investment activities, and the abandonment of the ISDS system in favour of alternative and less-accessible methods of international dispute-resolution or of purely domestic adjudication.[51]

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[47] Gazzini, *supra* note 37, at 114 ff; Muchlinski, 'Trends in International Investment Agreements, Balancing Investor Rights and the Right to Regulate. The Issue of National Security', in K. P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008– 2009* (2009) 35, at 39 ff.

[48] UNCTAD, World Investment Report 2020, *supra* note 15, at 112.

[49] 'Tribunals often do not practise what they preach; reference to the Vienna Rules is now mandatory, but such reference does not mean the Rules are taken and applied seriously. ' Waibel and Kill, 'Interpreting Investment Treaties: Experience and Examples', in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 724, at 730; see also Arsanjani and Reisman, 'Interpreting Treaties for the Benefit of Third Parties: The Salvors Doctrine and the Use of Legislative History in Investment Treaties Editorial Comment', 104 *American Journal of International Law* (2010) 597. On the rules of interpretation as applied specifically by arbitral tribunals, see, among others, T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (2013), The Interpretation of International Investment Law, at 34 ff; T. H. Yen, *The Interpretation of Investment Treaties* (2014); Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 129; A. Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (2012), at 22–40.

[50] Langford, Behn and Fauchald, *supra* note 28, at 81 ff.

[51] '[S]tates can recalibrate their international legal commitments without eschewing contemporary international investment law'. Peinhardt and Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment', 7 *Global Policy* (2016) 571.

Evidence of the above-mentioned tactics in IIAs may well indicate the attempt of drafting States to safeguard their regulatory authority: whenever drafting States restate or protect the sovereign prerogatives of the State hosting the foreign investment, be it through amending the classic traits of the regime or by abandoning some of its features altogether, they ultimately aim at curtailing the law-making power of arbitral tribunals,[52] either in favour of the tribunals' role of adjudicators or by depriving the latter of the power to scrutinize the exercise of (some areas of) regulatory powers.

As to the operational side of the present analysis, the developments in treaty drafting will be analysed in the following way. The study draws on the dataset of 3759 treaties included in the database *Investment Policy Hub* that are available in English, Spanish, Portuguese, Italian, and French.[53] It makes use of the mapping tools provided by the International Investment Navigator: while IIAs are mapped until October 2018, the remaining 67 more-recent (and not yet mapped) treaties until December 2020[54] have been surveyed and categorized individually. The analysis will focus on some developments specific to treaty drafting that are expression of the voice and hybrid voice tactics depicted above, and that are usually considered by the UNCTAD, as well as by international law scholarship, as preservation of the State's regulatory space.[55] As to voice tactics, they will be: the inclusion of

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[52] A. Stone Sweet, *Arbitral Lawmaking and State Power: An Empirical Analysis of the Evolution of Investor-State Arbitration*, 14 November 2016, available at https://www.kcl.ac.uk/law/tli/assets/asw-arbitral-lawmaking-and-state-power.pdf.

[53] UNCTAD, Investment Policy Hub, *supra* note 26.

[54] While the present work was finalized in March 2021, only 1 treaty from 2021 was available in full text in the Investment Policy Hub database and was therefore excluded by the present research.

[55] UNCTAD, World Investment Report 2020, *supra* note 15, at 112; among the numerous scholars that have analysed the developments of the IIA regime, see, Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper', 2 *OECD Working Papers on International Investment* (2017), at 30; S. Lester and B. Mercurio, *Safeguarding Policy Space in Investment Agreements*, January 2018, IIEL Issue Brief 12/2017, available at https://www.law.georgetown.edu/iiel/wp-content/uploads/sites/8/2018/01/Simon-Lester-and-Bryan-Mercurio-General-Exceptions-in-IIAs-IIEL-Issue-Brief-December-2017-Accessible.pdf; Rudall, 'Green Shoots in a Barren World: Recent Developments in International Investment Law', 67 *Netherlands International Law Review* (2020) 453; Stone Sweet, *supra* note 52, at 41 ff; Spears,

declaratory 'right to regulate' provisions, in the treaty text or treaty preambles; the presence of carve outs (general exceptions and essential security exceptions) that exclude policy areas from the protection of the IIA; the reduction or exclusion of the substantive protection offered by the most-relevant treaty standards, namely FET and protection from unlawful expropriation, in the treaty text and annexes; the presence of non-economic language (limited to human rights provisions) that attempt to shift the balance between the protection of FDI and the pursuit of public welfare of the host State towards the latter. As to hybrid tactics, they will be the restriction in the scope of FDI and the abandonment of the ISDS system. These categories correspond to dedicated sections of the UNCTAD's database and allow to isolate the treaties that include the corresponding features.[56]

The study will consider the departure from standard provisions contained in first-generation and second-generation BITs. For greater clarity, first-generation IIAs were, as explained above, devised to grant protection for investment flowing from developed Countries to developing ones and have grown to be considered little-respectful for the host State's regulatory authority; second-generation IIAs did not depart as to the substantial protection offered to FDI, but included the (nowadays) infamous ISDS system allowing a private investor to invoke treaty breaches directly before an arbitral tribunal.[57]

The analysis will be of a quantitative nature, as it will be based on the mutating presence of the selected provisions according to time slots that will better highlight possible developments,[58] here identified with a slot that goes from the first inclusion of the specific provision in a treaty until 1999, one that corresponds to the first decade of the present century (2000-2009) and one indicating the second decade

supra note 4.

[56] See UNCTAD, International Investment Agreement Navigator *International Investment Agreements Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 10 March 2021), Mapping of IIA Content.

[57] Pauwelyn, *supra* note 34, at 392–396.

[58] Other authors have addressed a dyacronic analysis of the IIA regime by a 'comparative' perspective. The latter entails the sole focus on treaty re-negotiations. See Broude, Haftel and Thompson, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach', in A. Roberts et al. (eds.), *Comparative International Law* (2018) 527.

(2010-2020). In doing so, it will give account of the different solutions adopted by the drafting Parties to safeguard the State's regulatory authority, therefore not overlooking the qualitative nature of new-generation provisions. To this end, it is important to clarify that the focus of the present analysis will not be the absolute number of IIAs with new-generation provisions. As pointed out by the UNCTAD, only about 10% of investment treaties currently in force constitute evidence of the current changes, while the vast majority of investment treaties still hold-on to the classic pro-investor imbalance.[59]

This reflects, on the one hand, the genesis of many of the existing IIAs, which dates back to the past century or the first years of the present one, when the fallback of the international regulation of FDI were not fully known yet.[60] On the other hand, it follows the scattered nature of the investment regime, where to a growing number of recent treaties that provide support to the current changes corresponds a more-consistent number that follows the traditional approach of including broad and non-specified provisions. Many are the reasons for adopting a traditional phrasing, even in recent years: broader expressions grant investment greater protection and can serve as a better incentive to attract foreign capitals; arbitral jurisprudence is clarifying the scope of traditional clauses and contracting States are more aware of the meaning of substantive provisions even if drafted in general terms; smaller Countries or developing Countries may not have the legal expertise to insert new-generation provisions in their IIAs.[61]

Regardless of the overall number, the survey carried out in the present Chapter will focus on the *momentum* generated by the conclusion of new-generation clauses: even if the number of new-generation IIAs remains low, evidence of a changing

[59] According to the UNCTAD's Investment, Enterprise and Development Commission, UNCTAD, Trade and Development Board, *supra* note 42, at 1: '[t]he stock of old-generation treaties is 10 times greater than the number of modern, reform-oriented treaties, and investors continue to resort to old-generation treaties when bringing investor–State dispute settlement cases.'

[60] UNCTAD, World Investment Report 2015, *supra* note 10, at 106.

[61] See, e.g., the absence of major revisions to existing IIAs by Turkey and Uzbekistan after being at the receiving end of ISDS proceedings, as surveyed by Sattorova, 'Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2017) 53.

trend in IIA treaty-drafting will be found in the increasing presence of clauses that can be considered as safeguarding the State regulatory authority, as opposed to their scant appearances in earlier treaties.

3. Voice tactics: influencing the interpretation of arbitral tribunals

Voice tactics are, as said before, the way in which drafting States aim at fettering the interpretation of arbitral tribunals and prevent, as far as possible, their exercise of law-making functions.

The inclusion of direct or indirect language in support of State regulatory authority is intended to influence the balance of conflicting interests towards the State in the hermeneutic process, as it becomes evident once looking at the customary rules of treaty interpretations codified by the VCLT.[62] The lack of textual determinacy has been consistently pointed at as one of the first problem of IIAs,[63] which allowed investors to exploit aggressive claims and tribunals to reach expansive –if not outright law-making– interpretations.[64] Without delving into the rules of interpretation, nor into the much-debated often-imperfect application of the VCLT rules by arbitral tribunals,[65] it is clear that including State regulatory authority in the treaty text will have a bearing on its interpretation.[66]

Explicit language, either through declaratory right to regulate provisions, non-economic clauses, treaty exceptions, positive or negative lists, will require interpretation according to Art. 31(1) of the VCLT, according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

[62] M. Herdegen, *Interpretation in International Law*, March 2013, Max Planck Encyclopedias of International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?prd=MPIL (last visited 19 March 2021), at para. 7.

[63] See, among others, Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter', 36 *Vanderbilt Journal of Transnational Law* (2003) 37; Laird and Askew, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System', 7 *Journal of Appellate Practice and Process* (2005) 285; Mann, *supra* note 9, at 27 ff.

[64] Brower, *supra* note 63, at 61–62.

[65] See, *supra*, Paragraph 2.

[66] Yen, *supra* note 49, at 191 ff.

terms of the treaty in their context and in the light of its object and purpose.'[67] Obviously, the inclusion of language in support of the regulatory power of States is not a free pass for host States to enact any kind of regulatory measures regardless of other treaty commitments: an interpretation 'in good faith' of the treaty text cannot disregard the protection and promotion of FDI, that are still fundamental objectives of IIAs, not to mention that the ordinary meaning of terms such as 'right to regulate' of public policy can be subject to a wide range of interpretations.[68] However, the presence of such terms in the treaty text entails that arbitral tribunals will give it (or should give it) due consideration in the balancing exercise.

Regulatory language contained in treaty preambles will equally guide treaty interpretation, since, according to Article 31(2) of the VCLT, the context of a treaty comprises the 'treaty text, its preamble and annexes'.[69] Treaty preambles are of particular importance in investment treaty law given the vague nature of substantive investment provisions and the long-term purpose of States' commitments, which makes IIAs likely to operate in a different context from the one existing at the time of their conclusion.[70] Investment arbitral tribunals have often resorted to treaty preambles in the determination of the content of treaty standards, sometimes using them as a basis for far-reaching conclusions.[71]

Language in support of State regulatory authority will then, more generally, come into play in the determination of the context for the purposes of treaty

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[67] VCLT, *supra* note 40, Art.31(1).

[68] See the problems arising in the determination of the ordinary meaning of treaty terms highlighted in R. Gardiner, *Treaty Interpretation* (2nd Edition, 2015), at 181 ff.

[69] , *supra* note 40, Art.31(1).

[70] On the relevance of preambles in the determination of the object and purpose of investment treaties, see Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures', 3 *Journal of International Dispute Settlement* (2012) 31, at 77.

[71] See, for example, the relevance of preambles in the inclusion of the stability of the host State's regulatory framework within the protection provided by the fair and equitable treatment (FET) standard: CMS v. Argentina *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, at para.247; *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL / LCIA Case No. UN3467, Final Award, 1 July 2004, at para 183.

interpretation.[72] As explained by the Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircraft*, related provision of the same treaty constituted part of the context for the interpretation of the term 'benefit' contained in the treaty.[73] Referring to the treaty as a whole, the arbitral tribunal dealing with the *Case concerning filleting within the Gulf of St. Lawrence between Canada and France* then clarified that '[l]e contexte dans lequel il convient de donner effet à la disposition litigieuse est aussi constitué par l'ensemble du texte de l'Accord.'[74]

Regardless of whether arbitral tribunals will effectively resort to these interpretation rules, voice tactics offer an indication that negotiating States are attempting to grant relevance to their regulatory powers should investment arbitration arise. The following paragraphs will therefore give account of the developments in treaty drafting, to test if voice tactics that reaffirm State regulatory powers are gaining increasing relevance in the IIA panorama.

3.1. Adding declaratory right to regulate provisions

The first minor but relevant development towards the recognition of the State's regulatory authority in IIAs is the inclusion of provisions that specifically refer to the 'right to regulate' of the host State. Their presence in investment treaties is one of the most-recent developments that States have introduced to safeguard their sovereign power. Provisions that mentioned the host State's autonomy were infrequent during the second half of the last century and only on rare occasions referred directly to the regulatory power of the host State. One example was the 1985 US-Morocco BIT, which specified that the '[t]reaty shall not supersede, prejudice, or otherwise derogate from […] laws and regulations […] of either Party'.[75] Conversely, since the end of the 1990s, IIAs have started to contain direct reference to the continuous capacity of the State to regulate in the public interest, at first with

[72] Gardiner, *supra* note 68, at 202 ff.

[73] *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, Appellate Body Report, AB-1999–2, at paras 155-157.

[74] *Case concerning filleting within the Gulf of St. Lawrence between Canada and France ("La Bretagne")(Canada/France)*, (1986) 82 ILR 591, 17 July 1986, at para 39.

[75] Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments (1985), 29 May 1991, Art.7(1).

limitations as to the scope of such power,[76] and later in broader terms in what are now referred to as declaratory right to regulate provisions. In this regard, developments in treaty drafting are varied.

A small number of IIAs reaffirms the State's right to regulate in treaty preambles. Since the early 2000s, preambles have included additional values to the protection and promotion of investments, among which the attempt to secure regulatory space for host States. Preambles that adopt this approach can be broadly formulated and respect 'the sovereignty and laws of the Contracting Party within whose jurisdiction the investment falls',[77] link the right to regulate to 'legitimate public policy objectives',[78] or recall the intent of the treaty to preserve the State's capacity to safeguard their public well-being.[79]

The indication of the public policy objectives can then be followed by an indicative list that merely exemplifies the scope of the preamble. This is the case of Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), which indicates 'public health, safety, environment, public morals and the promotion and protection of cultural diversity'[80] among possible legitimate objective. Other treaty preambles seem instead to limit the scope of the right to regulate. The 2017 Colombia-United Arab Emirates BIT recognises 'the right of each Contracting Party to regulate the investments made in its territory *in order to protect* legitimate public welfare objectives in the field of health, public order and

[76] Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments (1998), 10 December 2000, Art.2(3).

[77] Agreement between the Government of the Republic of India and the Government of Republic of Trinidad and Tobago for the Promotion and Protection of Investments (2007, 10 July 2007, Preamble.

[78] Agreement Between the Government of Japan and the Government of the Republic of Kenia for the Promotion and Protection of Investment (2016), 14 September 2017 (Japan-Kenia BIT), Preamble; Acuerdo Entre El Gobierno de La Republica de Colombia y El Gobierno de La Republica Francesa Sobre El Fomento y Proteccion Reciprocos de Inversiones (2014), (not in force), Preamble.

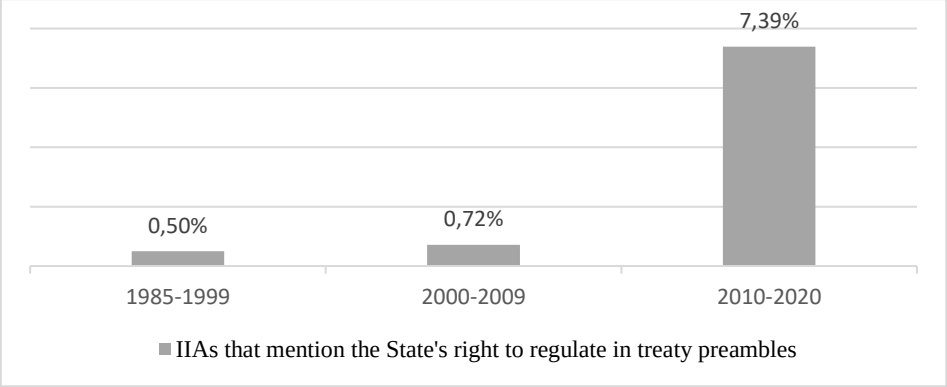
[79] Tratado de Libre Comercio Entre Los Estados Unidos Mexicanos y La República de Panama (2014), 7 January 2015, Preamble.

[80] Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, not in force, Preamble.

environment'.[81] Other options limit the right to 'regulate investments in their territory in accordance with their law and policy objectives'.[82]

Declaratory right to regulate language in treaty preambles constitutes, to date, a minor development in the international treaty framework. Clauses of this kind have started to sporadically appear only from 1985 and, over the sample of treaties surveyed, appeared in 9 cases over 1749 (0,5% of the total) in the period 1985-1999; in 9 cases over 1245 (0,72% of the total) in the period 2000-2009; in 35 cases over 473 (7,39% of the total) in the period 2010-2020, as shown in Figure 1. Consequently, even if little-relevant in absolute terms, it is possible to notice a stark increase in their use in treaties concluded during the last decade, especially when compared to the previous years.

Figure 1



[81] Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates (2017), not in force, Preamble. (emphasis added). See also, e.g., Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (2015), 11 October 2017, Preamble: 'Recognizing the right of each Party to adopt or maintain any measures that are consistent with this Agreement and that relate to health, safety, the environment, or public welfare, as well as the difference in the Parties' respective economies'; Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Iraq, of the Other Part (2012), (not in force), Preamble.

[82] Agreement between the Swiss Federal Council and the Government of the Republic of Tunisia on Reciprocal Promotion and Protection of Investments (2012), 16 October 2012, Preamble; Treaty between the Republic of Belarus and the Republic of India on Investments (2018), (not in force), Preamble.

A handful of treaties then contain declaratory right to regulate provisions in their texts. Provisions often read, as in the case of Art. 10 of the 2016 Argentina-Qatar BIT, that '[n]one of the provisions of this Agreement shall affect the inherent right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives […]'.[83]

The policies can then be explicitly indicated and include, among other things, the right of the State to prescribe special formalities in connection with FDI, requiring that the investment be legally constituted under the laws or regulations of the State;[84] policies designed to protect and promote cultural and linguistic diversity;[85] or to respond to environmental concerns.[86] In other cases, specific mention is made to prudential measures, usually concerning financial actions.[87] Some Countries then adopt a different approach, as is the case of the 2001 Benin-Mauritius BIT, which limits the right to regulate to 'some provisions of the present agreement'.[88]

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[83] The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (2016), (not in force), Art.10.

[84] Free Trade Agreement between India and Malaysia, 7 January 2011 (India-Malaysia FTA), Art.10(11).

[85] Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia (2006), 27 May 2010, Art.10(2).

[86] Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation (2013), 12 January 2013, Art.16.

[87] See, as a matter of example, Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (2018), not in force, Art.12: 'Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining prudential measures, such as: a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution; b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and c) ensuring the integrity and stability of a Contracting Party's financial system'.

[88] Accord Entre Le Governement de La Republique de Maurice et Le Governement de La Republique Du Benin Concernant l'Encouragement et La Protection Des Investissements (2001), (not in force), Art.11: 'Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant

The reference to the right to regulate might then be additionally fettered to a point where the provision does not entail any practical effect. One example can be found in the 2004 Greece-United Arab Emirates BIT, which reaffirms the State's right to maintain and enforce measures necessary to pursue legitimate policy objectives that are 'consistent with the provisions of this agreement'.[89] Such a redundant or circular wording does not seem to provide the host State with additional regulatory freedom.[90]

The increasing presence of right to regulate provisions in the IIA panorama is due to the drafting effort of some Countries such as Canada or the Belgium-Luxembourg Economic Union, but also to the approach adopted by some powerful actors in the international panorama. The EU has been particularly active in this regard. The EU Commission identified the right to regulate as one of the major policy areas that required further improvement during the first drafting of the Transatlantic Trade and Investment Partnership (TTIP).[91] In addition, it has considered that the right to regulate is part and parcel of its agreements during the negotiations of recent instruments with Canada, Singapore, and Mexico.[92] The result is the inclusion of

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les animaux et les végétaux'.

[89] Agreement between the Government of the Hellenic Republic and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (2014), 3 June 2016, Art.12. A similar formulation is contained in the Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (2018), (not in force), Art.4(1). See also Norway Model BIT (Draft) (2015), Art.12.

[90] Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', *European Yearbook of International Economic Law - Special Issue: International Investment Law and EU Law* (2011) 145, at 149–150; Muchlinski, *supra* note 47, at 45.

[91] Kim, 'Balancing Regulatory Interests through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements', 50 *George Washington International Law Review* (2017–2018) 289, at 294.

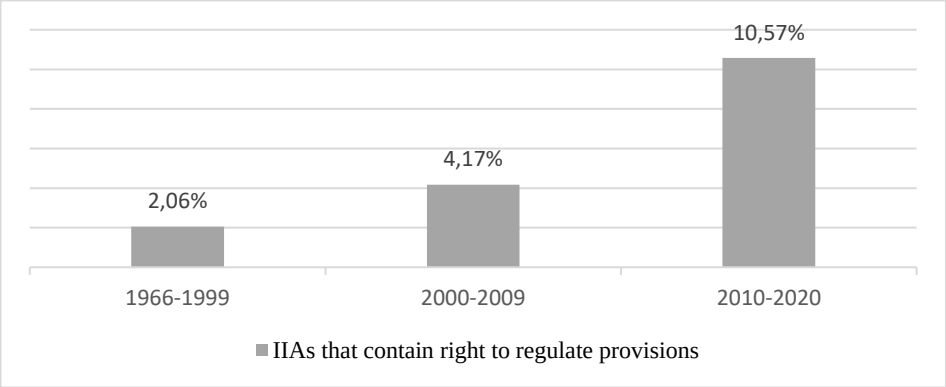
[92] European Commission, *Investment in TTIP and beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards an Investment Court*, 5 May 2015, European Commission Press Release Database, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

declaratory right to regulate clauses in its recent IIAs. The final text of the UE-Mexico FTA, still subject to ratification, provides that

> '[t]he Parties affirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, the promotion and protection of cultural diversity, or competition.'[93]

The inclusion of declaratory right to regulate provisions in IIAs is gaining momentum: starting from 1966, right to regulate clauses appeared in 43 cases over 1990 (2,06% of the total) in the period 1966-1999; in 52 cases over 1245 (4,17% of the total) in the period 2000-2009; in 50 cases over 473 (10,57% of the total) in the period 2010-2020, as indicated by Figure 2:

Figure 2



The inclusion of declaratory right to regulate language in IIAs is a clear attempt of States to influence treaty interpretation by arbitral tribunals towards a greater relevance of State regulatory powers in investment arbitral disputes. Explicit language to this end should not, in the idea of the drafters, be ignored in the balance of conflicting interests and should provide States with greater regulatory autonomy.

[93] EU-Mexico FTA, final outcome of negotiations still to be signed, Chapter XX, Section A, Art.1. See *New EU-Mexico Agreement: The Agreement in Principle and Its Texts*, 26 April 2018, European Commission News Archive, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (last visited 16 April 2019).

This notwithstanding, it is not yet clear how these provisions will be interpreted by arbitral tribunals. One might argue that right to regulate is another generic formula that is open to a broad range of interpretations and that it still must be balanced with the primary aim of protection and promotion of FDI, stated in equally clear terms in several IIAs. Given the (relative) novelty of these provisions in the IIA panorama, they are yet to be raised as defences by host States in arbitral proceedings, and therefore to show how they could operate in practice.

This notwithstanding, the reason for their inclusion in IIAs is, as said above, clear. In this regard, from an overview of the presence of declaratory right to regulate language in treaty preambles and treaty provisions, it is possible to state that, while it was almost non-existent in first and second-generation treaties, it is emerging as a feature in an increasing number of IIAs, especially of those concluded in the last decade.

3.2. Including new-generation exceptions to rebalance IIAs' obligations

Particularly indicative of any tendency of States to safeguard regulatory space in their IIAs is the presence of exceptions in treaty texts. Exceptions play a fundamental role as they exclude the State's obligations in the situations or fields indicated in their text, thereby preventing arbitral tribunals to scrutinize entire areas of State policy and relieving the State from possible liability for the adoption of measures otherwise in violation of the agreement. Two types of clauses, namely general exceptions and security exceptions, are the most-relevant in this regard and will be analysed below.

3.2.1. New-generation general exceptions

General exceptions exempt a contracting Party from its treaty obligations in situations where compliance with them would be incompatible with the policy objectives identified in the agreement.[94] While this type of clauses has been present in IIAs since the 1990s, different approaches have been adopted throughout the years. Early general exceptions provided little guidance to arbitral tribunals. For instance, Art. 1114.1 of the NAFTA, stated that

[94] UNCTAD, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2 (2000).

> '[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.'[95]

This type of broadly formulated general exceptions appear in regional agreements,[96] BITs,[97] and model BITs.[98] They impose few requirements on the State invoking the exception, such as that the measure be 'considered appropriate', as in the case of the NAFTA, 'proportional' to the objective sought,[99] or that the State had determined in good faith that the measure was appropriate with respect to the objective sought.[100] In some cases, the State must fulfil some procedural conditions, such as notifying the other State Party about the measure as soon as possible, to avoid misuse.[101] However, this type of general exception clauses have so far

[95] NAFTA North American Free Trade Agreement, 32 ILM 289, 605 (1993), 1 January 1994, Art.1114(1).

[96] See, e.g.; European Energy Charter, 17 December 1994, Artt.18 and 19; Economic Community of West African States (ECOWAS) Energy Protocol A/P4/1/03, Artt.19 and 24.

[97] See, e.g.; Accord Entre Le Gouvernement de La Republique Libanaise et Le Gouvernement de La Republique Du Tchad Sur l'encouragement et La Protection Reciproques Des Investissements (2004), not in force, Art.8; Accord Entre Le Gouvernement de La Republique de Madagarcar et Le Gouvernement de La Republique d'Afrique Du Sud Pour La Promotion et La Protection Reciproque Des Investissements (2006), not in force, Art.3.

[98] See, e.g.; US Model BIT (2004), *supra* note 13, Artt.12 and 13; Canadian Model Foreign Investment Protection Agreement (2004), Art.11; Belgian Model Bilateral Investment Treaty (2002), Artt.5 and 6.

[99] Colombian Model BIT (2002), Art.8.

[100] Investment Agreement For the COMESA Common Investment Area (2007), not in force, Art.22.

[101] See, for example, Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment (2002), 1 January 2003 (Japan-Korea BIT), Art.16.

enjoyed little fortune in investment arbitration,[102] one of the main reasons being their broad nature, that bears the risk of little effectiveness in their application.[103]

Recent developments in investment treaty practice seem to tackle this specific issue, and show the (scarce but) increasing adoption of general exceptions modelled after Art. XX GATT or Art. XIV GATS. This shift is driven, on the one hand, by the intent of States to reserve greater regulatory flexibility, while maintaining the need for investment protection and promotion.[104] On the other hand, it is meant to increase legal certainty in treaty interpretation, by offering express points of reference to which public interest considerations may be attached by tribunals when addressing the challenged measure.[105] Art. XX GATT provides that

> '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver […]'[106]

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[102] T. L. Berge and W. Alschner, *Reforming Investment Treaties: Does Treaty Design Matter? – Investment Treaty News*, 17 October 2018, Investment Treaty News, available at https://www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-laudal-berge-wolfgang-alschner/ (last visited 10 December 2019).

[103] Titi, *supra* note 37, at 172.

[104] Muchlinski, 'General Exceptions in International Investment Agreements, Preface', in M.-C. Cordonier Segger, M. W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (2011) 351, at 351.

[105] L. Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice – Investment Treaty News*, 21 May 2015, available at https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/ (last visited 11 April 2019).

[106] General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 (1994), 1 January 1995 (GATT), Art.XX.

A similar structure, with an identical introductory part (commonly referred to as the *chapeau*) is contained in Art. XIV GATS, as will be seen below. Art. XX GATT allows States, under specific conditions, to derogate from *all* GATT obligations.[107] As indicated by the Appellate Body in the case *US – Gasoline* (1996), the provision strikes a balance between the right of a member State to invoke the measure and the substantive rights of the other Members under the GATT. [108] Art. XX does so by resorting to a two-tier test: first, the measure must fall under at least one of the exceptions listed in subparagraphs (a) to (g). Second, the measure must satisfy the requirements of the chapeau. It must therefore not be applied in a manner that would constitute 'a means of arbitrary or unjustifiable discrimination between [C]ountries where the same conditions prevail' and not be 'a disguised restriction on international trade'.[109] As such, the chapeau of Art. XX GATT is an expression of the good faith principle in the application of exceptions.[110]

The first BIT to include GATT-style general exceptions was the 2002 Japan-Korea BIT,[111] while the first Country that consistently resorted to this kind of clauses was Canada, which included them in its 2003 Model Foreign Investment Promotion and Protection Agreement (FIPA), which modelled various BITs later entered into force.[112] Art. 10 of the Model FIPA provides that

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[107] P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (3rd Edition, 2013), at 548.

[108] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, Appellate Body Report, AB-1996-1, at 18. See also Van den Bossche and Zdouc, *supra* note 107, at 573.

[109] WTO, *WTO Rules and Environmental Policies: GATT Exceptions*, World Trade Organization, available at https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited 11 April 2019).

[110] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, Appellate Body Report, AB-1998-4, at para 157.

[111] Japan-Korea BIT, *supra* note 101, Art.16.

[112] See, among others, Canada-Peru BIT Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (2006), 20 June 2007, Art.10; Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (2010), 14 March 2012, Art.9; Agreement Between Canada and Mali for the Promotion and Protection of Investments (2014), 6 August 2016, Art.17.

'[s]ubject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life or health;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources.'[113]

The provision clearly follows the structure of Art. XX GATT, with a list of exceptions preceded by a clause similar to the chapeau, in this case adapted to the different focus of the IIA. Some recent treaties act accordingly and contain limited exceptions in addition to the chapeau,[114] although the exact phrasing can vary to a great extent. General exceptions can cover measures 'imposed for the protection of national treasures of artistic, historic or archaeological value',[115] or 'necessary to protect public morals or to maintain public order',[116] or can contain a shorter chapeau and a more limited list.[117]

[113] Canadian Model FIPA, *supra* note 98, Art.10.

[114] See Acuerdo Entre El Gobierno de La Republica Del Peru y El Gobierno de La Republica de Colombia Sobre La Promocion y Proteccion Reciproca de Inversiones (2007), 30 December 2010, Art.8(1).

[115] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (2015), 20 December 2015 (Australia-China FTA), Art.9(8)(1).

[116] Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile (2016), (not in force), Art.18(1)(a).

[117] However, short formulations do not, as aptly pointed out, give guidance on whether all discrimination is captured, rather than only arbitrary, unjustifiable or disguised discrimination, and could potentially hinder the relevance of the provision in granting the State leeway from its treaty obligations. See A. D. Mitchell, J. Munro and T. Voon, *Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks*, available at https://papers.ssrn.com/abstract=3084663 (last visited 11 April 2019), at 41.

The most-recent development adopted in treaty drafting is, however, that of further clarifying the extent of the general exception provision, by adopting lengthy clauses that clearly resemble the structure and wording of the general exception clause contained in Art. XIV GATS.[118] The 2016 Japan-Uruguay BIT, for instance, provides that

> '[s]ubject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:
>
> (a) necessary to protect human, animal or plant life or health;
>
> (b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
>
> (c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;
>
> (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or
>
> (iii) safety;
>
> (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or

[118] Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (2016), 26 April 2017, Art.13(1)See, among others, Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore (2016), (not in force), Art.28; .

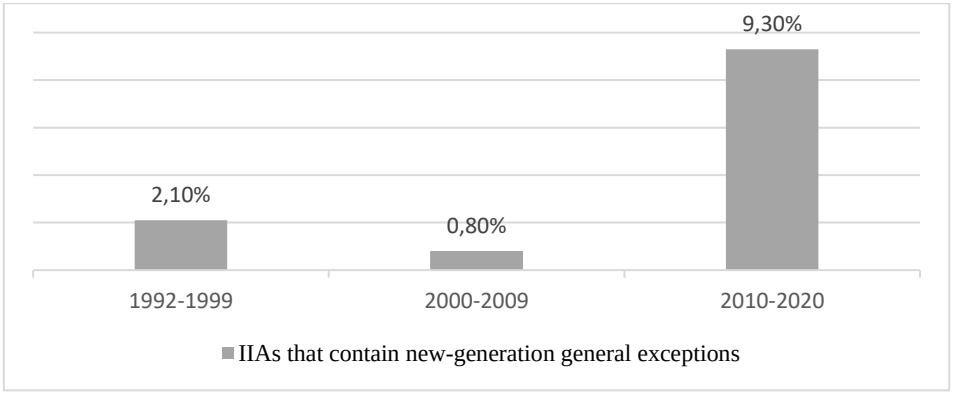
(e) necessary for the conservation of living or non-living exhaustible natural resources.'[119]

Other treaties overcome the hurdle by directly referring to Art. XX GATT or Art. XIV GATS in their exception provisions. As a matter of example, the 2008 China-New Zealand Free Trade Agreement, reads:

'[f]or the purposes of this Agreement, Article XX of GATT 1994 and its interpretative notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, mutatis mutandis […].'[120]

Exceptions modelled after Art. XX GATT or Art. XIV GATS, or operating a *renvoi* to them, have appeared in IIAs starting from 1992. Among the treaties surveyed, either one of these clauses could be found in 31 cases over 1467 (2,1% of the total) in the period 1992-1999; in 10 cases over 1245 (0,8% of the total) in the period 2000-2009; in 44 cases over 473 (9,3% of the total) in the period 2010-2020. Figure 3 indicates how, notwithstanding they did not find much consideration in the first decade of the present century, GATT-style general exceptions have experienced a comeback during the last decade:

Figure 3



[119] Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (2015), 14 April 2017, Art.22(1).

[120] Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China (2008), 10 January 2008, Art.200(1).

Notwithstanding the attempts to provide greater clarity in general exception provisions through resorting to GATT-like or GATS-like formulas, it is debated whether their wording can effectively reach this aim. Tribunals can adopt different approaches: through an *effet utile* interpretation, tribunals can maintain that the State Parties intended to provide the host State with greater regulatory flexibility and grant lower protection than IIAs not containing general exceptions.[121] However, the opposite scenario is also possible, and the introduction of public policy measures by way of exceptions might entail their restrictive interpretation, thereby confining public policy space only to the measures listed in the treaty and providing less regulatory flexibility to host States.[122]

In the lack of any clear indications, arbitral tribunals could turn to the WTO Appellate Body's jurisprudence to interpreting general exceptions clauses:[123] still, investment law and trade law, despite the commonalities, do not cease to be two different universes regulating in principle dissimilar relationships and drawing commonalities between the two systems always calls for a cautious approach. Investment arbitral tribunals could be called to carry out the two-tier test resorted to by WTO Panels and to determine whether a measure falls within the exceptions listed by the relevant article and is subject to the chapeau.

In this regard, one of the most significant questions is how tribunals will interpret what measures are 'necessary' to implement the policy objectives identified in the clause.[124] WTO Appellate Bodies have interpreted the term broadly, shifting from 'indispensable' to 'making a contribution to',[125] therefore recognizing the

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[121] Newcombe, 'General Exceptionsin International Investment Agreements', in M.-C. Cordonier Segger, M. W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (2011) 355, at 366.

[122] Cosbey, 'The Road to Hell? Investor Protections in NAFTA's Chapter 11', in L. Zarsky (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards* (2005) 150, at 165; see also DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin', 102 *American Journal of International Law* (2008) 48, at 82–83.

[123] Spears, *supra* note 4, at 1062.

[124] *Ibid.*, at 1063.

[125] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161, 10 January

right of WTO Members to choose their own level of protection with respect to a given objective. On the contrary, investment arbitral tribunals usually adopt restrictive interpretations of exceptions, based on the object and purpose of the treaty.[126] A WTO Member may thus have a greater expectation of policy space under WTO general exceptions than does a host State whose measure is challenged under investment obligations.[127]

It is then not clear what will be the effect of the inclusion of general exceptions on the substantive standards of treatment. As a matter of example, their relationship with the FET standard is murky: as noted by some commentators, a measure that respects the requirements of general exceptions –being listed in the treaty and passing the necessity test, applied in a non-arbitrary manner, not constituting a disguised restriction to investments– will hardly violate the MST.[128] As to the protection from expropriation, the question of whether the general exception would be interpreted as excluding the requirement to pay compensation would remain open.[129] What follows is the general reluctance of host States to raise general exceptions in the course of proceedings before arbitral tribunals.[130] This notwithstanding, it is clear that the inclusion of GATT-style and GATS-style general exceptions in IIAs is an attempt to increase the scope of and to clarify the host State's regulatory autonomy. At the same time, the analysis above indicates how the presence of these provisions, while

2001, Appellate Body Report, 169/AB/R, at para 161.

[126] See, among others, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at para 331; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, at para 373; .

[127] Mitchell, Munro and Voon, *supra* note 117, at 6.

[128] Titi, *supra* note 37, at 184–185; Newcombe, *supra* note 121, at 368–369.

[129] Newcombe, *supra* note 121, at 369.

[130] See Berge and Alschner, *supra* note 102, according to whom, 'to investigate how these clauses perform in practice, we have analyzed recent awards rendered under agreements containing general public policy exceptions. To our surprise, we found that respondent states fail to raise these clauses, and tribunals do not consider them on their own initiative. Moreover, even when these exceptions are applied, tribunals typically accord them little weight. In short, general public policy exceptions are largely missing in action'. See also *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

still being scarce in absolute terms, has become increasingly common in treaties concluded during the last decade.

3.2.2. New-generation essential security exceptions

Essential security exceptions aim to relieve States from respecting core treaty obligations whenever interests of fundamental importance, tied to the very existence of the State, are at stake.[131] These provisions have always been subject to a long-lasting debate, given their connection with the State's fundamental interests and their potentially disruptive nature of the whole system of international treaty obligations, if abused, and have sparked new interest following the recent wave of security measures enacted by States in response to the recent Covid-19 crisis.[132] Although their exact scope is controversial and their application has proven problematic, essential security exceptions have been increasingly inserted in IIAs and constitute, to date, the most-common type of exceptions in IIAs.[133]

Two inherent aspects of essential security provisions must be dealt with in a preliminary fashion, namely the meaning of the expression 'essential security' and the *self-judging* nature of essential security clauses.

The notion of essential security, in the absence of any specification in the treaty text, has been interpreted extensively by international jurisprudence.[134] In the1986

[131] A. Titi, *The Right to Regulate in International Investment Law* (2014), at 79.

[132] See, among the many, Vinuales, 'State of Necessity and Peremptory Norms in International Investment Law', 14 *Law and Business Review of the Americas* (2008) 79; Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', 59 *International & Comparative Law Quarterly* (2010) 325; Muchlinski, *supra* note 104, at 50 ff; Reinisch, 'Necessity in Investment Arbitration', 41 *Netherlands Yearbook of International Law* (2010) 137; Salacuse, *supra* note 18, at 399. For an analysis of security exceptions that accounts for the Covid-19 crisis, see Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law', 69 *International & Comparative Law Quarterly* (2020) 557.

[133] To date, around 400 IIAs contain security exceptions, more than 375 of which concluded after 1984. See: International Investment Agreement Navigator, *supra* note 56.

[134] K. Yannaca-Small, OECD, *Essential Security Interests under International Investment Law* (2007), International Investment Perspectives 2007 Freedom of Investment in a Changing World: Freedom of Investment in a Changing World 93, at 104 ff.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) case,[135] the ICJ stated that 'the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past'.[136] In the *Oil Platforms* case,[137] the Court seemed to include the flow of maritime commerce, and therefore economic interests, within the meaning of essential security.[138] A notion of essential security that encompasses also economic issues has then been accepted by investment arbitral tribunals. As a matter of example, the tribunal in the *LG&E v Argentina* case was called to determine the scope of Art. XI of the 1991 US-Argentina BIT, which did not preclude the application of measures 'necessary for […] the protection of [each Party's] own essential security interests'.[139] The tribunal 'reject[ed] the notion

[135] ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, General List No. 70, 27 June 1986 14.

[136] Nicaragua v. United States of America *Ibid.*, at para. 224. The Court was analysing the US-Nicaragua FCN treaty, which allowed the application of measures '[…] necessary to protect [the Party's] essential security interests'. See Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, vol. 367 U.N.T.S. 3, 24 May 1958, Art. 21(1)(d). The translation is personal and made from the original text in Spanish, that provides: 'necesarias para proteger sus intereses esenciales y seguridad'. The online version of the U.N.T.S. Volume available online at the official UN website https://treaties.un.org/doc/Publication/UNTS/Volume%20367/v367.pdf appears blanc in correspondence of the English version of Art. 21.

[137] ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment*, General List No. 90, 6 November 2003 161, at para.196.

[138] Burke-White and von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 48 *Virginia Journal of International Law* (2007–2008) 307, at 351.

[139] Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991), 20 October 1994 (US-Argentina BIT), Art. I. See Reinisch, 'Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases - Comments on CMS v. Argentina and LG&E v. Argentina', 8 *Journal of World Investment & Trade* (2007) 191; Gazzini, 'Necessity in International Investment Law: Some Critical Remarks on CMS v Argentina', 26 *Journal of Energy & Natural Resources Law* (2008) 450.

that Article XI [was] only applicable in circumstances amounting to military action and war.'[140]

The debate over the notion of essential security interest has touched also detailed clauses, such as Art. XXI of the GATT 1994.[141] While GATT/WTO Panels or Appellate Bodies have long remained silent on the issue, legal scholarship has accepted that this provision is not restricted to military events.[142] Recently, one authoritative statement in this regard has been given by a WTO Panel ruling in the case *Russia – Measures Concerning Traffic in Transit*,[143] which constitutes the very first attempt by the WTO to clarify the scope and ambit of security exceptions. After stating that emergency encompasses 'all defense and military interests, as well as maintenance of law and public order interests',[144] the Panel clarified that 'political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations […] unless they give rise to defense and military interests, or maintenance of law and public order interests',[145] therefore excluding economic interests from the scope of essential security interests.[146]

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[140] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para 238.

[141] GATT, *supra* note 106, Art. XXI: '[n]othing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

[142] Van den Bossche and Zdouc, *supra* note 107, at 598; see also Voon, 'The Security Exception in WTO Law: Entering a New Era Can International Trade Law Recover', 113 *AJIL Unbound* (2019) 45; Yoo and Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?', 19 *Journal of International Economic Law* (2016) 417.

[143] *Russia - Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019.

[144] *Ibid.*, at para. 7.74.

[145] *Ibid.*, at para. 7.75.

[146] For an analysis of this landmark case, see, among others, Boklan and Bahri, 'The First WTO's

Generally, the presence of a list that indicates what amounts to essential security interest has been considered as allowing the notion to be extended to other catastrophic events, but not to go as far as to encompass economic issues.[147]

Consequently, the meaning of essential security interest is still debated, as there is no common understanding on the magnitude that an economic threat must pose to trigger the application of the security exception clause.[148] Additionally, the inclusion of areas other than the military and economic threats −such as ecological damages or human rights violations− remains unclear.[149]

The second aspect is the self-judging nature of essential security provisions, namely the issue of whether the presence or absence of the circumstances prescribed in the exception is a unilateral and subjective determination of the State or can be subject to judicial review by courts and tribunals.[150] Self-judging clauses are included through wording such as 'if the State considers' or others having equivalent

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Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?', 19 *World Trade Review* (2020) 123; V. Lapa, *The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?*, 12 May 2020, Questions of International Law QIL - QDI, available at http://www.qil-qdi.org/the-wto-panel-report-in-russia-traffic-in-transit-cutting-the-gordian-knot-of-the-gatt-security-exception/ (last visited 21 March 2021); Voon, 'Russia—Measures Concerning Traffic in Transit', 114 *American Journal of International Law* (2020) 96.

[147] Schloemann and Ohlhoff, ''Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence', 93 *The American Journal of International Law* (1999) 424, at 444. Although the authors clarify that: 'There is, however, one rather clear inherent restriction on the members' definitional prerogative: security interests that are entirely a function of the economic capacities, activities and effects that are the very substance of WTO law are not covered'.

[148] UNCTAD, *The Protection of National Security in IIAs*, UNCTAD/DIAE/IA/2008/5 (2009), at 26. See also: Grizold, 'The Concept of National Security in the Contemporary World', 11 *International Journal on World Peace* (1994) 37, at 37.

[149] See: Muchlinski, 'Balancing Investor Rights and the Right to Regulate. The Issue of National Security', in K. P. Sauvant (ed.), *Yearbook of International Law and Politics 2008-2009* (2009) 35, at 57–58.

[150] For an analysis in the WTO context, see Van den Bossche and Zdouc, *supra* note 107, at 594 ff. See also Alford, 'The Self-Judging WTO Security Exception', *Utah Law Review* (2011) 697; Sanklecha, 'The Limitations on the Invocation of Self-Judging Clauses in the Context of WTO Dispute Settlement', *Indian Journal of International Law* (2019), available at https://link.springer.com/article/10.1007/s40901-019-00108-6 (last visited 21 March 2021).

effect,[151] and reserve to the State Party the right to not comply with treaty obligations whenever its sovereignty, public policy or security interests are at stake.[152] Security provisions generally resort to self-judging structures, as States wish to retain a greater margin of regulatory discretion in the above-mentioned fields.[153] For this reason, self-judging clauses have been defined as a 'residue of State –and sovereignty– centred international law'[154] in the system of cooperation instituted by international investment law.

Self-judging clauses can potentially have a disruptive effect on the State's treaty obligations: an abusive use by States might lead to their invocation in unjustified circumstances to avoid the legal commitments adopted with a treaty.[155] A radical reading of self-judging clauses prevents judicial review of the identification of essential security issues and of the measures adopted by the State to face the threat.[156] Such view has been submitted on various occasions by GATT Contracting Parties involved in disputes regarding Art. XXI GATT, although it has not been confirmed by rest of the WTO Members.[157]

Similarly, respondent States in investment disputes have argued for the self-judging nature of security exception clauses.[158] This reading has found the opposition of arbitral tribunals that have, on numerous occasions, held that the contested security measures could in fact be subject to judicial review.[159] This can be seen, in

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[151] Briese, 'Djibouti v. France - Self-Judging Clauses before the International Court of Justice Case Notes', 10 *Melbourne Journal of International Law* (2009) 308, at 308.

[152] Schill and Briese, 'If the State Considers: Self-Judging Clauses in International Dispute Settlement', 13 *Max Planck Yearbook of United Nations Law* (2009) 61, at 63.

[153] Titi, *supra* note 131, at 196.

[154] Schill and Briese, *supra* note 152, at 63. See also Rose-Ackerman and Billa, 'Treaties and National Security', 40 *New York University Journal of International Law and Politics* (2007–2008) 437.

[155] Salacuse, *supra* note 18, at 399. See also Burke-White and von Staden, *supra* note 138.

[156] UNCTAD, *supra* note 148, at 39.

[157] Chen, 'The Standard of Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement', 5 *Contemporary Asia Arbitration Journal* (2012) 23, at 318.

[158] Schill and Briese, *supra* note 152, at 64.

[159] Van den Bossche and Zdouc, *supra* note 107, at 596.

particular, in the so-called 'Argentine cases', that stemmed from the economic measures adopted by Argentina following the economic crisis that hit the Country after the year 2001.[160] Tribunals confronted with alleged violations of Art. XI of the 1991 US-Argentina BIT declared that the self-judging character of the measures could not be presumed in the silence of treaty text,[161] and held that the measures were open to substantial review.[162] Interestingly, the tribunals in the Argentine cases substantiated their arguments by adding that a provision similar to that of Art. XXI GATT would have constituted a self-judging exception instead.[163] A similar reasoning was adopted by the ICJ in its 1986 case *Nicaragua v. United States of America*.[164] However, the Panel in *Russia – Measures Concerning Traffic in*

[160] See, CMS v. Argentina, *supra* note 71; LG&E v Argentina, *supra* note 140; Enron v. Argentina, *supra* note 126; Sempra v. Argentina, *supra* note 126; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (Continental Casualty v. Argentina).

[161] See: CMS v. Argentina, *supra* note 71, at para 370: 'when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly'; Sempra v Argentina, *supra* note 126, at para 379: 'truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature'.

[162] For an overview of how arbitral tribunal addressed security exceptions in the 'Argentine cases', see Eisenhut, 'Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with Regard to 'Security Exceptions'', 48 *Archiv Des Völkerrechts* (2010) 431, at 439 ff.

[163] Gazzini, 'Interpretation of (Allegedly) Self-Judging Clauses in Bilateral Investment Treaties', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Conventionon the Law of Treaties: 30 Years On* (2010) 239, at 243.

[164] Nicaragua v. United States of America, *supra* note 135, at para.222: '[…] is also clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such '.

Transit has recently clarified that Article XXI(b)(iii) was not 'totally' self-judging or non-justiciable as argued by Russia, and allowed the Panel to have jurisdiction 'to determine whether the requirements of Article XXI (b) (iii) [were] satisfied.'[165]

Generally speaking, international courts and legal scholarship agree on allowing security exceptions to be subject to judicial scrutiny.[166] The exercise of discretion by States is subject to the obligation of good faith in accordance with Art. 26 VCLT,[167] and a good faith control must still be exercised by international courts and tribunals. This has been confirmed by the ICJ in the case *Djibouti v France*,[168] which is to date the only case in which the Court has specifically addressed a self-judging clause.

If the inclusion of security exceptions in treaty texts dates back to FCN treaties concluded in the 20th century and can be found in the GATT 1947 already, in the investment treaty framework such presence was tied to the drafting traditions of specific Countries, such as Germany and the US.

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[165] Russia – Measures Concerning Traffic in Transit, *supra* note 143, at para. 7.104. See also Boklan and Bahri, *supra* note 146, at 127; Lapa, *supra* note 146. For a focus on the standard of review employed by the tribunal in the analysis of the provision, see Voon, *supra* note 146, at 99.

[166] See: A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 494; Titi, *supra* note 131, at 201; UNCTAD, *supra* note 148, at 201; Burke-White and von Staden, *supra* note 138, at 376 ff; Schill and Briese, *supra* note 152.

[167] VCLT, *supra* note 40, Art.26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

[168] The case concerned the alleged violation of Art. 2(c) of the Mutual Assistance Convention, which provided exceptions to the duty of States Parties to exe-cute the international letter rogatory. The article allowed assistance to be refused 'if the requested State consider[ed] that the execution of the request is likely to prejudice its sovereignty, its security, its ordre public or other of its essential interests'. While France argued that the Court would have no jurisdiction to review a State's exercise of discretion under a self-judging clause, Djibouti contended that, in such case, the requested State was to act reasonably and in good faith. The Court stated that 'while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties'. See ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment*, General List No. 136, 4 June 2008 177, at paras.135, 145-146.

Early treaty practice shows 'unqualified' security exception provisions, which provided that '[m]easures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination […],[169] such as Germany's early BITs. On the other hand, the US has been the only Country to always insert essential security exceptions in its IIAs[170] since its 1982 US-Panama BIT, which provided that the treaty

> '[…] shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the production of its own essential security interests.'[171]

Until the mid-1990s, this practice was still limited to specific Countries such as India, Mexico and the Belgian-Luxembourg Economic Union (BLEU),[172] while a greater number of countries had only sporadically resorted to this kind of clauses.[173]

Treaty provisions have started to change due, in the first place, to the interaction between trade law and investment law. The GATT Uruguay Round that took place between 1986 and 1994 touched upon several investment topics. It led to the creation of the WTO[174] and the adoption of the Marrakesh Agreement[175] and its annexes. Among the annexes to the final agreement was the TRIMS Agreement, that made safe all exceptions under GATT 1994, at Art. 3. The discussion in the WTO context has spilled over to the investment regime,[176] and has sparked the attention

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[169] See, e.g., Germany-Pakistan BIT Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 28 April 1962, Protocol, Art.2.

[170] Yannaca-Small, *supra* note 134, at 98.

[171] Treaty between the United States and the Republic of Panama Concerning the Treatment and Protection of Investment (1982), 30 May 1991, Art. 10(1). The same clause has been included in all the treaties based on the 1984 and 2004 US Model BITs.

[172] Yannaca-Small, *supra* note 134, at 98.

[173] Muchlinski, *supra* note 149, at 83.

[174] The Uruguay Round spanned from 1986 to 1994. For a history of the negotiating process, see: Van den Bossche and Zdouc, *supra* note 107, at 79 ff.

[175] Marrakesh Agreement Establishing the World Trade Organization, vol. 1867 U.N.T.S. 154, 33 I.L.M. 1144, 1 January 1995.

[176] For an analysis on the interplay between the Uruguay Round and investment provisions, see: J.

on security exceptions and on the approach adopted by the GATT, which can be seen with more frequency in investment agreements concluded after this period. Art. XXI GATT reads:

> 'Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'[177]

In the 1990s, GATT-like security exceptions have been inserted mainly in plurilateral and multilateral agreements, such as the NAFTA,[178] which replicates entirely Art. XXI of the GATT, or the ECT, which adopts a different but similar wording.[179]

Kurtz, *The WTO and International Investment Law by Jürgen Kurtz* (2016), at 48 ff.

[177] GATT, *supra* note 106, Art.XXI.

[178] NAFTA Free Trade Commission, *supra* note 46, Art.2102.

[179] The Energy Charter Treaty, 2080 UNTS 95, 16 April 1998, Art.24(3): '[t]he provisions of this Treaty […] shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary: (a) for the protection of its essential security interests including those (i) relating to the supply of Energy Materials and Products to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations; (b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or (c) for the maintenance of public order '.

In more-recent years, security exceptions have become increasingly present in IIAs, and are now included in almost half of the treaties concluded in the last decade.[180] At the same time, unqualified phrasing, after a minor increase in the first decade of the present century, has gradually been abandoned in recent years by treaty drafters. Unqualified provisions adopt a broad language, providing that '[n]othing in the Agreement shall be construed to prevent either Contracting Party from taking measures to fulfil its obligations with respect to the protection of its essential security interests', with no further specifications.[181] In some cases, treaties specify that security interests 'include interests deriving from its membership of a customs, economic or monetary union, a common market or a free trade area',[182] thereby clarifying that economic interests fall within the scope of the provision. In other cases, IIAs require that the measures adopted to protect essential security interests be 'taken and implemented in good faith, in a non-discriminatory manner and so as to minimize the deviation from the provisions of this Agreement'.[183] Clauses of this kind, however, do not protect States from a full arbitral review of the measure, as the Argentine cases have shown.

Unqualified security exceptions were present in 97 cases over 2021 (4,80% of the total) in the period 1963-1999; in 74 cases over 1245 (6,02% of the total) in the period 2000-2009; in 15 cases over 473 (3,17% of the total) in the period 2010-2020, as shown by Figure 4:

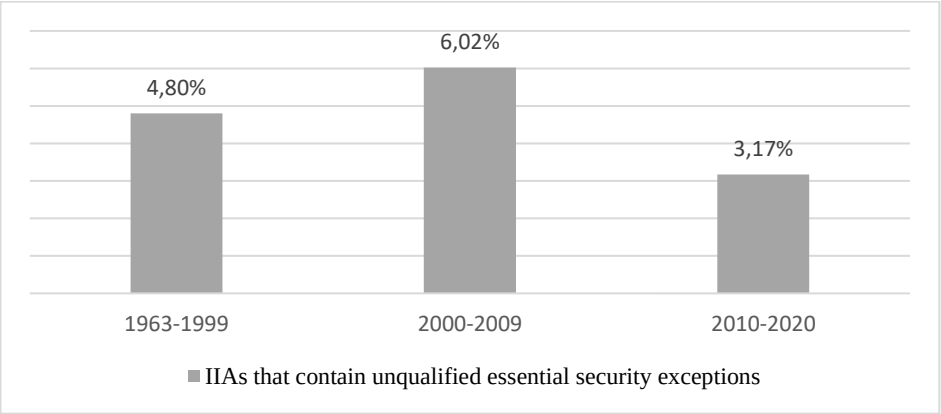
[180] See: International Investment Agreements Navigator, *supra* note 56. Since 2007, States have concluded 333 IIAs surveyed by UNCTAD, 158 of which contained essential security exceptions.

[181] See, among others: Agreement Between the Government of the Arab Republic of Egypt and the Government of the Republic of Iceland for the Promotion and Reciprocal Protection of Investments (2008), 15 June 2009, Art.13.

[182] See, among others: Agreement between the Slovak Republic and the Republic of Macedonia on the Promotion and Reciprocal Protection of Investments (2009), 25 August 2011, Art.12.

[183] See, among others: Agreement between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments (2014), not in force, Art.7.

Figure 4



Conversely, recent years have seen the inclusion of additional elements in essential security clauses gaining momentum in IIA drafting. Two different trends can be identified in this regard. On the one hand, some States still adopt open wording that is similar to that traditionally used by the US, this time implemented with self-judging language. This can be seen in the treaties based on the 2012 US Model BIT, which reads, at Art. 18:

> 'Nothing in this Treaty shall be construed:
>
> 1. to require a Party to furnish or allow access to any information the disclosure *of which it determines* to be contrary to its essential security interests; or
>
> 2. to preclude a Party from applying measures *that it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'[184]

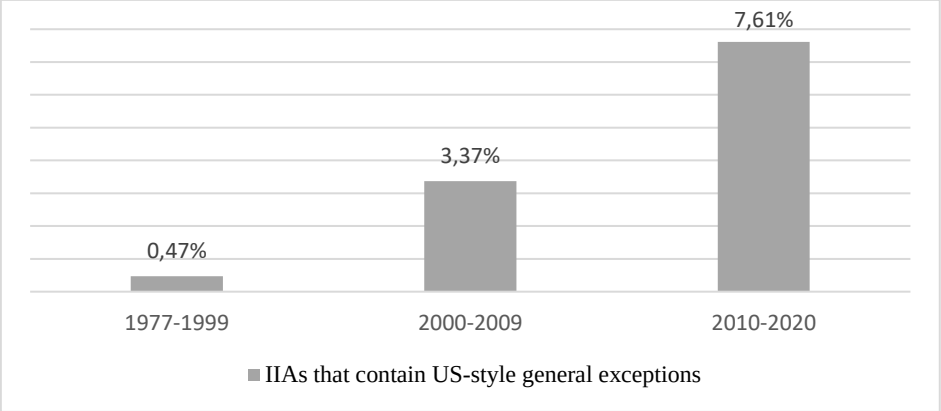
Although the degree of severity that is required by these provisions is still debated,[185] the attempt to expand the scope of the exception and limit accordingly the judicial review of the exception is clear, and might encompass economic

[184] U.S. Model Bilateral Investment Treaty (2012) (US Model BIT [2102)), Art.18 (emphasis added).

[185] Vandevelde, 'Defences, VI. Fundamental Change of Circumstances (Rebus Sic Stantibus / Imprévision)', in A. Newcombe and L. Paradell (eds.), *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 481, at 497–498.

emergencies. Starting from 1977, what can be summarised as US-style general exceptions[186] were inserted in 9 cases over 1906 (0,47% of the total) in the period 1962-1999; in 42 cases over 1245 (3,37% of the total) in the period 2000-2009; in 36 cases over 473 (7,61% of the total) in the period 2010-2020, as shown by Figure 5:

Figure 5



In a different fashion, other IIAs include more detailed wording, modelled after Art. XXI GATT. As indicated above, some multilateral agreements have adopted this approach already in the mid-1990s, although their presence in BITs was scarce. However, in the last decade GATT-like clauses have been the predominant type of security exceptions in IIAs[187] and are by now recurrent in general treaty practice.[188] In this case, provisions can incorporate the language of Art. XXI GATT *mutatis*

[186] While the first example is the France-Syria BIT, which pre-dated the US BIT programme, the overwhelming majority of BITs containing self-judging security clauses was then concluded by the US. See Convention Entre Le Gouvernement de La Republique Francaise et Ie Gouvernement de La Republique Arabe Syrienne Sur I'Encouragement et La Protection Reciproques Des Investissements (1977), 3 January 1979, Art.4.

[187] Over little more than 100 treaties concluded since 2010, 70 included security exceptions provisions that reproduced the language of Art. XXI of the GATT. Source: International Investment Agreements Navigator, *supra* note 56.

[188] Sauvant et al., 'The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements', *Columbia FDI Perspectives* (2016).

mutandis,[189] refer directly to it,[190] or refer to Art. 73 of the TRIPs Agreement,[191] which replicates Art. XXI of the GATT.

As seen above, GATT-like wording seems to prevent economic emergencies from falling within the scope of the security exception. Art. XXI(b)(iii) leaves the door open to cases of 'emergency in international relations',[192] although emergencies that remain in the domestic realm and do not extend to the international field are not covered by the provision.[193] Legal scholarship has considered Art. XXI as not being limited to military measures but at the same time as being so broad to encompass economic emergencies, and this interpretation was confirmed by the WTO Panel in the case *Russia – Measures Concerning Traffic in Transit* .[194]

If the scope of clauses modelled after Art. XXI is narrower than that of older-style unqualified security exceptions or the 2012 US Model BIT clause, the provisions at hand provide an element of clarity in treaty language. Given the little success enjoyed by broadly framed provisions, listing the circumstances in which the exception operates aims at making the latter effective, unlike past clauses. Concurrently, Art. XXI expressly introduces a self-judging language, once again attempting to fetter the interpretation of arbitral tribunals.

GATT-style security exceptions have only appeared in IIAs from 2002,[195] and can be found in 15 cases 1245 (1,20% of the total) in the period 2000-2009; in 72 cases over 473 (15,22% of the total) in the period 2010-2020. Figure 6 shows the boom such clauses have experienced during the last decade:

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[189] See, among others: Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (2009), 6 July 2016, Art. 10(4).

[190] See, among others: Australia-China FTA, *supra* note 115, Art. 16(3); Free Trade Agreement between the Eurasian Economic Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (2015), 10 May 2016, Art. 1.9(2).

[191] For an example of investment agreement recalling Art. 73 of the TRIPs Agreement, see: Agreement between Japan and Mongolia for an Economic Partnership (2015), 6 July 2016, Art.12.19.

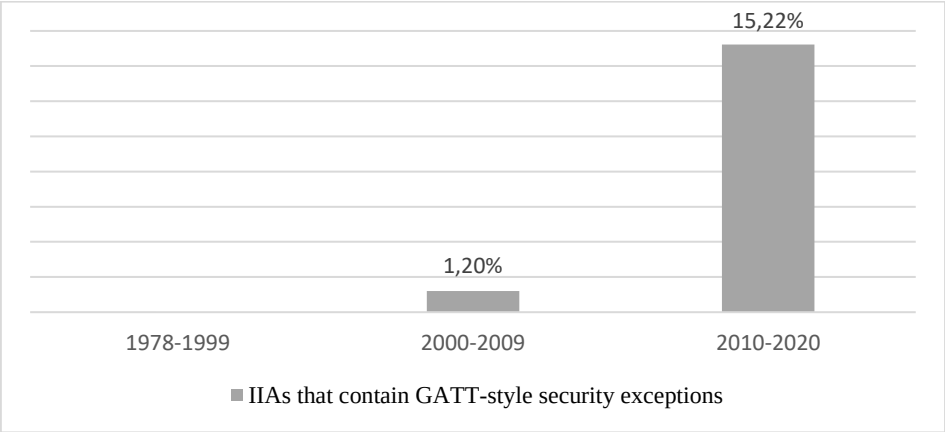
[192] GATT, *supra* note 106, Art. XXI(b)(iii).

[193] Vandevelde, *supra* note 185, at 497.

[194] , *supra* note 143, at para. 7.75.

[195] With the Japan-Korea BIT, *supra* note 101, Art.16.

Figure 6



While security exception clauses have long been a trait of the international protection of FDI, it is possible to notice how 'unqualified' security exception provisions have been abandoned in recent years in favour of self-judging provisions, alone or followed by a detailed list that aim at fettering the interpretative power of arbitral tribunals. Once again, this shift can be appreciated in treaties concluded during the last decade, that show a proper boom in the inclusion of new-generation security exceptions.

3.3. Clarifying substantive provisions

A changing approach towards the State regulatory space in new-generation IIAs can also be seen in the evolution of the standard of investment protection. The primary aim of IIAs to promote the inward flux of foreign capitals fully emerges here, and shows the continuous attempt of treaty drafters to create a favourable investment climate, notwithstanding the changes to the regime.

Consequently, few new-generation IIAs safeguard the host State's regulatory authority by abandoning some of the most-important traits of the substantive protection of FDI: if doing so certainly increase the margin of manoeuvre of the State, it also bears the risk of having detrimental effect on the foreign investors; perception of the State as a place for possible business endeavours.

On the contrary, and similarly to what has been seen for exception clauses, the majority of new-generation substantive clauses clarify the State's obligations and the treatment of investments and investors. The goal is that of restricting the

discretion of arbitral tribunals in the interpretative process, avoiding the expansive interpretations that have characterised arbitral jurisprudence and ensuring that the regulatory action of host States is not subject to unwarranted restrictions. In doing so, IIAs insert elements of specificity that lead substantive provision to (partially) depart from the traditional standard-like clauses and to embrace a more-specific language.

The following sections will address the most-important standards provided for by IIAs, namely the protection from unlawful expropriation and the FET of investors.

3.3.1. Protection from unlawful expropriation

The inclusion of public interest considerations and the refinement of State's obligations towards foreign investors can be witnessed in the evolution of treaty provisions that protect investors from unlawful expropriation. Recent developments not only attempt to strike a balance between granting the highest level of protection to foreign investors and allowing the State to pursue its legitimate regulatory powers in the public interest.[196] Contracting States also exclude certain regulatory measures adopted in the public interest from the scope of indirect expropriation. In so doing, treaty provisions have become longer and more detailed, as will be seen below.

In a preliminary fashion, one must recall that international law does not prevent States from expropriating alien property in their territory. The right of States is a direct expression of the doctrine of territorial sovereignty and is not affected by modern investment treaties.[197] International law places limitations on the rights of States to expropriate foreign property, requiring expropriation to be made for a public purpose, in a non-discriminatory and arbitrary manner, and to be accompanied by compensation. While the first two requirements are generally accepted under

[196] Ortino, 'Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for 'Greater Certainty'', 43 *Legal Issues of Economic Integration* (2016) 351, at 352.

[197] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Edition, 2012), at 98.

customary international law and are believed to be elements of the MST,[198] compensation has been defined as 'widely accepted in principle', due to the lack of universal agreements relating to the assessment of the compensation due.[199]

International investment agreements contain clear requirements for the legality of an expropriation, be it direct or indirect. *Direct* (or formal) expropriation consists in the outright seizure of the investor's title in favour of the host State, and is easily identifiable, although it has become rare.[200] *Indirect* expropriation, on the contrary, consists of measures that do not affect the title of the investment but deprive the investor of the possibility of utilising the investment in a meaningful way.[201]

The traditional wording contained in IIAs, typical of what have been defined as 'pre-modern' expropriation clauses,[202] indicates only the requirements for a lawful

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[198] H. Dickerson, *Minimum Standards*, October 2010, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e845 (last visited 9 July 2018). Such consensus is, however, less monolithic than expected. The numerous resolutions adopted by international organizations on the matter show diverging texts that might cast doubts on the exact traits of the traditional expropriation standard. For an overview of the different requirements for the legality of expropriation under customary international law, see Reinisch, 'Legality of Expropriations', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 171, at 173–176.

[199] UNCTAD UNCTAD, *International Investment Agreements: Key Issues (Volume I)*, UNCTAD/ITE/IIT/2004/10 (2004), available at http://unctad.org/en/Docs/iteiit200410_en.pdf (last visited 7 September 2018), at 235. The UN GA Res. 1803 (XVII), 14 December 1962, 'Permanent sovereignty over natural resources' required expropriation to be justified by the public interest and accompanied by compensation, although subsequent UN GA Resolutions dropped the requirement of compensation. See, e.g., UN GA Res. 3171(XXVIII), 'Permanent sovereignty over natural resources', 17 December 1973, A/RES/3171 at para.3; GA Res. 3281 (XXIX), 12 December 1974, A/RES/29/3281, 'Charter of Economic Rights and Duties of States' at Art.2(2)(c). See: A. Reinisch (ed.), *Standards of Investment Protection* (2008) at Chapter 8.

[200] Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit', *Vanderbilt Journal of Transnational Law* (2008) 775, at 130.

[201] Dolzer and Schreuer, *supra* note 197, at 101.

[202] Reinisch and Stifter, 'Expropriation in the Light of the UNCTAD Investment Policy Framework for Sustainable Development', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 81.

expropriation, whether direct or indirect, with no further indications. Such structure resumes the wording of failed multilateral conventions drafted in the 1950s, such as the Draft Convention on Investments Abroad,[203] or the 1967 OECD Draft Convention, which have been used as a model for subsequent BITs.[204] The OECD Draft Convention provides, at Art. 3, that

> '[n]o Party shall take any measures depriving, *directly or indirectly*, of his property a national of another Party unless the following conditions are complied with:
>
> (i) The measures are taken in the *public interest* and *under due process of law*;
>
> (ii) The measures are *not discriminatory*; and
>
> (iii) The measures are accompanied by provision for the payment of just *compensation* […].'[205] (emphasis added)

Treaties can equally refer to measures 'having effect equivalent to nationalization or expropriation'[206] or 'tantamount to expropriation'[207] when addressing indirect expropriation. Although provisions protecting from indirect expropriation are

[203] Draft Convention on Investments Abroad (Abs–Shawcross Convention), reprinted in UNCTAD, International Investment Instruments: A Compendium – Volume V, p. 395 (2000) at Art. III: 'No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property *except under due process of law* and provided that such measures are *not discriminatory* or contrary to undertakings given by that Party and are accompanied by the payment of *just and effective compensation*' (emphasis added).

[204] S. W. Schill, *The Multilateralization of International Investment Law* (2009), at 31 ff.

[205] Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (Paris: OECD, 1967), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2812 (last visited 11 July 2018), Art. 3.

[206] See, e.g.: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (1980), 18 December 1980, Art.5(1); ECT, *supra* note 179, Art.13(1).

[207] See, e.g.; Treaty between the Federal Republic of Germany and the Sultanate of Oman Concerning the Encouragement and Reciprocal Protection of Investments, 2 April 1986 (terminated on 4 April 2010), Art.4(2); NAFTA, *supra* note 95, Art.1110.

present in almost all investment treaties with very few exceptions,[208] the exact nature of what constitutes indirect expropriation is controversial.

'Pre-modern' treaty clauses on expropriation still characterise the majority of existing IIAs, providing no guidance for the determination of indirect expropriation. In the silence of treaty texts, the task has been carried out by arbitral tribunals, with conflicting outcomes. In recent years, considerable attention has been given to regulatory measures, in an attempt to clarify when a measure is legitimate and when it constitutes a regulatory expropriation instead.[209] Tribunals have adopted different approaches, either following the *sole effect* doctrine or the *police powers* doctrine.[210]

Recent treaty practice has acknowledged the critical aspects of a non-specified notion of indirect expropriation and has evolved to redefine its content. Clarification can be included in the treaty text or in explanatory annexes. Modern provisions generally follow two approaches, either defining with greater clarity what

[208] A BIT that does not refer to indirect expropriation is the Agreement between the Government of the Lebanese Republic and the Government of Malaysia for the Promotion and Protection of Investments (1998), 20 January 2002, which provides the following: 'Neither Contracting Party shall take any measures of expropriation or nationalization against the investments of an investor of the other Contracting Party except under the following conditions [...]'.

[209] U. Kriebaum and A. Reinisch, *Property, Right to, International Protection*, July 2009, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e864?rskey=LrDjnl&result=2&prd=EPIL (last visited 23 July 2018).

[210] Among the tribunals that expressed the pure effect doctrine, see, e.g., *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000;, *supra* note 126. For cases that reflect the police powers doctrine, see, e.g., *Saluka Investment BV (The Netherland) v. The Czech Republic*, PCA, Partial Award, 17 March 2006 (Saluka v. Czech Republic); *Chemtura Corporation v. Government of Canada*, UNCITRAL Award, 2 August 2010. For an overview of the vast scholarly production on the topic, see, among the many, Dolzer, 'Indirect Expropriations: New Developments Regulatory Expropriations in International Law: Colloquium Articles', 11 *New York University Environmental Law Journal* (2002–2003) 64Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20 *ICSID Review - Foreign Investment Law Journal* (2005) 1.

constitutes an indirect expropriation or excluding certain regulatory measures from the scope of the provisions.

Generally, IIAs do not exclude *tout court* the State's regulatory action from the scope of indirect expropriation: although such an approach would protect host States from investor's claims, it would have detrimental effects on foreign investors' perception of the protection afforded by the host State. Contracting States still aim at balancing FDI protection with the exercise of their regulatory powers. Still, be it through a clarification of the scope of the provision or through explicit exclusions, new-generation clauses exclude from the notion of indirect expropriation measures that past arbitral awards have considered as violating the standard of protection.

The first approach indicates the criteria that arbitral tribunals must analyse for a finding of indirect expropriation and is the dominant approach in modern IIA drafting. Provisions of this kind first appeared in the US Model BIT and Canada Model BIT in 2004 and have been included in their subsequent FTAs and BITs.[211] The US Model BIT (2004) provided, at Annex B, Art. 6(4)(a) that

> '[t]he 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.'[212]

[211] UNCTAD, *Expropriation: A Sequel* (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (last visited 7 September 2018), at 60. See, e.g., Free Trade Agreement between Australia and the United States of America (2004), 1 January 2005; Canada-Peru BIT, *supra* note 112.

[212] US Model BIT (2004), *supra* note 13, Annex B, Expropriation, Art.6(4)(a). The same provision appears in the U.S. Model BIT (2012), Annex B, Expropriation, Art.6(4)(a).

This model reflects the American restrictive approach towards expropriation, in contrast with the European practice of allowing both direct and indirect expropriation, provided the requirements generally identified under customary international law for the legality of expropriation are met.[213] However, recent European and general treaty practice show a convergence towards the American model, and a widespread use of the formulation indicated above.[214] Some treaties, such as the 2016 Canada-EU CETA, include additional requirements to those of the 2004 US Model BIT, such as the 'the duration of the measure or series of measures'[215] and 'the character of the measure or series of measures, notably their object, context and intent.'[216] Other treaties contain more restrictive provisions than the ones just listed. The 2016 Japan-Kenya BIT provides, at Art. 2(2) that

> '[f]or the purposes of this Agreement, the determination of whether a measure or a series of measures by a Contracting Party have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and evidence that includes:
>
> (a) permanent and complete or near complete deprivation of the value of investment;

[213] Outside the scope of the present work is the debate over the impact of IIAs on customary international law, and its repercussions in the determination of the legality of expropriation under customary international law. To this end, see the cautious approach adopted by Sir Michael Wood, Special Rapporteur for the ILC study group on the 'Identification of customary international law', when addressing the capacity of a considerable number of concordant treaties to be considered as evidence of customary international law. See W. Michael, UNGA, *Third Report on Identification of Customary International Law*, International Law Commission, A/CN.4/682 (2015) 1, at para. 42. Among the numerous scholarly voices on the topic, see, sharing the scepticism of the special rapporteur, Dumberry, 'Are BITs Representing the 'New' Customary International Law in International Investment Law?', 28 *Penn State International Law Review* (2010) 675. Contra, see Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law', 98 *Proceedings of the Annual Meeting (American Society of International Law)* (2004) 27; Alvarez, 'A Bit on Custom', 42 *New York University Journal of International Law and Politics* (2009–2010) 17.

[214] De Brabandere, 'States' Reassertion of Control over International Investment Law - (Re)Defining 'Fair and Equitabe Treatment' and 'Indirect Expropriation'', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2017) 285, at 304.

[215] CETA, *supra* note 80, Annex 8-A, Expropriation, 2(b).

[216] *Ibid.*, 2(d).

(b) permanent and complete or near complete deprivation of the investor's right of management and control over the investment; or

(c) an appropriation of the investment by the Contracting Party which results in transfer of the complete or near complete value of that investment to that Contracting Party […].'[217]

In this last example, the 'adverse effect' included in the US Model BIT gives way to the 'permanent and complete deprivation of the value of the investment', and the 'evaluation of the extent of interference' becomes an 'appropriation' of the investment, further narrowing down the range of State measures that can constitute indirect expropriation.[218]

In other cases, States deal with the controversial element of investor's legitimate expectations, as identified by investment arbitral tribunals, in order to exclude every kind of expectations, exception made for those arising out of host State's legal obligations. For instance, the 2009 Association of South-East Asian Nations (ASEAN) Comprehensive Investment Agreement requires a case-by-case, fact-based inquiry that considers, among other factors, 'whether the [G]overnment action breaches the [G]overnment's prior binding written commitment to the investor whether by contract, licence or other legal document'.[219] This approach was

[217] Japan-Kenia BIT, *supra* note 78, Art.10(2).

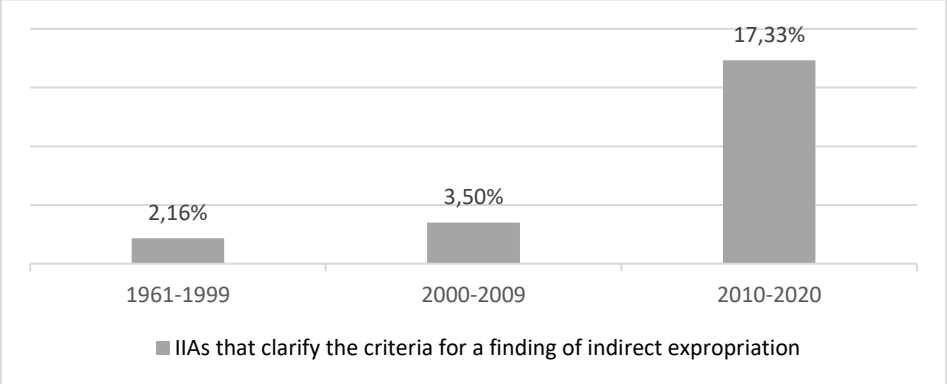
[218] Equally narrow, but with a different wording, is the China – New Zealand Free Trade Agreement (2008), which clarifies that 'In order to constitute indirect expropriation, the state's deprivation of the investor's property must be: (a) either severe or for an indefinite period; and (b) disproportionate to the public purpose. 4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either: (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or (b) in breach of the state's prior binding written commitment to the investor, whether by contract, licence, or other legal document.' China-New Zealand FTA, *supra* note 120, Annex 13, Expropriation, 3-4.

[219] ASEAN Comprehensive Investment Agreement (2009), 24 February 2012, Annex 2, Expropriation and Compensation, 3(b); see also, *supra* note 120, Annex 13, Expropriation, 4(b). A similar provision is contained in the Trans-Pacific Partnership Agreement (2016), not in force, at Footnote 36 to Annex 9-B, Expropriation, 3(a)(ii).

developed in the context of the FET standard and ensures that only expectations well-grounded on host State's assurances may reduce the State's regulatory freedom.[220]

Attempts to clarify the criteria for a finding of indirect expropriation could be found already in 1961. These type of clauses appeared in 44 cases over 2036 (2,16% of the total) in the period 1961-1999; in 44 cases over 1245 (3,50% of the total) in the period 2000-2009; in 82 cases over 473 (17,33% of the total) in the period 2010-2020, as shown in Figure 7:

Figure 7



A second and more restrictive approach is that of indicating what general measures (or specifying which measures) do not constitute indirect expropriation. When the State's action falls among the listed exceptions, the State will not be obliged to pay compensation irrespective of the harmful effects that the measure can have on the investment. This approach is often seen in conjunction to the first one. A consistent number of treaties contain provisions that expressly affirm the right of the State to regulate to protect certain pubic interests, following once again the example of the US Model BIT (2004), which provided that

> '[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party *that are designed and applied to protect legitimate public welfare objectives, such as public*

[220] Reinisch and Stifter, *supra* note 202, at 95.

health, safety, and the environment, do not constitute indirect expropriations.'[221] (emphasis added)

The opening sentence 'in rare circumstances' has been considered by some commentators as simply creating a presumption in favour of the legality of the regulations, that can still configure an indirect expropriation.[222]

Other treaties avoid the problem by resorting to narrower clauses. The 2016 Rwanda-Turkey BIT, for instance, states that '[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.'[223] Narrower phrasings might be more effective, as they preclude arbitral tribunals from determining whether a measure adopted to protect legitimate public welfare objectives is expropriatory or not. Moreover, the list of measures is non-exclusive and other public welfare objectives can be covered.

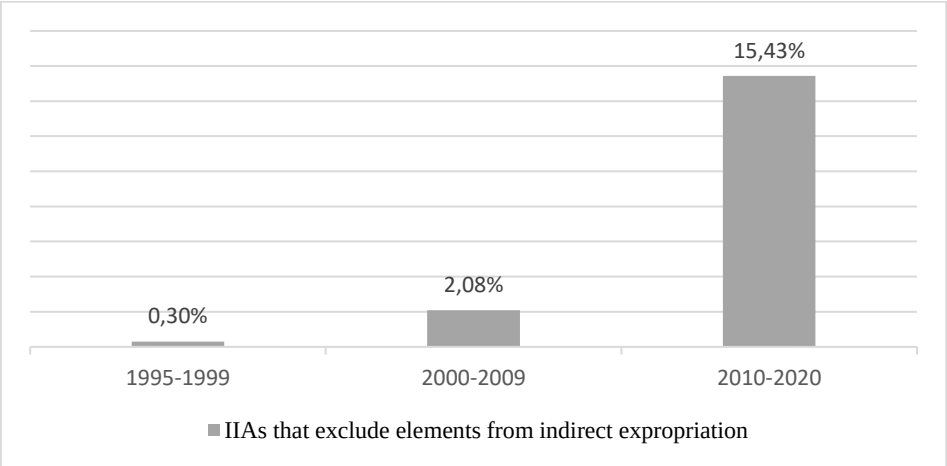
This more-restrictive approach can be found only in IIAs concluded after 1995, and appeared in 3 cases over 998 (0,30% of the total) in the period 1995-1999; in 26 cases over 1245 (2,08% of the total) in the period 2000-2009; in 73 cases over 473 (15,43% of the total) in the period 2010-2020. Figure 8 highlights the increasing presence of these clauses in the last decade:

[221] U.S. Model BIT (2004), *supra* note 13, Annex B, Expropriation, 4(b). See, for instance, the, *supra* note 100, Art.20(8), which provides that '[c]onsistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.'

[222] S. H. Nikièma, IISD - International Institute for Sustainable Development, *Best Practices Indirect Expropriation* (2012) 1, available at http://www.iisd.org/sites/default/files/publications/best_practice_indirect_expropriation.pdf (last visited 7 November 2018), at 11.

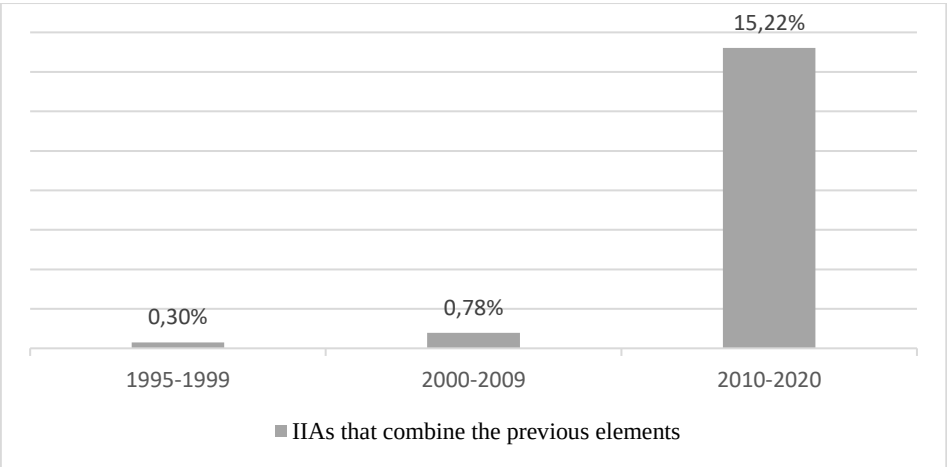
[223] Agreement between the Government of the Republic of Rwanda and the Government Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments (2016), not in force (Rwanda-Morocco BIT), Art.6(2).

Figure 8



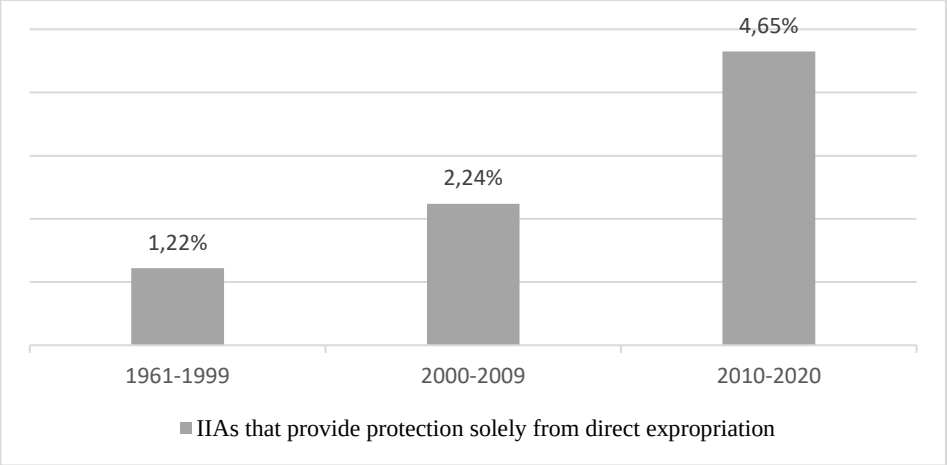
The two developments described above are not mutually exclusive. On the contrary, almost all the provisions that exclude elements from indirect expropriation do so after preliminarily clarifying the criteria that arbitral tribunals ought to employ when confronted with alleged violations of the standard. As can be seen in Figure 9, provisions that include both new-generation elements appeared in 3 cases over 998 (0,30% of the total) in the period 1995-1999; in 9 cases over 1245 (0,72% of the total) in the period 2000-2009; in 72 cases over 473 (15,22% of the total) in the period 2010-2020:

Figure 9



Finally, some recent treaties abandon the voice tactics and omit altogether any reference to indirect expropriation or expressly exclude indirect expropriation from their coverage, granting protection only from direct expropriation. This can be found in BITs concluded by Brazil under its 2015 Model Cooperation and Facilitation Investment Agreements (CFIA),[224] as well as by few other Countries.[225] Starting from 1961, expropriation clauses that limit their scope to the sole direct expropriation appeared in 25 cases over 2036 (1,22% of the total) in the period 1961-1999; in 28 cases over 1245 (2,24% of the total) in the period 2000-2009; in 22 cases over 473 (4,65% of the total) in the period 2010-2020, as can be seen in Figure 10:

Figure 10



In these cases, protection from indirect expropriation will be subject to the legal framework of the host Country, or to the protection afforded by the relevant investor-State contract (if any) or by any relevant human rights instrument binding the State.[226] In so doing, the State limits its exposure to liability for measures that lead

[224] In 2015 Brazil concluded 7 IIAs that did not include protection from indirect expropriation. See: International Investment Agreement Navigator, *supra* note 56.

[225] See, e.g., Agreement between the Republic of Serbia and the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments (2013), not in force; Rwanda-Morocco BIT, *supra* note 223.

[226] Johnson, Sachs and Coleman, 'International Investment Agreements, 2014: A Review of Trends

to non-direct takings, although, as already mentioned, it can have detrimental effects on the investors' perception of the risk in investing in the Country.[227]

The analysis above highlights how voice attempts directed to clarify indirect expropriation provisions are increasingly present in new-generation IIAs. Developments to this end can involve the indication of the criteria that should guide the tribunals' analysis in such determination or by safeguarding policy space areas by excluding them from the protection of the treaty. If their presence was scarce until few years ago, they have been consistently included in IIAs, especially in the last decade. Such tendency then is juxtaposed by the growing exclusion of indirect expropriation from the protection of the treaty, which, though an expression of exit tactics, is indicative of the same trend.

3.3.2. Fair and Equitable Treatment of FDI

The redefinition of host State's obligations towards foreign investors then finds a major example in the evolution of FET provisions. The indeterminacy of the wording 'fair and equitable', originally inserted as an element of flexibility that could cover situations considered as unfair and yet not covered by other standards (expropriation above all),[228] has revealed its disruptive potential, following arbitral tribunals' interpretations that were considered too far-fetched by contracting States.

Although FET provisions are included in the majority of IIAs, treaty texts show important variations that have given rise to different sets of issues yet to be resolved.[229]

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and New Approaches', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2014-2015* (2016), at 34.

[227] *UNCTAD's Reform Package for the International Investment Regime* (2017), available at http://investmentpolicyhub.unctad.org/Upload/UNCTADs%20Reform%20Package_web_09-03-2018.pdf (last visited 17 July 2018), at 33.

[228] Dolzer and Schreuer, *supra* note 197, at 132; Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 111, at 111.

[229] For a detailed study of the possible FET formulations contained in IIAs, see: UNCTAD, *Fair and Equitable Treatment - A Sequel*, UNCTAD/DIAE/IA/2011/5 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last visited 24 July 2018); I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008).

A first set of issues arises from considering FET as being part of the MST under international law or as an autonomous standard. Some IIAs contain 'unqualified' provisions that grant FET with no further indications, while others explicitly 'qualify' the standard by linking it to the MST under customary international law. The former approach is the most common in treaty practice and dates back to the early stages of investment treaty making. It has traditionally been followed by German and Swiss BITs and is still adopted by the major European capital-exporting Countries.[230] Unqualified FET provisions grant FDI 'in any case […] fair and equitable treatment'[231] or equivalent formulations.[232] At times, unqualified FET clauses are drafted in conjunction with full protection and security (FPS) clauses,[233] or other standards of treatment.[234]

Qualified FET clauses have been resorted to by the US and Canada in their respective IIAs. As a matter of example, Art. 1105 of the NAFTA provides that

> '[e]ach 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.'[235]

The exact scope of the link to international law has been addressed on various occasions in the context of NAFTA arbitration. Before 2001, different

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[230] Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 *International Lawyer* (2005) 87, at 90; Malik, 'Bulletin #3 - Fair and Equitable Treatment', *IISD - Best Practices Series* (2009), available at https://www.iisd.org/pdf/2009/best_practices_bulletin_3.pdf (last visited 17 August 2018), at 16.

[231] Treaty between the Federal Republic of Germany and Ceylon for the Promotion and Reciprocal Protection of Investments (1963), 12 July 1966, Art.1.

[232] Some treaties use a different formulation, granting foreign investors 'equitable and reasonable treatment'. See, e.g.: Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments (1992), 20 December 1992, Art.3. This variation, however, does not appear to reflect a difference on the meaning. See: *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 271-278.

[233] See, e.g.: Agreement between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment (1997), 18 June 1997, Art.2(3).

[234] ECT, *supra* note 179, Art.10(3).

[235] North American Free Trade Agreement, 32 ILM 289, 605 (1993), 1 January 1994, Art. 1105(1).

interpretations were adopted by arbitral tribunals and some, such as the tribunal in *Pope & Talbot v. Canada*, asserted that the standard was additive to the MST and that tribunals were free to go beyond the limits of the latter.[236] In 2001, Art. 1105 was subject to an official interpretation by the NAFTA FTC that stated that FET 'do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'[237] The interpretation was followed by later arbitral tribunals in the NAFTA context,[238] although its importance must not be overestimated, since interpretations by the FTC are binding only between NAFTA Parties.

Linking the FET standard to the MST does not clarify its content: the MST itself lacks precise connotations and requires an intense hermeneutic effort by arbitral tribunals. Such endeavour has been carried out extensively, but not exclusively, by NAFTA arbitral tribunals, although a widely accepted interpretation is yet to be found. One of the most-relied decisions by respondent States is *Genin v. Estonia*,[239] which equated the FET with the MST as defined in the *Neer* case. The latter provided that

> '[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'[240]

This threshold has been considered too high by other tribunals that have relied on other, less-stringent concepts. A 2004 OECD report has indicated some areas

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[236] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award on the merits of phase 2, 10 April 2001, at paras. 110-117.

[237] NAFTA Free Trade Commission, *supra* note 46,at B(2).

[238] See, among others: *Pope & Talbot Inc. v. The Government of Canada, Canada's Counter-Memorial (Phase Two)*, 10 October 2000, at paras.17-69; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at paras.90-91;, *supra* note 210, at para.121.

[239] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 25 June 2001, at para.367.

[240] Neer v. Mexico Mexico/USA General Claim Commission, *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, Reports of International Arbitral Awards 60, at para 21.

across which the notion of MST apply, namely the administration of justice in cases involving foreign nationals, usually linked to the notion of denial of justice; the treatment of aliens under detention; full protection and security, understood as the obligation of the host State to adopt all reasonable measures to physically protect foreign assets or properties from attacks; the expulsion of foreigners carried out in the least-injurious way for the person affected.[241]

The above-mentioned debate has led to a second set of issues, namely the influence that the presence of FET clauses in IIAs has had on the MST under international law. Some arbitral tribunals have emphasised the evolutionary nature of the MST, that has developed since the *Neer* case, levelling the differences with the FET.[242] Other tribunals went further and stated that the widespread inclusion of FET in IIAs has transformed the standard into customary law.[243] However, increasing doubts have been raised about the relevance of the whole debate.[244] Various tribunals have maintained that 'it appears that the difference between the treaty standard and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real.'[245]

It must be noted that the debate has followed similar lines with regard to unqualified clauses. Some commentators have adopted the so-called 'equating' approach, which denies the existence of a self-contained meaning for FET, identifying their content with the international minimum standard.[246] However, the dominant interpretation follows the so-called *semantic* −or *plain meaning*− approach, which

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[241] OECD, *Fair and Equitable Treatment Standard in International Investment Law*, 3 (2004), OECD Working Papers on International Investment, at 9, footnote 34.

[242] Pope & Talbot v. Canada, *supra* note 238, at para.58 ff.

[243] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Mondev v. US), at para 125.

[244] Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), at 152–154.

[245] Saluka v. Czech Republic, *supra* note 210, at para.291.

[246] Klager, 'Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness', 11 *Journal of World Investment & Trade* (2010) 435, at 438.

considers the standard as an independent one, with an autonomous meaning to be ascertained on a case-by-case basis by arbitral tribunals.[247]

The third set of issues relates to the content of the FET standard. In the absence of a clear guidance in treaty text, the determination of the content of the standard has been left to arbitral tribunals. Given the failure of any attempt to provide a clear-cut definition,[248] tribunals have identified a series of features that, based on the specific circumstances of the case, characterise the standard.

Legal scholarship has attempted to rationalise these features by grouping them into categories that differ according to the author.[249] In the categorisation provided by Dolzer and Schreuer, the main features of the standard are stability and the protection of the investor's legitimate expectations, transparency, compliance with contractual obligations, procedural propriety and due process, good faith and freedom from coercion and harassment.[250]

The interpretation given by arbitral tribunals of the elements of the standard has proven problematic. In some cases, it has been considered too broad, curtailing the State's regulatory autonomy and attracting widespread criticism. As a matter of example, some arbitral tribunals have found a breach of the investor's legitimate

[247] Newcombe and Paradell, *supra* note 166, at 264–265. For commentators in support of this approach, see: Dolzer and Schreuer, *supra* note 197, at 134; Dolzer, *supra* note 230, at 91.

[248] One of the most famous attempts at defining the content of FET, and yet one of the most criticised was the definition given by the arbitral tribunal in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (Tecmed v. Mexico), para.154. According to the tribunal, FET '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. The 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'.

[249] See, e.g.: Dolzer and Schreuer, *supra* note 197; R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2011); A. Reinisch, *Recent Developments in International Investment Law* (2009); Tudor, *supra* note 229; Yannaca-Small, *supra* note 228; Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* (2013–2014) 7.

[250] Dolzer and Schreuer, *supra* note 197, at 145 ff.

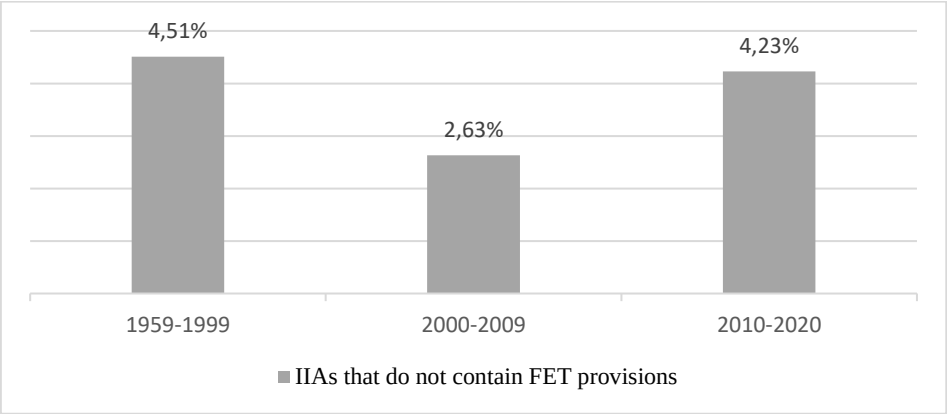
expectations following a change in the regulatory framework that existed at the time their investment was made,[251] finding strong criticism in investment scholarship.[252] Findings of breaches of the FET standard on the basis of the sole modifications incurred in the legal framework of the host State have been considered as going beyond the scope of FET protection, imposing a burden on host States devoid of legal basis in the treaty text.

States Parties to IIAs have reacted in different ways to the indeterminacy of the FET standard and to what they perceived as the excessive discretion of arbitral tribunals. One method is that of resorting to exit tactics and omit FET from investor's protection in new investment treaties. In so doing, the State's regulatory measures will not be reviewed under the standard and will constitute a violation of the IIA only if it integrates a violation of other standards, expropriation above all. This approach has been followed by some Countries such as Brazil or Morocco in their latest IIAs and, notably, in some recent FTAs concluded by the EU that do not contain a FET provision. It is, however, not a new development in IIA drafting, as its presence has remained roughly consistent throughout the years. As Figure 11 shows, FET provisions were absent in 92 cases over 2039 (4,51% of the total) in the period 1959-1999; in 33 cases over 1245 (2,63% of the total) in the period 2000-2009; in 20 cases over 473 (4,23% of the total) in the period 2010-2020.

[251] Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', 28 *ICSID Review - Foreign Investment Law Journal* (2013) 88, at 110.

[252] See, among others: Potestà, *supra* note 251; Zeyl, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law', 49 *Alberta Law Review* (2011–2012) 203.

Figure 11



The downsides of this drafting choice lay primarily in the fact that the lack of FET provisions could be considered by investors as affecting the investment climate,[253] while at the same time, depending on the specific ISDS clause, it might not prevent the application of the MST to the specific dispute.[254] Furthermore, the presence of MFN clauses could still allow the application of FET to foreign investors. As a matter of example, the MFN provision contained in the 1995 Pakistan-Turkey BIT[255] was interpreted by the arbitral tribunal in *Bayindir v. Pakistan* as allowing the incorporation of FET from third-party treaties.[256] Some recent treaties seem to have acknowledged this possibility. The 2015 Brazil-Malawi BIT,[257] for instance, does not contain any MFN provision, along with the absence of FET. However, the

[253] Klager, 'Revising Treatment Standards - Fair and Equitable Treatment in Light of Sustainable Development', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 65, at 78.

[254] UNCTAD, *supra* note 229, at 18–19.

[255] Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (1995), 9 March 1997, Art.2(2).

[256] UNCTAD, *supra* note 229, at 19–20. See also: Bayindir v. Pakistan *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, at para.155. For an analysis of the issue, see: Dumberry, 'Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection', 33 *Arbitration International* (2017) 1.

[257] Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi (2015), not in force.

majority of recent IIAs that do not contain FET provisions do not follow suit, leaving the problems that arise from MFN clauses applications unsolved.

Another method adopted in the context of qualified FET provisions is that of explicitly linking FET to customary international law or the MST under customary international law. Customary international law is not used here as a lower threshold for the standard but it identifies the content of the standard instead. The above-mentioned FTC interpretation finds place in this context. Provisions of this kind have been included in BITs concluded by Mexico and Canada,[258] and are contained in the US Model BIT and Canadian FIPA. Usually they are worded in the following terms:

> '[e]ach Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The [concept] of 'fair and equitable treatment' [..] *do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*.'[259]

Such wording does not solve, as seen above, the issue of vagueness. Investment arbitral tribunals have pushed the interpretation of the MST beyond the *Neer* standard and, to date, there is no wide consensus on the exact meaning of the clause. Linking the FET clause to the MST, however, can serve as a means to raise the State's liability threshold,[260] and to prevent the so-called *semantic* approach to the clause, averting arbitral tribunals from giving unfettered interpretations of FET.[261] Notwithstanding the shortcomings, States are increasingly resorting to this method to fetter the tribunals' law-making power. IIA provisions that link FET to customary international law or the MST under customary international law have been resorted

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[258] See International Investment Agreements Navigator, *supra* note 56.

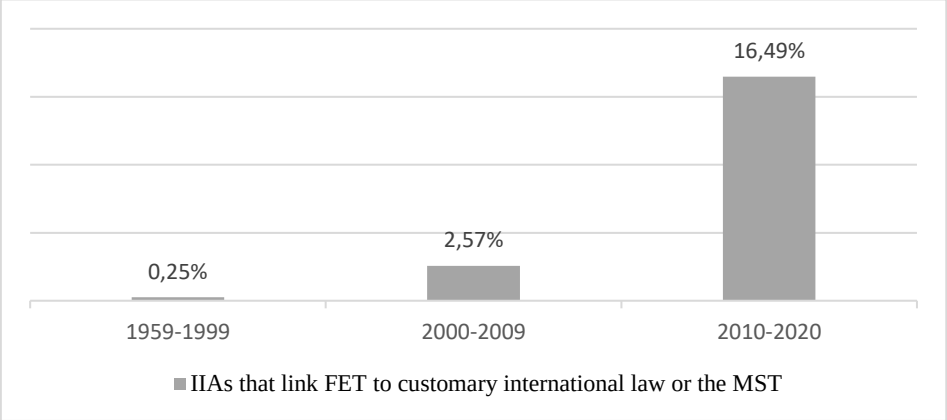
[259] Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (2014), 16 December 2016, Art.6(1-2).

[260] Klager, *supra* note 253, at 71.

[261] De Brabandere, *supra* note 214, at 297. See also Gélinas and Jadeau, 'CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation', 13 *Transnational Dispute Management (TDM)* (2016), available at https://www.transnational-dispute-management.com/article.asp?key=2319 (last visited 22 August 2018), at 14.

to in 5 cases over 1982 (0,25% of the total) in the period 1967-1999; in 32 cases over 1245 (2,57% of the total) in the period 2000-2009; in 78 cases over 473 (16,49% of the total) in the period 2010-2020, as can be seen in Figure 12:

Figure 12



Of great importance when analysing the developments of the current treaty framework is then the third method, which shows the abandonment of open-ended FET clauses and the inclusion in IIAs of provisions that list the elements considered by the Parties as constituting the content of the standard. This approach characterises some of the most-important IIAs recently concluded and cannot be overlooked. Two types of clauses can be identified in this regard. Some IIAs define the traits of the FET through non-exhaustive lists, usually specifying the identification of the FET with the MST and adding that

> ‘‘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 of law’.[262]

Other treaties clarify the concept even further, explicitly limiting the scope of the investor’s legitimate expectations. The 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership explains that

[262] Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea (2015), 20 December 2015, Art.12.5(2)(a). The same provision can be found in the TPP, *supra* note 219, Art.9.6(2)(a).

'[f]or 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.'[263]

These treaties limit the element of investor's legitimate expectations, as they seem to require some additional elements, in the relationship between the State and the investor, for legitimate expectations to exist. The legal framework will not be considered sufficient to create expectations, in the absence of specific commitments made from the State to the investor. These non-exhaustive lists, however, do not limit the standard, thereby leaving arbitral tribunals leeway for identifying other elements as being part of FET.

The second type of clauses can be seen in recent investment negotiations of the EU with important economic partners. Although they reflect only a limited State practice, this is the approach currently being followed by the EU in its current negotiations and will likely be reflected in its forthcoming investment agreements. The EU Commission made clear that the aim of its action was that of strengthening the 'balance between investment protection and the right to regulate, through clarifying and improving the substantive investment protection provisions while at the same time preserving the right of States to take measures for legitimate public policy objectives.'[264]

The new EU approach has taken a U-turn from the use of unqualified FET provisions traditionally resorted to by its Member States. FET provisions contain an exhaustive list of elements −or *basic rights for investors*− as indicated by the Commission,[265] that clarify the standard and eliminate uncertainties in its application. The FET provision in the CETA, almost mirrored by the one contained in the current draft text of the TTIP,[266] provides that

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[263] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), not in force, Art.9.6(4).

[264] European Commission, *Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (last visited 22 August 2018).

[265] *Ibid.*

[266] *Transatlantic Trade and Investment Partnership (TTIP), Commission Draft Text*, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last visited 22 August

'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 […].

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.'[267]

Paragraph 3 sets up a mechanism for the review of the FET obligation that involves recommendations by a Committee on Services and Investment. Notably, investor's legitimate expectations are not listed among the core elements of the standard. They still find room at paragraph 4 of the provision, which provides that

'[w]hen 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.'[268]

Legitimate expectations only play a subsidiary role in the determination of a breach of one of the elements of FET and only whenever specific representations have been made to the investor. In so prescribing, the CETA excludes the stability of the legal framework from the elements of the FET. In IIAs currently being

2018), Art.3.

[267] CETA, *supra* note 80, Art.8.10(1-2).

[268] *Ibid.*, Art.8.10(4).

negotiated, the definition of FET is even narrower. The EU-Singapore trade and investment agreements includes in the exhaustive list fewer elements than those contained in the CETA. At its Art. 2.4(2), it reads

> '[a] Party breaches the obligation of fair and equitable treatment referenced in if its measure or series of measures constitute:
>
> (a) denial of justice in criminal, civil and administrative proceedings;
>
> (b) a fundamental breach of due process;
>
> (c) manifestly arbitrary conduct;
>
> (d) harassment, coercion, abuse of power or similar bad faith conduct.'[269]

Furthermore, the treaty contains an additional clarification that concerns the investor's legitimate expectations (identical to paragraph 3 of the CETA), criticised by some commentators for being too indeterminate.[270] Paragraph 6 of the EU-Singapore trade and investment agreements provides that

> 'Where a Party […] had given a specific and clearly spelt out commitment in a contractual written obligation towards a covered investor of the other Party […] that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority either:
>
> (a) deliberately; or
>
> (b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the covered investor or investment to a position which it would have been in had the frustration or undermining not occurred.'[271]

Footnote 12 adds that ''contractual written obligation' means an agreement in writing, entered into by a Party […] that creates an exchange of rights and obligations, binding both parties.'[272] Not only the stability of the host State's legal

[269] EU-Singapore Trade and Investment Agreements, (Authentic Texts as of April 2018), Art.2.4(2).

[270] See Gélinas and Jadeau, *supra* note 261.

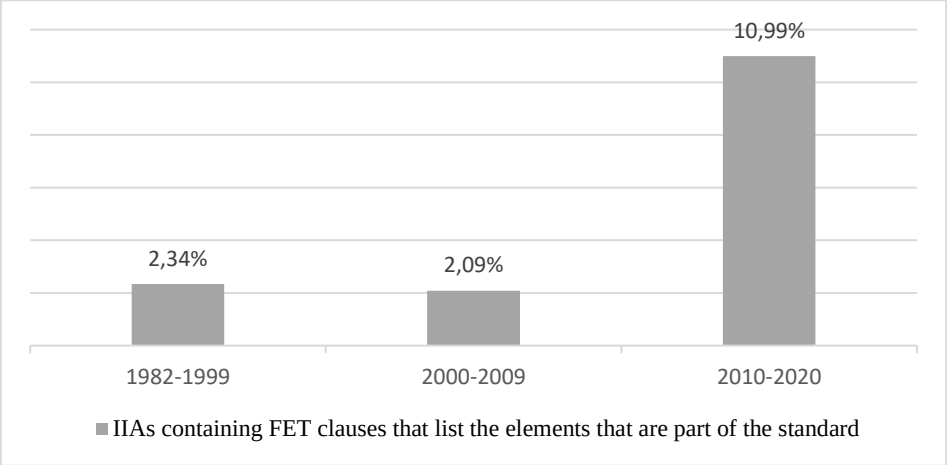
[271] EU-Singapore Trade and Investment Agreements, *supra* note 269, Art.2.4(6).

[272] *Ibid.*, Footnote 12.

framework is not an element of the FET, but also non-written commitments seem to be excluded by such formulation.

Both types of clauses that make the third method have increasingly emerged in the IIA panorama. Starting from 1982, these provisions can be seen in 43 cases over 1836 (2,34% of the total) in the period 1982-1999; in 26 cases over 1245 (2,09% of the total) in the period 2000-2009; in 52 cases over 473 (10,99% of the total) in the period 2010-2020, as displayed by Figure 13:

Figure 13



Though the vast majority of IIAs stick to unqualified FET formulations, leaving the determination of the content of the standard to arbitral tribunals, it is possible to notice a trend towards the limitation of the tribunals' discretion and to grant host States greater room for the exercise of their regulatory power. The abandonment of FET protection is not widespread and confirms the fundamental role that States attribute to the standard in the promotion and protection of FDI. The two different approaches that attempt to fetter the standard, either by linking it to the MST according to the North-American tradition or by listing FET elements under the recent EU approach, have, on the other hand, sensibly increased during the last decade.

3.4. Including human rights language in IIAs

Another indicator of the reassertion of State regulatory authority in new-generation IIAs can be found in the increasing inclusion of international human rights (HR) language in investment treaty provisions. The argument might not be

straightforward. The vertical structure of international HR treaties, that bind the State in order to confer rights to the State's individuals, seems at odds with the provision of a greater regulatory autonomy for the State currently taking place in international investment law.

However, the State's regulatory authority, as already explained above, is exercised nowadays within the boundaries of international law, which imposes duties of protection on the State in fields such as HR or the environment.[273] As recognised by the tribunal in *ADC v Hungary*, '[…] while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. […] The rule of law, which includes treaty obligations, provides such boundaries.'[274]

The very lack of explicit provisions on HR in international IIAs does not imply that international investment law is oblivious to the topic. Some of the standards of investment protection find (a non-exact) correspondence in HR instruments: protection from unlawful expropriation corresponds, in narrower terms, to the protection of the right to property;[275] the FET standard is generally considered to include, among other things, the protection against discrimination, the right to a fair and public hearing by an independent and impartial tribunal; full protection and security corresponds to a narrower prohibition of cruel, inhuman or degrading treatment or punishment.[276] It must be noted, however, that these rights constitute part of the protection specifically set up by the negotiating States for foreign investors and do

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[273] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2nd Edition, 2017), at 67; Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International & Comparative Law Quarterly* (2005) 279, at 395–398; Brower II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes', in K. P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008– 2009* (2009) 347, at 374–375.

[274] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, at para 423.

[275] On the relationship between the right to property and protection from unlawful expropriation, see: Kriebaum and Reinisch, *supra* note 209.

[276] See Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), 10 December 1948, Arts. 5, 7, 8, 9, 10, 11, 17.

not have a general reach outside this narrow category of such natural or legal persons.[277]

This structure seems to have reflected in the jurisprudence of arbitral tribunals when dealing with HR arguments. The latter have not shied away from HR considerations and have on various occasions informed their reading of investor's rights with the jurisprudence of international HR courts.[278] The very rules of treaty interpretation, specifically Art. 31(3)(c) of the VLCT, require a tribunal to take into account, together with the context, '[…] any relevant rules of international law applicable in the relations between the parties.'[279] The latter is widely recognized to reflect the customary rules of treaty interpretation, and arbitral tribunals consistently resorted to its provisions in the interpretation of IIAs.[280]

However, standards of treatment deal solely with specific rights of foreign investors and completely overlook the HR of the host State's population. This has reflected in a problematic relationship between the protection and promotion of FDI and the international protection of HR. Host States can be called to adopt general measures to meet legitimate public purpose objectives, among which measures protecting HR according to their international obligations, to the detriment of foreign investors. Arbitral tribunals have, so far, never considered HR raised by States in

[277] In the words of Alvarez, 'if viewed as the human rights treaty that, in fact, it is, the NAFTA investment chapter is the most bizarre human rights treaty ever conceived'. Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven', 28 *The University of Miami Inter-American Law Review* (1996) 303, at 307. Although limited to the NAFTA framework such a conclusion fits well for IIAs in general.

[278] Among the many instances in tribunals have resorted to the reasoning of HR courts when interpreting investment treaty provisions, see, e.g., the determination of whether State's regulations constitute regulatory takings that trigger compensation as opposed to legitimate regulations: Continental Casualty v. Argentina, *supra* note 160, at para 276; *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, at para 176. Another example, among the many, is the meaning of provisions directed against discrimination or denials of justice: see, e.g., Mondev .v US, *supra* note 243.

[279] VCLT, *supra* note 40, Art.31(3)(c).

[280] Simma and Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 678, at 691.

their defence arguments as determinant, dismissing them on factual grounds[281] or simply disregarding them.[282] What accounts for such a difference can hardly be found in the legal reasoning of arbitral tribunals, that show an impressive lack of legal methodology in this regard. Tribunals have often used vague language to justify why relevance (or lack thereof) was given to HR considerations, making their findings difficult to assess.[283] The combination of these factors has further stressed the emergence of a pro-investor bias in international investment arbitration.

Recent developments in IIA drafting seem to acknowledge this state of affairs and show the tentative but growing inclusion of provisions that move beyond the mere protection of foreign investors and include HR instances. If confronted with old-generation clauses, their broader reach might not only facilitate the harmonization of potentially conflicting obligations binding on the host State, as amply discussed in international scholarship.[284] Of greater relevance for the present analysis is the fact that these clauses, by providing a textual treaty basis for the State's regulatory action in compliance with its HR obligations, aim at shifting the balance between the protection of FDI and the pursuit of public welfare of the host State towards the latter. The aim is that of relieving the State from international responsibility in the adoption of its policies, provided that they are consistent with their HR obligations.

An increasing trend is that of mentioning HR in treaty preambles. Though the majority of investment treaties still refer solely to the protection and promotion of

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[281] Among the numerous cases against Argentina in this regard, see: *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case n. ARB/03/19, Decision on liability, 30 July 2010.

[282] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

[283] Kube and Petersmann, 'Human Rights Law in International Investment Arbitration', 11 *Asian Journal of WTO and International Health Law and Policy* (2016) 65, at 79.

[284] See, among the many, Tanzi, 'Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector', in *International Courts and the Development of International Law* (2013) 587, that identifies due diligence from both the State and the investor as a possible harmonization tool; Fahner and Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration', 68 *International & Comparative Law Quarterly* (2019) 741.

investments in their preambles, HR references are gaining momentum. Treaty preambles can mention international labour standards,[285] sustainable development,[286] or require consistency with the protection of human health,[287] sometimes by providing a link to specific international instruments.[288] Some IIAs expressly recall HR *in general* in their preambles. This practice is consistently followed by the EU in the conclusion of its FTAs, which often recall the UN Charter, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Helsinki Final Act of 1975.[289] A similar approach can be seen in recent IIAs concluded by the European Free Trade Association (EFTA) States.[290] To date, these developments are mainly contained in FTAs with investment provisions, as the only relevant BIT in this regard is the 2016 Morocco-Nigeria BIT, which recognises '[…] the important contribution investment can make to the sustainable development of the state parties, including […] *the furtherance of human rights* and human development.'[291]

[285] See Japan-Kenia BIT, *supra* note 78, Preamble.

[286] The 2030 Agenda for Sustainable Development Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, 21 October 2015 includes the protection and implementation of human rights as necessary steps to achieve sustainable development.

[287] See Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (2016), 30 August 2017, Preamble.

[288] US-Argentina BIT, *supra* note 139, Preamble.

[289] Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part (2014), 7 January 2016, Preamble: 'committed to all the principles and provisions of the Charter of the United Nations, the Organisation for Security and Cooperation in Europe (OSCE), in particular of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the concluding documents of the Madrid and Vienna Conferences of 1991 and 1992 respectively, and the Charter of Paris for a New Europe of 1990, as well as the United Nations Universal Declaration of Human Rights of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950'.

[290] Free Trade Agreement between the EFTA States and Georgia (2016), 9 January 2017, Preamble.

[291] Morocco-Nigeria BIT Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016), not in force, Preamble.

The inclusion of HR is then finding its way in model BIT preambles. The latter mention labour standards[292] or sustainable development issues,[293] or adopt a more-comprehensive approach, such as the new draft of the 2015 Norwegian model BIT, which reaffirms the Parties'

> 'commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights […].'[294]

HR language can then be found in treaty provisions, usually reflecting two approaches: the most-common one is the use of non-binding clauses, through which the treaty Parties restate their international commitments and guide their future law-making activities towards the protection of international HR. The second one is the inclusion of binding HR provisions in IIAs.

Non-binding language can be seen in the introduction of dedicated clauses on corporate social responsibility (CSR), usually connected to the drafting tradition of specific States, such as Canada. International CSR standards are contained in soft-law international instruments that deal with the conduct of enterprises, reflecting a global awareness of their social impact. According to these instruments, CSR includes a variety of duties related to HR, which cover labour, the environment, public health, human rights, community relations and anti-corruption.[295]

Reference to social instances through soft formulations is by no means limited to CSR standards: treaties can reaffirm already-existing international law obligations of the Parties or commit them to adopt measures to tackle specific issues by mentioning labour rights as contained in the International Labour Organization

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[292] Serbia Model BIT (2014), Preambe.

[293] India Model BIT (2015), Preamble.

[294] Norway Model BIT, *supra* note 89, Preamble.

[295] As a matter of example, the UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in June 2011 (Ruggie Report) read, at Principle 11, "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." See UNHR, *UN Guiding Principles on Business and Human Rights* (2011), Principle 11.

(ILO) Declaration on Fundamental Principles and Rights at Work,[296] provisions regarding the fight against corruption,[297] environmental protection.[298]

A similar soft result can be reached by States also through the inclusion of apparently binding language. Art. 15(5) of the 2016 Morocco-Nigeria BIT, for instance, deals with labour rights and provides that 'each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection', but it then limits the practical relevance of this by adding that such protection must be 'appropriate to [each Party's] economic and social situation'. Likewise, Art. 15(1) of the 2018 Brazil-Ethiopia BIT provides that each Party 'shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism […] *in accordance with its laws and regulations.*'

Finally, a handful of recent treaties impose binding HR provisions on the States Parties. These provisions usually take the form of restatements of existing obligations. BITs concluded by the BLEU with Montenegro, Togo and Tajikistan bind the States to their existing international labour obligations, by stating that:

> 'the Contracting Parties reaffirm their obligations as members of the International Labour Organization and their commitments under the International Labour Organization Declaration of Fundamental Principles and Rights at Work and its Follow-ups.'[299]

A wider reach can then be found in two recent IIAs concluded in the African context, that amount to the only IIAs to impose general HR obligations on the States Parties to date. Both Art. 21(5) Appendix 3 to the ECOWAS Treaty and Art. 15(6) of the 2016 Morocco-Nigeria BIT provide that 'all [P]arties shall ensure that their

[296] See, e.g., Morocco-Nigeria BIT, *supra* note 291, Art.15.

[297] See, e.g., Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (Protocolo de Cooperación y Facilitación de Inversiones Intramercosur) (2017), Art.14.

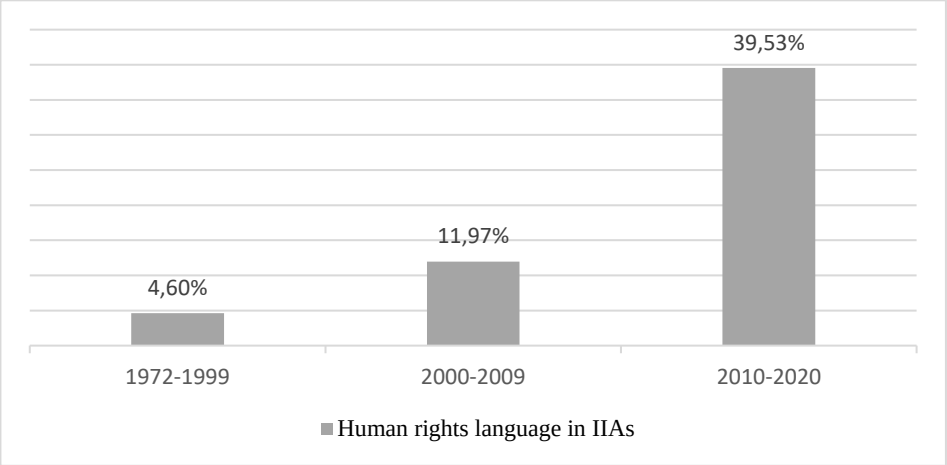
[298] See, e.g., Agreement Between the Belgium - Luxembourg Economic Union on the One Hand, and the Republic of Colombia, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (2009), (not in force) (BLEU-Colombia BIT), Art.7(1).

[299] See, e.g., Agreement Between the Belgium - Luxembourg Economic Union on the One Hand, and Montenegro, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (2010), not in force, Art.6(3).

laws, policies and actions are consistent with the international human rights agreements to which they are a Party'.

Human rights language, both in treaty preambles or in the treaty text, has appeared in 90 cases over 1955 (4,60% of the total) in the period 1972-1999; in 149 cases over 1245 (11,97% of the total) in the period 2000-2009; in 187 cases over 473 (39,53% of the total) in the period 2010-2020. The stark increase in IIAs that make reference to human rights can be seen in Figure 14 below:

Figure 14



The restatement of the host State's HR international obligations through binding provisions and soft wording −be it contained in treaty preambles or in the treaty text− serves the purpose of letting non-economic values enter the balance of conflicting interests in investor-State arbitration by concurring to the determination of the context relevant for the interpretation of treaty terms. In practical terms, these clauses entail that a reading in good faith of the treaty by arbitral tribunals should consider the protection of HR (or at least of the HR referred to in the treaty) in the balancing exercise of the conflicting interests of investors and host States.

The presence of HR provisions in IIAs constitutes one of the most-important developments of the last decade: from the analysis above in can be noticed that, while in the first decade of the present century attention was rising around HR issues but still not yet found widespread reflection in treaty drafting, during the last decade States have acknowledged the detrimental effects that economic activities

can have on the HR of the host State's population and have, to some extent, reacted to it.

4. Exit tactics: restricting the field of action of arbitral tribunals

In a different fashion from the avenues seen above, exit tactics do not aim at guiding the interpretation of arbitral tribunals inasmuch as they seek to obstruct the action of arbitral tribunals, either by narrowing down their jurisdiction or by abandoning the ISDS system altogether. These attempts can equally be considered as indicating the goal of States to preserve a greater regulatory space than that provided by old-generation IIAs. By limiting the activities that enjoy protection under the IIA, States make sure that the exercise of regulatory powers in the areas excluded from the protection of treaty, even if to the detriment of the investor(s), will not be referred to an international arbitral tribunal, and will be dealt with before the courts of the host State. The same goes for the abandonment of the ISDS system. While in some cases, it will be seen, alternative methods of dispute resolution are provided, the aim is to avoid that an exercise of sovereign powers will be scrutinized by an arbitral tribunal.

4.1. The shrinking definition of investment under IIAs

The first development concerns the new tendency in IIA drafting to put increasing limitations on the definition of investment activities. The unrestricted power to limit the entry of foreigners and foreign capitals represents an expression of State sovereignty and economic self-determination,[300] and is well rooted in customary law,[301] according to which the State may well choose not to admit aliens or to impose conditions on their admission in its territory.[302] The power of controlling the entry of FDI lies, in the first place, in the need to preserve important regulatory powers in public policy fields such as national security, public morals, economic policy goals within the discretion of the State.

The primary tool used by States to regulate the entry of FDI is by defining what constitutes an investment: the definition of investment in IIAs is critical because

[300] UNCTAD, International Investment Agreements: Key Issues, *supra* note 199, at 146.

[301] Reinisch, *supra* note 249, at 19.

[302] I. Brownlie, *Principles of Public International Law* (5th Edition, 1998), at 552.

only the assets or interests of investors that fall within its scope are entitled to the protections of the treaty.[303] Traditional IIAs contain broad asset-based definitions of investment.[304] A significant number of BITs define investment as 'every kind of asset' owned or controlled by an investor of another party, usually followed by an indicative list of assets. The assets listed often fall within the following categories: movable and immovable properties, interests in companies, contractual rights, intellectual property rights, business concessions, including natural resource concessions,[305] although there are numerous variations in the precise language used to describe them.[306]

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[303] M. Malik, IISD - International Institute for Sustainable Development, *Definition of Investment in International Investment Agreements* (2009) 1, available at https://www.iisd.org/sites/default/files/publications/best_practices_bulletin_1.pdf, at 1.

[304] In addition to the asset-based model, other models include the transaction-based model, which protects the underlying transfer of capital rather than the asset, and the enterprise-based model, which defines the protected investment in terms of the business organization through an enterprise. These models are usually resorted to by national foreign investment legislations. Schlemmer, 'Investment, Investor, Nationality and Shareholder', in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 49, at 52.

[305] UNCTAD, *supra* note 199, at 120.

[306] As a matter of example, the Agreement between the Government of the Republic of Nicaragua and the Government of the Italian Republic on the Promotion and Protection of Investments (2004), 22 May 2006, Art.1(1) states that '[t]he term "investment" shall mean any kind of asset invested, before or after the entry into force of this Agreement, by a natural or legal person of a Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter, irrespective of the legal form chosen, as well as of the legal framework. Without limiting the generality of the foregoing, the term "investment" shall include in particular, but not exclusively: a] movable and immovable property and any ownership rights in rem, including real guarantee rights on a property of a third party, to the extent that it can be invested; b) shares, debentures, equity holdings and any other instruments of credit, as well as Government and public securities in general; c] credits for sums of money connected with an investment as well as re-invested incomes and capital gains or any service right having an economic value as integral part of an investment; d) copyright, commercial trade marks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill; e] any economic right accruing by law or by contract and any license and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources; f) any increase in value of the original investment.'

The definition of what constitutes an investment for the purposes of the IIA is then linked to the entry of the investment, which States screen according to two main models, the so-called 'admission model' and the so-called 'pre-establishment model'.

The admission model grants the preferential treatment of the IIAs only to the activities that the host State has unilaterally decided to admit. The State does not grant positive rights of entry and establishment to investors and determines the conditions under which foreign investments are allowed to enter and operate in the Country.[307] This approach is traditionally adopted by European Countries and by the vast majority of developing Countries and is resorted to in almost two thirds of the BITs currently concluded, as well as in regional agreements.[308] Treaties following this model usually encourage the States Parties to promote favourable conditions for FDI, leaving the determination of the entry and establishment to the laws and regulations of the State.[309] The reference to national legislation can be contained in the provision defining the term investment, such as in the 2004 Germany Model BIT, which specifies that

> '[e]ach Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and *admit such investments in accordance with its legislation* […]'[310]

[307] Dolzer and Schreuer, *supra* note 197, at 81.

[308] 1647 out of 2571 mapped treaties in the UNCTAD contain 'in accordance with host State laws' requirements. Source:, *supra* note 56.

[309] Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 9, at 11.

[310] Germany Model BIT (2008), Art.2(1) (emphasis added). Formulations are extremely varied and present subtle differences. As a matter of example see, among others, Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (1999), 30 March 2002, Art.2(1): 'Each Contracting Party shall admit investments by investors of the other Contracting Party, including the establishment of representative offices, in accordance with its legislation and administrative practice and encourage such investments'; Agreement between the Lebanese Republic and the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments (2001), 11 February 2001, Art.2(1): 'Each Contracting Party shall in its territory promote as far as possible investments by

while it can also be found in a separate article defining the scope of application of the treaty.[311] By adopting such model, States Parties are under no obligation to revise their domestic laws of admission and retain the power to repeal some favourable conditions after the treaty has entered into force.[312]

A different scenario characterises the pre-establishment model, whereby States grant national treatment and MFN treatment in all stages of the life of an investment, including the pre-establishment phase.[313] Such treaties do not limit the entry of investments to those in accordance with national legislations. However, no State is willing to accept that any kind of FDI enters its territory, fettering its sovereign prerogatives. Consequently BITs using the pre-establishment model include lists of exceptions –or 'negative lists'– to national treatment and MFN treatment, that exclude the ambits deemed relevant by the State.

This is the solution traditionally resorted to by BITs concluded by the US, Canada, and Japan, and more generally in FTAs. An example can be seen in the 1988 US-Mozambique BIT, which provides that a 'Party may adopt or maintain exceptions to the obligations of [national treatment and MFN] in the sectors or with respect to the matters specified in the Annex to this Treaty.'[314] The annex lists the

investors of the other Contracting Party and admit such investments in accordance with its laws and regulations'.

[311] Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments (2002), 17 July 2002, Art.2: 'The benefits of this Agreement shall apply to the investments by the investors of one Contracting Party in the territory of the other Contracting Party which is specifically approved in writing by the competent authority in accordance with the laws and regulations of the latter Contracting Party'.

[312] As a matter of example, see Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments (2001), 9 May 2002, Art.3(1): 'Each Party shall encourage and promote investments in its territory by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.'

[313] Joubin-Bret, *supra* note 309, at 13.

[314] Agreement between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments (2001), 9 January 2004 (Mozambique-Netherlands BIT), Art.2(2)(a).

fields excluded from national treatment by the US,[315] among which 'atomic energy; customhouse brokers [or] licenses for broadcast'[316] and measures excluded from MFN, such as 'fisheries; air and maritime transport, and related activities; banking, insurance'[317] and so on.

The limitations posed by the definition of investment have not always been strictly interpreted by arbitral tribunals, that on various occasions have extended the range of assets considered as protected by the relevant IIA. On some occasions, tribunals have linked the meaning of the term to the wording of the international instrument containing the State's consent to arbitrate. In doing so, tribunals have disregarded the definition of investment contained in the BIT, to rely solely on the meaning of 'investment' under the ICSID Convention.[318] In an award subsequently annulled by the ICSID Annulment Committee, the sole arbitrator in the *Malaysian Historical Salvors* case considered it unnecessary to apply the Malaysia-United Kingdom (UK) BIT, explaining that the ICSID Convention formed the 'outer-limit' of ICSID's jurisdiction. Consequently, the definition given to investment in the BIT would not alter his decision.[319]

On other occasions, tribunals have removed the reference to the laws and regulations of the host State from the area of definitions of investment and confined

[315] Mozambique, on the contrary, has taken no exceptions to is national treatment obligation or to its MFN obligation.

[316] Mozambique-Netherlands BIT, *supra* note 314, Annex, at para 1.

[317] *Ibid.*, Annex, at para 2.

[318] The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, vol. 575 U.N.T.S. 159, 14 October 1966, Art.25(1), states that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment', without giving a definition of investment for the purposes of the ICSID. Such non-inclusion was deliberate, as the drafters feared that inserting a definition would limit the scope of the convention and create jurisdictional problems, and has led to the formation of the so-called 'two-barrel test', according to which the arbitral tribunal will retain jurisdiction if the activity falls within the definition of investment of both the relevant IIA and the ICSID Convention. See Lopina, 'The International Centre for Settlement of Investment Disputes: Investment Abitration for the 1990s Note', 4 *Ohio State Journal on Dispute Resolution* (1988–1989) 107, at 114.

[319] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, at para.69.

them to a test of legality of the investment.[320] The tribunal in the *Salini* case, by interpreting the 'in accordance with the laws and regulations' of the host State provision contained in the Italy-Morocco BIT,[321] stated that

> '[i]n focusing on 'the categories of invested assets […] in accordance with the laws and regulations of the aforementioned party,' this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.'[322]

This interpretation was followed by later tribunals,[323] that in some cases were called to look into the actual violation by the foreign investor of the laws and regulations.[324]

In recent years, States have attempted to provide for greater clarity in their IIAs by narrowing down the scope of treaty protection, through the inclusion of limitations to the entry of FDI. The mutated circumstances in which investment treaties operate have shown the capacity of broad asset-based definitions to become open-ended, and not effectively limit the applicability of IIAs to activities that were considered by the drafters.[325]A number of narrowing approaches have been adopted,[326] although two main ones can be identified.

In the first approach, the screening already operated by domestic legislations is enhanced by additional treaty exclusions in the definition of investment. While

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[320] Dolzer and Schreuer, *supra* note 197, at 65; Joubin-Bret, *supra* note 309, at 20.

[321] Accordo Tra Il Governo Della Repubblica Italiana e Il Governo Del Regno Del Marocco Sulla Promozione e Protezione Degli Investimenti (1990), 26 April 2000, Art.1.

[322] Salini v. Morocco *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, at para 46.

[323] See, among others, Tokios Tokelés v. Ukraine *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at para 84; Bayindir v. Pakistan, *supra* note 256, at para 110.

[324] See *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007.

[325] UNCTAD, *Scope and Definitions*, UNCTAD/DIAE/IA/2010/2 (2011), at 8.

[326] As a matter of example, some treaties require that a covered investment contribute to the host State's economy or sustainable development. See, e.g., Morocco-Nigeria BIT, *supra* note 291, Art.1.

some treaties provide limited exceptions, excluding solely 'a claim to payment that arises solely from the commercial sale of goods and service',[327] or 'a loan to, or debt instrument issued by, a Contracting Party or a [S]tate enterprise thereof',[328] other treaties adopt a much-narrower approach. The 2010 Colombia - United Kingdom BIT provides that

'Investment does not include:

(i) public debt operations;

(ii) claims to money arising solely from:

a. commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party; or

b. credits granted in relation to a commercial transaction.'[329]

IIAs can, however, resort to sensibly longer clauses,[330] and keep out fields such as, among others, taxation measures[331] or public procurements.[332]

This approach has been resorted to in 20 IIAs over 998 (2,00% of the total) in the period 1967-1999; in 27 cases over 1245 (2,17% of the total) in the period 2000-

[327] Agreement between the Government of the Republic of Korea and the Government of the Union of Myanmar for the Promotion and Protection of Investments (2014), Art.1(h).

[328] Agreement between Japan and Ukraine for the Promotion and Protection of Investments (2015), 26 November 2015, Art.1(1)(c)(iii).

[329] Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), 10 October 2014, Art.1(2)(b).

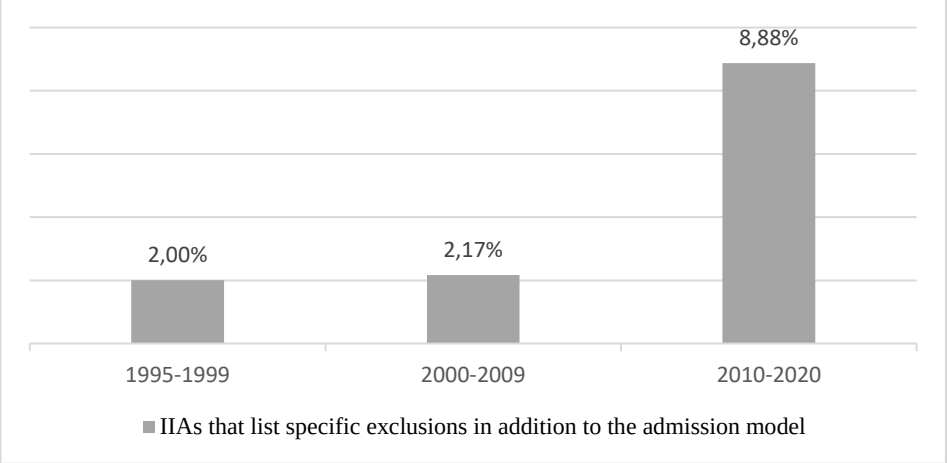
[330] See Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (2005), (terminated), Art.1(1)(ix-xii).

[331] See, among others, Agreement between the Government of the Republic of India and the Government of the United Arab Emirates on the Promotion and Protection of Investments (2013), 21 August 2014, Art.2(1)(3); Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenia for the Promotion and Reciprocal Protection of Investments (2011), (not in force), Art.4(b).

[332] See, among others, India-Malaysia FTA, *supra* note 84, Art.19(1)(2)(b).

2009; in 42 cases over 473 (8,88% of the total) in the period 2010-2020, as shown in Figure 15 below:

Figure 15



A different strategy consists of reversing the listing system. Instead of containing an indicative list followed by exclusions, new treaties increasingly provide a closed list of covered assets, thereby forcing out all activities not specifically indicated. This approach ensures that anything not listed in the definition of investment will not qualify as an investment and aims to ensure more predictable outcomes than broad asset-based definitions.

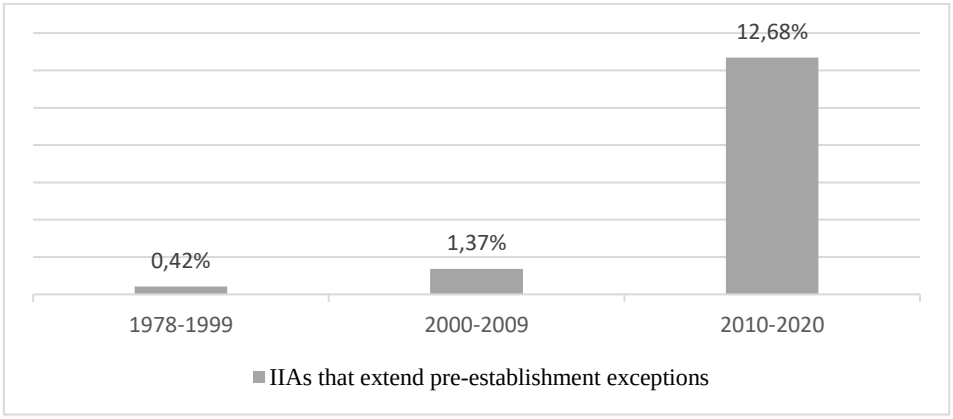
Treaties that contain this kind of clauses show long and detailed contents,[333] usually paired with additional exclusions, in order to further clarify the meaning of

[333] See, as an example, Mexico Model BIT (2008), art.1(5): '"investment" means the following assets owned or controlled by investors of one Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose territory the investment is made: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise; (e) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;

investment. Such approach has been adopted by Mexico and Canada in their Model BITs, and in the NAFTA and USMCA:[334] though in the case of Canada this feature of the Model BIT has not found concretization in many adopted texts,[335] it has been adopted in several recent BITs concluded by Mexico.

New-generation lists can be found in an increasing number of IIAs from 1978 on. More precisely, they appeared in 8 cases over 1896 (0,42% of the total) in the period 1967-1999; in 17 cases over 1245 (1,37% of the total) in the period 2000-2009; in 60 cases over 473 (12,68% of the total) in the period 2010-2020, as displayed by Figure 16:

Figure 16



and (f) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; (g) claims to money involving the kind of interests set out in (a) to (f) above, but no claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above.'

[334] NAFTA Free Trade Commission, *supra* note 46, Art.1139(h).

[335] The only IIAs in which it was adopted are, to date,, *supra* note 112; Free Trade Agreement between Canada and the Republic of Honduras (2013), 10 January 2014.

Restrictive clauses that attempt to limit the jurisdiction of arbitral tribunals found, for both entry models, new attention during the last decade, which witnessed a steep increase in their presence in IIAs. This is, for treaties that resort to the admission model, irrespective of any additional barrier that numerous States have begun adopting following the recent Covid-19 crisis in their domestic legislations.[336] Such developments are in line with the tendencies already emerged in the analysis of voice tactics seen above.

4.2. Disengaging from the investor-State dispute-settlement system

The reassertion of the State's sovereign authority finally covers one of the most-problematic aspects of the investment regime, namely the availability, in almost the totality of second-generation IIAs, of an ISDS system that allows investors to bring an action against the host State directly before an investment arbitral tribunal. By preventing possible disputes to be adjudicated internationally, States aim at avoiding that the exercise of State regulatory powers be subject to international tribunals, searching for the conflict to be dealt with by domestic courts instead.

In the last 30 years, ISDS proceedings initiated by investors against the host State have witnessed a staggering increase, reaching a total of 608 known treaty-based investor-State arbitration (ISA) cases filed against 99 different Countries as to the end of 2014.[337] The rising number of arbitration proceedings, together with the broad range of government measures challenged (including changes to domestic regulatory frameworks) and the sometimes expansive, unexpected and inconsistent interpretations of IIA provisions by arbitral tribunals, has resulted in mounting criticism to the existing ISDS system. This situation has triggered an ongoing worldwide debate over the utility and effectiveness of the current investor-State arbitration structure,[338] with obvious reflections in IIA negotiations.

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[336] OECD, *supra* note 21.

[337] UNCTAD, *supra* note 10, at 146.

[338] See, above all, the works and draft papers of the UNCITRAL Working Group on investor-State Dispute settlement reforms, available at: UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform*, United Nations Commission on International Trade Law, available at https://uncitral.un.org/en/working_groups/3/investor-state (last visited 22 November 2020).

Attempts to limit recourse to ISA are not new in IIAs. So-called alternative methods of dispute resolution (ADR) and dispute prevention policies (DPPs) such as conciliation and mediation, have been included in IIAs since the 1990s and are contained in about 15% of the overall IIA panorama.[339] These instruments attempt to strike a balance between the need for investment promotion and protection and the need to grant regulatory flexibility, as they aim at preventing investors from filing claims before arbitral tribunals and find an agreed solution with the host State. On the one hand, they recognize that the exercise of sovereign prerogatives may be detrimental to the investor, and that depriving the investor of a preferred dispute settlement mechanism might render the legislative framework less appealing to them. On the other hand, they prevent an excessive resort to ISA by investors, as the latter will need to initiate ADR methods in good faith before bringing an action before investment tribunals. A formulation that can often be found reads:

> '[a]ny dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.'[340]

These clauses can be followed by procedural requirements, such as those contained in the treaties based on the Canadian FIPA,[341] or can create ad-hoc bodies, such as focal points, ombudsmen or joint committees,[342] to facilitate the amicable solution of the dispute. Should ADR mechanisms fail, IIAs can provide for a cooling-off period before resorting to arbitration.[343]

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[339] Source: International Investment Agreements Navigator, *supra* note 56.

[340] Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiria for the Promotion and Protection of Investments (2007), 23 March 2009, Art.9; see also, among others, Agreement between the Government of the Republic of Turkey and the Government of the Republic of Singapore Concerning the Promotion and Protection of Investments (2008), 27 March 2010, Art.11.

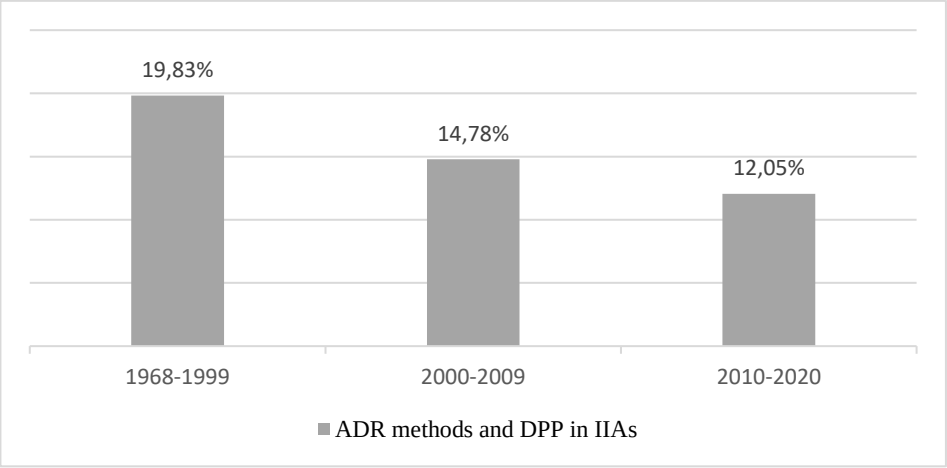
[341] See Canadian Model FIPA, *supra* note 98, Art.26.

[342] Morocco-Nigeria BIT, *supra* note 291, Art.26.

[343] See, among others, Agreement between the Government of the Republic of Macedonia and the Government of the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments (2010), 15 October 2012, Art.8(1); Agreement between the Government of Georgia and the

The inclusion of ADR methods and DPPs was frequent in IIAs during the 1990s and early 2000s, although it has lost momentum in recent years. As shown by Figure 17 below, investment treaties that employed either one of the methods were 392 cases over 1977 (19,83% of the total) in the period 1968-1999; 184 cases over 1245 (14,78% of the total) in the period 2000-2009; 57 cases over 473 (12,05% of the total) in the period 2010-2020. Their misfortune, though apparently in contrast with the underlying trend that can already be spotted in treaty drafting, is due to their little effectiveness, to date, in preventing ISDS. These mechanisms do not solve ISDS main issues, and States are resorting to more efficient ways to limit investors from initiating ISA proceedings. In addition to this, ADR mechanisms are entirely based on the voluntary effort of the parties to the dispute, since no IIA provides for compulsory ADR provisions. Consequently, most States have implemented ADR and DPP efforts at the national level and considered their inclusion in IIAs no more necessary.[344]

Figure 17



Notwithstanding the UNCTAD suggests, among its policy lines for the future, to resort to ADR mechanisms and DPPs,[345] recent developments in IIAs show a

Government of the State of Kuwait for the Promotion and Reciprocal Protection of Investments (2009), 30 May 2013, Art.8(1).

[344] World Investment Report 2013, *supra* note 27, at 113.

[345] *Ibid.*

diminishing trust in the international resolution of investment disputes altogether. State are currently attempting to narrow down the range of cases in which investors can file claims before investment arbitral tribunals. These developments are still but a fraction of the overall number of IIAs, although their inclusion in investment treaties is gaining momentum. The modalities to which this takes place differ greatly.

The most-widespread development to this end is the exclusion of the jurisdiction of specific policy areas from the scope of ISDS provisions. The identification of policy areas depends on the drafting tradition of States: IIAs concluded by Canada based on its Model FIPA, for instance, exclude from arbitration decisions over the admission of an investment in accordance with its national legislation.[346] Turkey excludes ISA for disputes related to the property and property rights upon the real estates.[347] Other instruments exclude areas related to national security,[348] indicated in their security exceptions,[349] or related to labour conditions.[350] Other treaties again task tribunals to dismiss ISDS claims where the investors or the investment have violated host State laws related, among other things, to fraud, tax evasion,

[346] Canadian Model FIPA, *supra* note 98, Annex IV; see, among others, Agreement Between Canada and the State of Kuwait for the Promotion and Protection of Investments (2011), 19 February 2014, Annex 3; Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (2015), 27 March 2017, Annex 3. But see also NAFTA, *supra* note 95, Art.1138 and Annex 1138.2.

[347] Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Cameroon Concerning the Reciprocal Promotion and Protection of Investments (2012), (not in force), Art.10(4)(c); Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments (2009), 22 April 2011, Art.8(4)(b); Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments (2012), (not in force), Art.10(4)(b).

[348] Agreement on Promotion, Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Mexican States (1998), 10 January 1999, Schedule, Art.12 Exclusions.

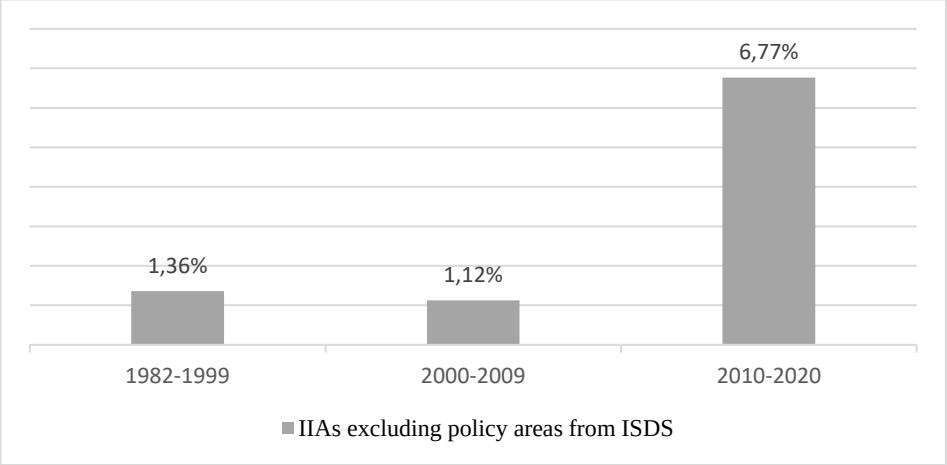
[349] See, among others, Comprehensive Economic Cooperation Agreement between India and Singapore (2005), 8 January 2005, Art.6.12(4); Comprehensive Economic Partnership Agreement between India and the Republic of Korea (2009), 1 January 2010, Art.10.18(3) and Annex 10-C.

[350] BLEU-Colombia BIT, *supra* note 298, Art.VIII(4).

corruption or where the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[351]

While not a consistent presence in overall numbers, the exclusion of policy areas from the scope of ISDS in IIAs has been resorted to by drafting States with increasing frequency and can be found in 25 cases over 1836 (1,36% of the total) in the period 1982-1999; in 14 cases over 1245 (1,12% of the total) in the period 2000-2009; in 32 cases over 473 (6,77% of the total) in the period 2010-2020, as shown by Figure 18:

Figure 18



A more far-fetching development is that of completely excluding the possibility to resort to ISDS. This approach is by no means new, as it constituted the praxis of some Countries such as Germany, Switzerland or France in their early BITs, and by Turkey during the 1990s. This notwithstanding, it was practically abandoned during the early 2000s, when economic liberalization reached its peak.

The exclusion of ISA provisions has found new fortune in IIAs concluded after 2010. In April 2011, the Australian Government publicly announced in a Trade Policy Statement that it would no longer include investor-State dispute resolution procedures in future trade agreements.[352] Such approach later found concretization

[351] Slovakia-Iran BIT, *supra* note 287, Art.14(2).

[352] Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (2011), at 14. See also Kurtz,

in the 2011 Australia-Malaysia FTA,[353] that does not contain any reference to ISA. Australia is not the only State to have sought to disengage itself from the constrictions of ISA commitments in its IIAs. Brazil's recent Model CFIA does not provide for investment arbitration, providing for a system of dispute prevention based on the creation of a focal point, or ombudsman, instead:[354] this text has been included in recent BITs concluded by Brazil in 2015 with Chile, Colombia, Malawi, Mexico, Angola, and Mozambique.[355] Although not in a similar comprehensive fashion, the 2012 Cross-Straits China-Taiwan investment agreement does not to include access to investor-state arbitration.[356]

The exclusion of ISA from IIA texts aims at reducing the States' financial liability arising from ISDS awards and save resources.[357] States may possibly violate the protection provided for in the IIA without incurring in ISA proceedings initiated by the investor.[358] To some extent, however, this approach would be a return to the earlier system, in which investors could lodge claims only in the domestic courts of the host State, negotiate arbitration clauses in specific investor-State contracts or apply for diplomatic protection by their home State. As such, it might prove detrimental for the promotion of new investments in the territory of the interested countries, since the lack of ISA options renders more difficult the judicial scrutiny of State's actions.

A different approach is that resorted to by the EU in its recent FTAs with investment provisions. Although the EU is the most critical actor against ISA in the international panorama, it has not completely abandoned some sort of ISDS in its IIAs, although whether the system contained in such treaties can still be considered

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'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication', 27 *ICSID Review - Foreign Investment Law Journal* (2012) 65.

[353] Free Trade Agreement between Australia and Malaysia (2012), 1 January 2013.

[354] See Vidigal and Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?', 19 *The Journal of World Investment & Trade* (2018) 475.

[355] See: International Investment Agreements Navigator, *supra* note 56.

[356] Cross-Straits Economic Cooperation Framework Agreement (2010), 9 January 2010.

[357] UNCTAD, *supra* note 27, at 115.

[358] Markert, *supra* note 90, at 153.

as ISDS is subject to debate.[359] The mechanism envisaged in the CETA involves the creation of a Tribunal of First Instance and an Appeal Tribunal, also referred to as investment court system (ICS).[360] The same solution has been proposed by the EU Commission in its proposal for Investment Protection and Resolution of Investment Disputes for the TTIP in 2015.[361] The creation of a permanent court excludes the participation of investors to the formation of the adjudicatory body, unlike ad-hoc arbitral tribunals. Although the permanent court will be composed by independent experts, they will be selected among a pool of candidates indicated by the States Parties. Conversely, the 2016 EU-Vietnam FTA[362] introduces an ISDS system which is influenced by the dispute settlement system of the WTO. In this case, there is no possibility for the investor to bring a claim directly against the State.

Overall, either one of the two approaches can be found in 115 cases over 2032 (5,66% of the total) in the period 1959-1999; in 0 cases over 1245 (0% of the total) in the period 2000-2009; in 24 cases over 473 (5,07% of the total) in the period 2010-2020, as shown by Figure 19:

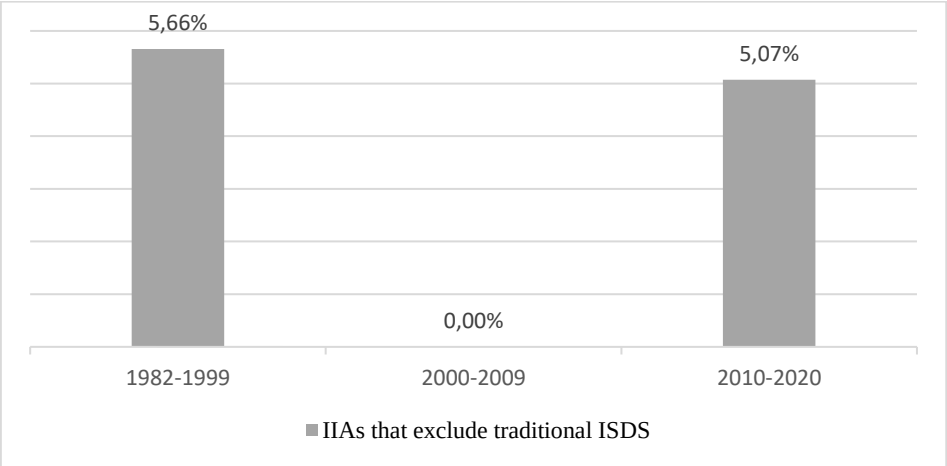
[359] See Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration', 19 *Journal of International Economic Law* (2016) 761.

[360] CETA, *supra* note 80, Art.8.23 ff.

[361] European Commission, *EU Finalises Proposal for Investment Protection and Court System for TTIP*, 12 November 2015, European Commission News Archive, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396&title=EU-finalises-proposal-for-investment-protection-and-Court-System-for-TTIP.

[362] European Commission, *EU-Vietnam Trade and Investment Agreements*, 24 September 2018, European Commission News Archive, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

Figure 19



The developments above indicate a growing mistrust towards the international resolution of disputes in favour of domestic adjudication. This can be seen not only in the rejection of ISDS altogether or in the exclusion of policy areas from ISDS. The progressive abandonment of ADR mechanisms and DPPs is indicative in this regard, as it highlights that not only investment arbitration, but the whole system of international dispute resolution connected to FDI is being ostracised by States. As in all the other cases above, provisions to this end have found fortune or have re-vamped their presence in IIAs during the last decade.

5. Conclusion

At the end of the survey of the IIA panorama, it is possible to answer the research questions presented at the beginning of the present Chapter, namely: what are the developments that can point to the changing relevance of State regulatory authority in IIAs? Do these developments consistently aim towards a reassertion – or an expansion– of the State's regulatory power?

The analysis carried out above shows a wide range of tools that negotiating States have employed to give relevance to their regulatory authority. Based on the effect that they aimed at achieving, these developments have been grouped into so-called *voice* and *exit* tactics. Through voice tactics States attempt, while still adhering to the fundamental traits of the investment regime, to influence the interpretative process of arbitral tribunals so to enhance the relevance of the State's sovereign action in the balance of conflicting interests. Examples to this end are numerous

and have been identified in: the presence of declaratory 'right to regulate' language; the inclusion of new types of general and security exceptions; the clarification of substantive obligations; the mention of non-economic interests, specifically human rights. As already explained, these ambits are considered by scholarship and by the UNCTAD as providing evidence of the changing relevance of State regulatory authority in IIA treaty-making.

Through exit tactics, States abandon some traits of the investment regime that are deemed problematic, in order to safeguard their regulatory powers. These have been identified in the restriction of the notion of investment, which entails the exclusion of entire areas of policy-making from the protection of IIAs, and the abandonment of the ISDS system, with the consequence that alleged violations of the treaty will be decide by domestic courts, or by returning to diplomatic protection. In addition to these, exit elements have been registered with regard to the abandonment of the protection from indirect expropriation or the provision of FET for FDI, analysed alongside the respective voice tactics. Both exit and voice avenues, through the specific tools seen above, highlight how State regulatory authority is given new relevance in IIA treaty drafting.

The survey of IIAs then indicates a steady increase in the effort of negotiating States to ensure greater respect for their regulatory authority in new-generation treaties. Not all the developments are a novelty in the IIA panorama: as a matter of example, the inclusion of self-judging security exceptions dates back to 1977, with the France-Syria BIT. This notwithstanding, if attempts to reassert the State's regulatory power could be found already during the last century, they were often scarce or framed in general terms. Conversely, with the new century, and especially in the last decade, what can be referred to as new-generation provisions, that frame the regulatory power of the State in direct and specific terms, can be found at an increasing pace. This emerges in the analysis of the numerous drafting techniques surveyed above, that have experienced a steady increase (e.g., the inclusion of declaratory right to regulate language, see Figure 2), a boom (e.g., the inclusion of GATT-style security exception, see Figure 6), or a revamp (e.g., the abandonment of the ISDS system, see Figure 19) in the last decade.

As seen above, with the exception of HR language, which has been included in almost 40% of new IIAs in the last decade (Figure 14), all other developments remain limited when confronted to the overall number of IIAs. Many are the reasons for adopting a traditional phrasing, even in recent years: broader expressions grant investment greater protection and can serve as a better incentive to attract foreign capitals; arbitral jurisprudence is clarifying the scope of traditional clauses and contracting States are more aware of the meaning of substantive provisions even if drafted in general terms; smaller Countries or developing Countries may not have the legal expertise to insert new-generation provisions in their IIAs, and so on. In addition, the several developments addressed above take place in an uneven fashion. While some IIAs reflect a more comprehensive approach and include several new-generation provisions, in other cases detailed wordings are but a sporadic appearance among old-style clauses.

The analysis carried out in the Chapter then clarifies how FDI protection still remains a primary aim of IIAs. The abandonment of indirect expropriation is increasing at a lower rate than the other developments (Figure 10), while not including FET has experienced little variation since the conclusion of first-generation treaties (Figure 11). The main traits of the international investment regime, as seen in traditional IIAs are therefore still present, although the obligations towards FDI are clarified and narrowed.

It is undeniable, however, that the drafting approach is changing and that it is changing in a consistent and widespread manner, so that it is possible to identify a clear tendency towards the reassertion of State regulatory power in IIA drafting. Through the different avenues seen above, States act as 'masters of the treaty' and draft new IIAs paying more attention to the balance of conflicting interests, in an attempt to give renovated relevance to the continuous exercise of their regulatory powers. The underlying effort is that of curtailing the law-making power of arbitral tribunals,[363] either in favour of the tribunals' role of adjudicators or of by depriving the latter of the ability to scrutinize the exercise of (some areas of) regulatory powers.

[363] Stone Sweet, *supra* note 52, at 41.

These effort are buttressed by the other minor instances not addressed here and recalled at the beginning of the present Chapter, namely exit behaviours that involve the abandonment of the international protection of FDI (see *supra,* at Paragraph 1, and Chapter 1, Paragraph 4) or voice behaviours that target the interpretation of IIAs already adopted, as seen *supra* at Paragraph.2.

Ultimately, all these developments indicate the reassertion of State sovereignty that is currently taking place in investment treaty drafting, and reflect the approach that the primary actors in the international arena, namely States, are expressing when it comes to the relevance of their sovereign prerogatives.

IIAs that are currently being concluded will then constitute the basis for future investor-State relationships and disputes. Although the exact interpretation of new-generation provisions still needs to be tested by arbitral tribunals, following the changing features of treaty language, it should not come as a surprise if the developments in arbitral tribunals' jurisprudence in the forthcoming years will show a greater respect for this aspect of State sovereignty.[364] However, as seen throughout the Chapter, although the intention of treaty drafters can be clear, on several occasions treaty texts might not provide the expected clarity or lead to the results hoped for. If the effectiveness of such trend will be evident only in the years to come, when new-generation IIAs will be analysed and applied by arbitral tribunals, the analysis of arbitral jurisprudence stemming from old-generation treaties can offer some indications in this regard.

[364] Although, for a cautious voice on the relationship between treaty amendments and arbitral jurisprudence, see Berge and Alschner, *supra* note 102.

CHAPTER III

A theoretical framework for the study of State sovereignty in international investment arbitral jurisprudence

1. Introduction – 2. A general approach to the study of investment arbitral jurisprudence – 3. Identifying a working parameter: the degree of deference paid to the State's regulatory authority – 3.1. Investment arbitration as a form of public-law review – 3.2. Employing public-law tools: the standard of review – 3.3. Deference in investment arbitration – 4. Restricting the scope of the analysis – 5. The method employed in the present analysis – 6. Conclusion

1. Introduction

The evolution of the normative framework is not, in and of itself, enough to explain the transformations that the international investment regime is currently undergoing and constitutes an informative but partial study of the latter. The focus on treaty texts reflects the attitude of States as emerging from treaty negotiations and allows considerations from a *pro future* perspective, while it remains silent on the consideration and application of international investment law as it stands today. As already emerged on numerous occasions (see, among others, Chapter 2, Paragraphs 3.2.1. and 3.2.2. on general exception clauses and security exception clauses), the inclusion of a specific wording in the treaty does not guarantee that the latter will achieve the effects aimed at by its drafters. In addition, numerous IIAs among those recalled in the previous Chapter are not currently in force or have not yet been ratified by all their Parties, thereby displaying no effects for the time being and leaving the regulation of a great number of investor-State relationships to first-generation IIAs.

It seems clear that any attempt that aims to grasp the transformation of the international investment regime cannot limit its scope to the text of IIAs but needs to delve into the study of the case law of investment arbitral tribunals. In international law, the role of international adjudicators has gradually shifted from that of mere dispute-resolution bodies, to that of displaying creative traits that 'may have considerable consequences for the regulatory autonomy of [S]tates, thus affecting the

space for domestic democratic government.'[1] In doing so, tribunals, through the practice of interpretation, contribute to the making of international law.[2] This emerges with particular emphasis in the international regulation of FDI, where standard-like treaty clauses can often be interpreted only by reference to previous arbitral awards, to an extent that 'to understand [international investment law] means knowing the practice of investment treaty tribunals'.[3]

The following Chapters build upon the study carried out in the previous one by examining the role that State sovereignty plays in the jurisprudence of investment arbitral tribunals. In particular, if the analysis so far has highlighted the existence of a trend towards a greater role for the State's regulatory authority in international investment treaty drafting, the following Chapters will survey investment arbitral jurisprudence to determine whether it unfolds and develops along similar lines. In order to do so, the study aims at answering the following research questions: is it possible to pinpoint a parameter that indicates the respect that arbitral tribunals pay to the host State's sovereign regulatory authority and that allows to compare arbitral jurisprudence under the lens of State sovereignty? If so, is it possible to identify any consistent tendency or trend in investment arbitral jurisprudence?

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[1] Bogdandy and Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', in A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (2012) 3, at 7.

[2] On the law-making role of the ICJ, see, e.g.: C. Chinkin and A. Boyle, *The Making of International Law* (2007), Chapter VI; M. Đorđeska, *General Principles of Law Recognized by Civilized Nations (1922-2018)* (2019), General Principles of Law Recognized by Civilized Nations (1922-2018), at 31–53; Enabulele, 'Judicial Lawmaking: Understanding Articles 38(1)(d) and 59 of the Statute of the International Court of Justice', 33 *The Australian Year Book of International Law Online* (2015) 15. For a less-emphatic approach that prefers the term 'development' over 'law-making', see Tams, 'The ICJ as a 'Law-Formative Agency': Summary and Synthesis', in C. J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013) 377, at 397. For an overview of how legal doctrines have framed interpretation into the theory of sources, see, among others, I. Venzke, *The Practice of Interpretation: A Theoretical Perspective* (2012).

[3] Schill, 'Sources of International Investment Law - Multilateralization, Arbitral Precedent, Comparativism, Soft Law', in J. d'Aspremont and S. Besson (eds.), *The Oxford Handbook on the Sources of International Law* (2017) 1095, at 1105.

The existence of any trend in international investment arbitration is far from clear and constitutes a field that international investment scholarship has little (if not at all) enquired, thereby leaving any discussion on the dynamics of the international investment regime devoid of a proper analytical basis.[4] In which direction (if any) arbitral case law is evolving is then uncertain. In the words of Alvarez,

> 'if, as indicated, international investment law is driven by the jurisprudence produced by investment arbitrators, does that jurisprudence provide a firewall to protect foreign investors against trends in favor of "re-balancing?" This is far from clear.'[5]

The reasons for such a lack of enquiry are manifold, although they can be tracked down to the inherent nature of the ISDS system, which is scattered into a multitude of ad-hoc arbitral tribunals that interpret often-different treaty texts while formally unbound by other tribunals' findings. A sound methodological approach thus becomes necessary to correctly frame the present research. The present Chapter will lay down the research method and, contextually, will answer the first research question presented above, namely the identification of a working parameter to carry out the study. The following Chapters will proceed with the survey of investment arbitral case law through the chosen method and will try to answer the second research question, determining whether any consistent development can be identified. Should the outcome be in the positive and the existence of a trend emerge, the results will offer important indications as to the overall evolution of the role of State sovereignty in the international investment regime and as to the relationship between its normative and judicial components.

[4] The works that deal with numerous aspects of the so-called return of the State in investment law and investment arbitration do not tackle in a general and structured way the evolving role of State sovereignty in international investment arbitration. See C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011); A. Kulick, *Reassertion of Control over the Investment Treaty Regime* (2018).

[5] Alvarez, 'The Return of the State', 20 *Minnesota Journal of International Law* (2011) 223, at 241.

2. A general approach to the study of investment arbitral jurisprudence

Before dealing with the research method, due account must be given to the possibility of conducting the analysis of investment arbitral case law from a *general* perspective in the first place. Such an endeavour faces several hurdles related to the very architecture of the ISDS system. The latter follows the traditional traits of international arbitration (and international commercial arbitration)[6] and is based on elements that, although much criticized nowadays, have determined the success of the system: these are the *ad-hoc* nature of investment arbitral tribunals, the lack of a rule of binding precedent, and the confidentiality of the proceedings. These traditional elements have acquired a different significance following the practice of investment arbitral tribunals or are being abandoned as a result of the effort of States. Ultimately, they do not encumber the analysis of investment arbitral case law from a general point of view.

The first peculiar trait of investment arbitration is the *ad-hoc* composition of arbitral tribunals, common not only to arbitration under IIAs,[7] but also to institutional arbitration.[8] It entails that a tribunal be specifically constituted for the particular dispute on the basis of an agreement of the parties, and that it fulfil its scope once the proceedings are concluded.[9] Such a structure is not affected by institutional rules, which merely provide a set of rules and apparatus to support arbitral

[6] See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Edition, 2012), at 222. For an overview of the traits of international commercial arbitration, see R. H. Kreindler and T. Kopp, *Commercial Arbitration, International*, November 2013, Max Planck Encyclopedia of Public International Law, available at https://opil-ouplaw-com.proxy.uba.uva.nl:2443/view/10.1093/law:epil/9780199231690/law-9780199231690-e1508 (last visited 24 September 2019).

[7] Ad-hoc arbitrations most commonly use the UNCITRAL Arbitration Rules as the basis for their procedure, although IIAs may provide that the parties are free to determine their own rules. See Sasson, 'Investment Arbitration: Procedure', in M. Bungenberg et al. (eds.), *International Investment Law* (2015) 1288, at 1299.

[8] The latter being arbitration carried out under the auspices of international institutions. See *Ibid.*, at 1298.

[9] Schreuer, 'Investment Arbitration', in C. P. R. Romano, K. J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 295, at 297.

tribunals.[10] Though meant to grant a better expertise of arbitrators, the ad-hoc nature of arbitral tribunals directly affects the coherence of the investment regime and the consistency of its decisions,[11] since every newly appointed tribunal is completely different and potentially disengaged from the findings of previous tribunals.

Connected to the first trait is the absence of a doctrine of legally binding precedent or *stare decisis* in international investment arbitration.[12] In common-law systems, the rule of binding precedent requires a court to apply the law in the same manner as prior decisions when those decisions were rendered by higher or, occasionally, equally situated courts.[13] The absence of a *stare decisis* rule in the ISDS system does not differ from the well-established practice of international law:[14] as a matter of example, Art. 59 of the ICJ Statute, which provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case', has been consistently interpreted as excluding the system of binding precedent.[15] Likewise, in the WTO context, Appellate Bodies have consistently

[10] As a matter of example, Article 37(2)(a) of the ICSID Convention provides that '[t]he Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.' Convention on the Settlement of Investment Disputes between States and Nationals of Other States, vol. 575 U.N.T.S. 159, 14 October 1966, Art.37(2)(a).

[11] Schreuer, *supra* note 9, at 297.

[12] Schreuer and Weiniger, 'Doctrine of Precedent?', in P. T. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 1188; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 102.

[13] Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation', 65 *Louisiana Law Review* (2004–2005) 775, at 783.

[14] Bernhardt, 'Article 59', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* 1st (2006) 1231, at 1244.

[15] In the words of the PCIJ, later referred to by the ICJ, 'the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes.' PCIJ, *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)*, PCIJ Rep Series A No 7, 25 May 1926, at 19. Later recalled in ICJ, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, General List No. 68, 21 March 1984 3, at 26.

argued against the existence of a rule of binding precedent, this time in the silence of the Dispute Settlement Understanding on the matter.[16]

IIAs language is no exception. Several agreements follow the wording of Art. 1136(1) of the NAFTA, now replicated by Art. 14.D.13(7) of the USMCA, which provides that '[a]n award made by a [t]ribunal shall have no binding force except between the disputing parties and in respect of the particular case',[17] or similar phrasing.[18] The absence of a rule of legally binding precedent is then usually found in Art. 53(1) of the ICSID Convention,[19] according to which '[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'.[20]

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[16] WTO, *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, World Trade Organization, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm (last visited 24 September 2019). WTO Tribunals have often cited the passage of the Japan – Alcoholic Beverages case that, referring to Panel Reports, states: '[…] they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.' *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 4 April 1996, Appellate Body Report, AB-1996-2. For Reports that cite this decision, see, among others, *United States - Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, Appellate Body Report, AB-2008-1, at para 38.

[17] North American Free Trade Agreement, 32 ILM 289, 605 (1993), 1 January 1994 (NAFTA), Art.1136(1); Agreement between the United States of America, the United Mexican States, and Canada (2018), 1 July 2020 (USMCA), Art.14.D.13(7). An identical text is contained in IIAs based on the U.S. Model Bilateral Investment Treaty (2012), Art.34(4) and the Canadian Model Foreign Investment Protection Agreement (2004), Art.45(1). .

[18] See, among others, Agreement Between Japan and The Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (2018), 15 May 2019, Art.24(19): '[t]he award rendered by the arbitral tribunal shall be final and binding upon the disputing parties'. See also, Australia - Peru Free Trade Agreement (2018), not in force, Art.8(30)(7). Though not resorting to an explicit wording like the one contained in NAFTA, this clause can be safely interpreted in the sense that the award will produce no binding effects toward third parties. .

[19] Bungenberg and Titi, 'Precedents in International Investmnet Law', in M. Bungenberg et al. (eds.), *International Investment Law* (2015) 1505, at 1507.

[20] ICSID Convention, *supra* note 10, Art.53(1). The absence of a rule of legally-binding precedent is finally confirmed by the negotiating history of the latter, which demonstrates that it was never the intention of the Parties to confer a broader effect to such provision. See C. H. Schreuer and L. Malintoppi, *The ICSID Convention: A Commentary* (2nd ed., 2009).

Arbitral tribunals, on their end, have consistently acknowledged that there is no doctrine of binding precedent and that they are not bound by precedent decisions.[21] As framed by the tribunal in *El Paso v. Argentina*,

> 'ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present [t]ribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*.'[22]

Notwithstanding all the above, international courts often make use of previous decisions to inform their reasoning. Although judicial decisions are but a subsidiary means for the determination of the rules of law, as indicated by Art. 38 of the ICJ Statute, the practice of international courts shows that they regularly rely on the rulings of previous tribunals in similar cases. The exclusion of the *stare decisis* rule does not prevent the decisions of the ICJ from having precedential force,[23] while the WTO system accords *de facto* precedential value to Appellate Body reports.[24]

In a similar fashion, it is a feature of the investment regime that arbitral tribunals rely on previous arbitral awards to buttress their legal reasoning and consider them as authoritative statements of applicable rules or principles of law.[25] The reliance on precedent stems from one of the main traits of the international investment regime, namely the presence of treaty provisions that, although different in their exact wording, contain substantive provisions that are similar, for the most part, in

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[21] A. Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (2012), at 114See, among others, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, at para.97.

[22] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, at para.36.

[23] M. Shahabuddeen, *Precedent in the World Court* (1996), at 107–109.

[24] See Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)', 9 *Journal of Transnational Law Policy* (1999) 1.

[25] Newcombe and Paradell, *supra* note 12, at 103. See El Paso v. Argentina, *supra* note 22, at para.39: 'It is [...] a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent'.

form and structure and can thus inform each other's decision.[26] Although, to date, no structure of precedent has coalesced even in the context of regional treaties,[27] the interpretation of IIAs shows a steady interrelation between decisions, as well as recourse to cross-treaty interpretation by arbitral tribunals. Reference to this end crosses the boundaries of treaty practice of the home State or the host State in a particular dispute,[28] and extends to unrelated third-Country BITs.[29]

The non-applicability of the common-law *stare decisis* doctrine has thus not precluded the formation of an orderly body of jurisprudence, or of what has been referred to as a *de facto* practice of precedent.[30] Such a body of jurisprudence has been analogised to the concept of *jurisprudence constante*, typical of the French civil-law tradition,[31] which can be defined as 'the progressive acceptance of certain precedents through a process of influence by judicial decisions that have elaborated on particular questions.'[32] Tribunals resort to previous decisions to satisfy a wide

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[26] Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence', 24 *Journal of International Arbitration* (2007) 129, at 141.

[27] Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', in C. Picker, I. Bunn and D. Arner (eds.), *International Economic Law: The State and Future of the Discipline* (2008) 265, at 270.

[28] See *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, at paras.291 ff.

[29] S. W. Schill, *The Multilateralization of International Investment Law* (2009), at 305–312. See *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at para.51. Still, the simple fact that recourse to precedent has been consistently made even when the cases cited did not address identical texts does not entail that in the presence of the same treaty text arbitral tribunals will be bound by each other's lead in the interpretation of treaty provisions. See M. Kinnear, A. K. Bjorklund and J. F. G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), at 1103-11-1103–22.

[30] Schreuer and Weiniger, *supra* note 12, at 1196; Reinisch, 'The Role of Precedent in ICSID Arbitration', in C. Klausegger et al. (eds.), *Austrian Yearbook on International Arbitration, Volume 2008* (2008) 495, at 508.

[31] Bjorklund, *supra* note 27, at 272.

[32] Bungenberg and Titi, *supra* note 19, at 1509. Unlike in common law, this doctrine adopts a written text as a starting point, and seems to better fit international investment treaties. It then not only refers to the weight given by lower courts to the decisions of higher courts for practical purposes, but also,

range of purposes: they can do so in order to highlight similarities in points of fact or law and exercise persuasive force in the case at hand;[33] to justify differing interpretations based on differences in facts or in the underlying treaty text;[34] to reinforce interpretations made in accordance with Arts.31 and 32 of the VCLT,[35] among other things.[36]

Some tribunals have argued for the duty to adopt solutions established in a series of consistent cases and the duty to contribute to the harmonious development of investment law,[37] thereby considering the purpose of investment treaties as that of promoting and protecting investments, depoliticizing international disputes, and fostering the predictability of the legal environment.[38] Consistency, in this regard, is viewed by some authors as one of the necessary goals of investment arbitration, given the relatively unrefined character of international investment law as opposed to other international law regimes and the recurring issues that must be resolved 'by the application of one and the same rule of law',[39] although this view is very much

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and most importantly, to the use of decisions of equal or lower courts to provide a positive (or negative) model for the case under con-sideration. See Bjorklund, *supra* note 27, at 272.

[33] See *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986 at para.16(11).

[34] See *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, at para.143.

[35] See *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL Award on Jurisdiction, 28 January 2008, ar paras.49-50.

[36] Rigo Sureda, *supra* note 21, at 117–120. See also Schill, *supra* note 29, at 328.

[37] See *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, at para.67: 'The Tribunal […] is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.

[38] Rigo Sureda, 'Precedent in Investment Treaty Arbitration', in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 830, at 838.

[39] Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture', 23 *Arbitration International* (2007) 357, at 376.

debated among scholars.[40] States Parties to IIAs are, on the other hand, interested in the consistency of adjudication, given the fact that they can be (and in some cases are) repeat players in investor-State proceedings.[41] Doctrinal or policy discussions are rare among tribunals that prefer to grant value to precedent as a result of their 'persuasive' force, rather than in the name of any intrinsic binding value.[42] Leaving the doctrinal debate aside, in the presence of open-ended treaty language, the indication of how previous arbitral tribunals have considered and resolved similar issues is sought by tribunals as a matter of legitimacy of the award.[43]

The increasing reliance on previous case law is then made possible by the gradual abandonment of the third trait of investment arbitration, namely the confidentiality of the proceedings. The debate on the transparency of arbitral proceedings has been dominated by issues such as third-party participation to ensure greater public accountability, mainly through the possibility to make the hearings open to the public, the admission of third-party submissions and the disclosure of documents of the proceedings to third parties.[44] However, it has also touched upon a more-relevant

[40] For views against the need for consistency, see, among others, Cheng, 'Precedent and Control in Investment Treaty Arbitration', 30 *Fordham International Law Journal* (2006–2007) 1014; Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?', 25 *ICSID Review - Foreign Investment Law Journal* (2010) 104; Schultz, 'Against Consistency in Investment Arbitration', in *The Foundations of International Investment Law: Bringing Theory into Practice* (2012) 297.

[41] Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration', in *The Foundations of International Investment Law: Bringing Theory into Practice* (2012) 257, at 270; Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration', 51 *Columbia Journal of Transnational Law* (2012–2013) 418, at 420.

[42] Reinisch, *supra* note 30, at 510.

[43] Commission, *supra* note 26, at 158.

[44] See, among others, Bernardini, 'International Commercial Arbitration and Investment Treaty Arbitration', in D. D. Caron et al. (eds.), *Practicing Virtue: Inside International Arbitration* (2015) 52; Asteriti and Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 787; Euler, 'Transparency Rules and the Mauritius Convention: A Favourable Haircut of the State's Sovereignty in Investment Arbitration?', 34 *ASA Bulletin* (2016) 355.

matter to the present analysis, namely the publicity of decisions of arbitral tribunals, be they final awards or preliminary rulings.

In the silence of investment instruments,[45] rules regulating international arbitration generally forbid awards to be published without the consent of the parties to the dispute. In recent years, however, institutional rules have been amended to achieve greater transparency. The 1968 version of Art. 48(5) of the ICSID Rules of Procedure indicated that '[t]he Centre shall not publish the award without the consent of the parties.'[46] A second sentence was added in 1984, according to which the Centre *may* publish excerpts of the legal rules applied by a tribunal,[47] and, after the 2006 amendment, it now provides that the Center '*shall* […] promptly include in its publications excerpts of the legal reasoning of the Tribunal'[48] in cases where the parties do not consent to the publication of the award in full. Moreover, since these Rules are directed to the Center only, nothing prevents the parties from releasing the award and make it available to the public, unless they specifically agree to make it confidential.[49] Helped by the fact that the ICSID Secretary-General is under an obligation to publish information about requests for arbitration, and that the registry of ICSID arbitrations is publicly available, most of ICSID decisions reach the public domain, often times in their full text.[50] Similar changes are then taking place in

[45] As to October 2019, only 50 of the 2577 IIAs mapped in the UNCTAD website contained provisions on the transparency of the proceedings. See *International Investment Agreements Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 10 March 2021).

[46] ICSID, Rules of Procedure for Arbitration Proceedings, 1968, Art.48(5); see also the original text of UNCITRAL, UNCITRAL Arbitration Rules, 1998, Art.32(5); Stokholm Chamber of Commerce (SCC), Arbitration Rules, 2017, Art.3.

[47] ICSID, Rules of Procedure for Arbitration Proceedings, 1984, Art.48(5).

[48] ICSID, Rules of Procedure for Arbitration Proceedings, 2006, Art.48(5).

[49] Schreuer and Malintoppi, *supra* note 20, at 836.

[50] F. Ortino, *External Transparency of Investment Awards*, 14 July 2008, Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, available at https://papers.ssrn.com/abstract=1159899 (last visited 26 September 2019); Schreuer and Malintoppi, *supra* note 20, at 837.

arbitration rules, such as the UNCITRAL Arbitration Rules,[51] or the Secretariat's Guide to the ICC.[52]

Finally, IIAs address the issue of transparency in their provisions and, in most recent cases, have shifted from granting the parties the option to choose transparency to imposing a *duty* of transparency: some treaties follow the template provided by the UNCITRAL Transparency Rules and compel parties to make 'orders, awards, and decisions of the tribunal' available to the public,[53] or indicate that '[t]he arbitral award shall be public, unless the disputing parties agree otherwise',[54] or similar wording.[55] Other IIAs adopt a more-comprehensive approach, such as the USMCA, which provides that

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[51] The UNCITRAL, UNCITRAL Arbitration Rules, 2010 regulated some scenarios where the award can be made publicly available even without the con-sent of the parties at their Art.34(5), that stated: 'An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.' Their new Article 1(4) adopted in 2013 incorporated the text of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2013, Art.3(1), providing for the publication, among other things, of 'orders, decisions and awards of the arbitral tribunal'.

[52] The Secretariat's Guide to the ICC clarifies that '[t]he Rules do not provide that the arbitration proceedings are confidential.' See J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration* (2012), at para.3-807 .

[53] See, among others, Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (2015), 20 December 2015, Art.9(17)(e); Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (2016), 25 January 2018, Art.20(1)(e). See also US Model BIT, *supra* note 17, Art.29(1)(e).

[54] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (2007), 25 July 2007, Art.18(4).

[55] Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (2015), 11 October 2017 (Burkina Faso - Canada BIT 2015), Art.32(1): ' A Tribunal award under this Section shall be publicly available, including via the internet, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information'. The Canadian Model FIPA does not allow the derogation of the duty of transparency, at Art.38(3), according to which '[n]otwithstanding paragraph 3, any

'1. […] the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Annex Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions […];

(d) minutes or transcripts of hearings of the tribunal, if available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.'[56]

All these elements combined (and especially the effort towards transparency carried out by the ICSID) have led to concrete results. From the early 2000s, the number of publicly available awards and preliminary rulings rendered in known investment arbitrations is around 90% of the total.[57]

Given all the above, although fragmentation of arbitral proceedings remains an inherent trait of investment arbitration, one must note the steady tendency towards the cross-influence among arbitral awards, which operates notwithstanding the ad-hoc nature of arbitral tribunals, the absence of a rule of *stare decisis*, and the differences in treaty texts. It is clear that the unpredictability of the outcomes of arbitral proceedings is still intrinsic to investment adjudication. However, this does not negatively affect the development of a body of jurisprudence, especially when the interconnection and interrelation of awards is a fundamental element of the legal reasoning of tribunals. Consequently, the structure of the ISDS system does not prevent from studying the jurisprudence of arbitral tribunals as a unitary body and to focus on its variations.[58]

Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information', although such wording has not yet been adopted in final treaty texts.

[56] USMCA, *supra* note 17, Art.14.D.8.

[57] Ortino, 'Transparency of Investment Awards', in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2012) 119, at 127–131.

[58] On a final note, the very existence of a permanent court does not entail that previous judgments

3. Identifying a working parameter: the degree of deference paid to the State's regulatory authority

Once the possibility of studying investment arbitral jurisprudence in general terms has been clarified, the problem of identifying a working parameter that indicate the measure of respect for State regulatory authority by investment arbitral tribunals arises. To this end, the present study resorts to the methodological framework offered by a (relatively) recent stream of international scholarship that frames investment arbitration through the *standard of review* doctrine, and identifies the relevant criterion with the degree of *deference* employed by arbitral tribunals in the analysis of State measures. The reasons guiding this choice will be here listed and later delved into in the following paragraphs.

The identification of a space of manoeuvre that arbitral tribunals grant to States implies that one party to the arbitral proceedings (the State) be of a different nature –and thus entitled to different prerogatives– than the other (the investor). The unequal nature of the parties to the dispute is better grasped when locating international investment arbitration among the dispute-resolution mechanisms that pertain to the public realm, as it opposes a private investor to a public entity that exercises sovereign functions (see *infra*, Paragraph 3.1.). Accordingly, tools commonly employed to frame adjudication under public or public international law better allow to understand the role of international arbitral tribunals when confronted with the regulatory action of sovereign entities and to disclose whether the former respect sovereign regulatory space.

The ISDS system has been described by some as showing inherently public international traits because of its treaty-based genesis and its jurisdiction on issues

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will not be overridden. Notwithstanding the persuasive value of the ICJ's precedents, there are several cases where the Court has used language recognising the existence of a power of departure, even when ultimately not resorting to it. See ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962) - Separate Opinion of Judge Tanaka*, I.C.J. Reports 1964, 24 July 1964 65, at 66, 69; Shahabuddeen, *supra* note 23, at 128 ff. Nor does the existence of the rule of stare decisis preclude the departure from precedent, as proved by the experiences of domestic systems.

of international responsibility of States for alleged violations of international legal obligations.[59] Under this line of reasoning, investor-State arbitration shows common traits with other avenues of public international law, such as the WTO or the HR regime, in which international courts scrutinize decisions of national entities concerning regulation that is allegedly inconsistent with the international rule.[60] A different line of scholarship has associated investor-State arbitration with national State liability regimes, justifying a functional comparison of ISDS with the judicial review carried out domestically by constitutional and administrative courts.[61] Both approaches conceive investor-State disputes in public terms and consider it possible to resort to the standard of review doctrine to frame the analysis of arbitral tribunals' reasoning and to graduate the intensity of the scrutiny of the State's regulatory action through the degree of deference employed by the tribunal (see *infra*, Paragraph 3.2.).

The degree of deference indicates the measure of restraint exercised by arbitral tribunals in the scrutiny of State measures and entails the recognition of an ambit of discretion to the primary decision-maker. For this reason, it is considered a viable parameter for the identification of the respect for State's regulatory authority –and consequently for State sovereignty– reflected in the jurisprudence of investment arbitral tribunals. The adoption of a more (or less) deferential standard of review in the analysis of State measures can serve as an indicator of a greater (or lesser) recognition of sovereign space and can guide the analysis accordingly (see *infra*, Paragraph 3.3.).

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[59] E. De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014), at 202 ff.

[60] Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 90 *The American Journal of International Law* (1996) 193, at 194.

[61] See, e.g., Burke-White and von Staden, 'Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations', 35 *Yale Journal of International Law* (2010) 283, at 291; Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107 *The American Journal of International Law* (2013) 45, at 46 ff; Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier', 4 *Law & Ethics of Human Rights* (2010) 46, at 58–59; A. Van Aaken, OECD, *The Interaction of the Remedies between National Judicial Systems and ICSID: An Optimization Problem* (2012), Investor-State Dispute Settlement, Summary Reports by Experts at 16th Freedom of Information Roundtable 1, at 8.

These elements will receive more-detailed discussion in the following paragraphs, that will look into the debated nature of investor-State arbitration and into the standard of review analysis informed by the level of deference.

3.1. Investment arbitration as a form of public-law review

The standard of review analysis entails that international investment arbitration be considered as a form of public-law review. However, the very nature of investment arbitration is subject to debate.

Some commentators understand investment arbitration as a peculiar form of international commercial arbitration.[62] The latter heavily informs the structure of investment arbitration, serving as a template over which it has been modelled,[63] and has constituted the professional background of many arbitrators that decided over investment disputes.[64] International commercial arbitration is grounded in the principle of party equality, according to which no party can claim special treatment or one-sided privilege[65] and that is closely tied to the principle of party autonomy, which gives the parties control over the process that will be used to resolve their dispute.[66] Scholars that follow this approach confer primary importance to the private law aspects of the relationship between host governments and foreign investors: as stated by one commentator, 'modern international investment law inclines

[62] See Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working', 59 *Hastings Law Journal* (2007–2008) 241, at 251. Other commentators completely identify commercial and investment arbitration. See Brower, Brower and Sharpe, 'The Coming Crisis in the Global Adjudication System', 19 *Arbitration International* (2003) 415.

[63] Legum, 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration', 60 *Dispute Resolution Journal* (2005) 70, at 72.

[64] Wälde, 'The Multiple Asymmetries in Investment Arbitration', in *Les Aspects Nouveaux Du Droit Des Investissements Internationaux* (2006) 76, at 76.

[65] Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-Actively, the Equality of Arms', 26 *Arbitration International* (2010) 3, at 6.

[66] Dickson, 'Party Autonomy and Justice in International Commercial Arbitration', 60 *International Journal of Law and Management* (2018) 114, at 116.

to 'lower' [State-individuals] relationships to the private law level and 'elevate[s]' their protection to the international level.'[67]

From this perspective, States and investors are equal disputing parties, and States are not entitled to different treatment.[68] Accordingly, the concept of standard of review is not applicable, as granting deference to one of the parties (the State) to the detriment of the other (the investor) would disrupt the principle of party equality; under this approach, deference is considered an 'arbitral heresy'.[69] What follows is that deference-based standards of review are disregarded, since they entail the continuous capacity of States to regulate in the public interest vis-à-vis a private entity or person,[70] ultimately granting a privileged position to the State.

However, if understanding investment arbitration as a peculiar form of international commercial arbitration may find justification when arbitration is stemming from investment contracts (considered as falling within the realm of international commercial arbitration when the State is acting in a private capacity),[71] the same cannot be said for treaty-based arbitration. The latter is disconnected from the existence of a previous relationship between the State and the investor (and is defined as *arbitration without privity*)[72] and is often grounded in acts of the State adopted in the exercise of its sovereign powers, be they legislative, executive or judicial. Disputes may touch upon State regulations aimed at protecting fundamental interests and values such as, among other things, access to water, public health or cultural polices. The very general offer (and the ensuing consent) to arbitration

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[67] Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 97, at 114.

[68] See Wälde, *supra* note 65, at 15.

[69] As defined by Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577, at 586.

[70] Foster, 'Adjudication, Arbitration and the Turn to Public Law 'Standards of Review': Putting the Precautionary Principle in the Crucible', 3 *Journal of International Dispute Settlement* (2012) 525, at 525.

[71] G. Van Harten, *Investment Treaty Arbitration and Public Law* (2008), at 63.

[72] See Paulsson, 'Arbitration Without Privity', 10 *ICSID Review - Foreign Investment Law Journal* (1995) 232.

contained in investment treaties is a departure from the private capacity of States and entails the exercise of sovereign authority, since the State exercises its prerogatives so that certain disputes relating to its sovereign activity within its territory can be settled through an alternative mechanism than that provided by national courts.[73] Consequently, arbitral tribunals deal with the exercise of public powers and operate in a public-law context more than a private one.[74]

Following this line of reasoning, a second understanding of international investment arbitration focuses on its public international law aspects, constructing the former as a traditional international dispute-resolution mechanism.[75] In addition to the obvious public international law genesis of the ISDS system, investment treaties allow investors to refer to international arbitral tribunals matters that otherwise would have been subject to the scrutiny of domestic courts, or that would have otherwise triggered the diplomatic protection of their home State and the ensuing transformation of the dispute into a State-State one.[76] This trait reflects the structure of other regimes of international law where individuals can bring a claim against the State before an international tribunal, such as that constituted by HR treaties. Arbitral tribunals deal with matters of State responsibility arising from the violation of, among other legal instruments, international treaties and customary law.[77] They are empowered with the task of not only resolving investor-State disputes, but also of

[73] Van Harten, *supra* note 71, at 65.

[74] Burke-White and von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 689, at 690.

[75] See De Brabandere, *supra* note 59, at 17 ff; Foster, *supra* note 70.

[76] Provided that State-State arbitration as an option provided by the overwhelming majority of IIAs. Almost 2560 out of little less than 2580 treaties mapped by the UNCTAD contain State-State dispute-resolution provisions. See International Investment Agreement Navigator, *supra* note 45. See also Dolzer and Schreuer, *supra* note 6, at 211 ff.

[77] See ICSID Convention, *supra* note 10, at Art.42(1): 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.

interpreting and developing international investment law, a trait that according to some commentators displays global governance functions.[78]

Considering investor-State arbitration as a form of public international law dispute settlement allows the analysis to be informed by the concepts of standard of review and deference, that constitute an inherent trait in adjudication that deals with sovereign entities.[79] As a matter of example, this is common practice in disputes emerging in the context of WTO, where tribunals are called to determine the compatibility of State legislative measures with the GATT or the other WTO agreements.[80]

A third understanding of investor-State arbitration has then gained momentum in recent years and addresses the nature of investment arbitration through the domestic public-law analogy.[81] Neither the public-international-law paradigm nor the private-law one are considered as satisfactorily grasping the nature of investor-State arbitration, which presents some features that are common as well as alien to both fields.[82] Unlike public international adjudication, investment claims are usually not subject to customary international law limitations, such as the requirement of exhausting domestic proceedings before referring a case to the international arbitral tribunals. The direct access to international tribunals is then not limited to contractual disputes or to an ad-hoc expression of consent as in commercial arbitration but

[78] Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration', in A. J. van den Berg (ed.), *Arbitration: The next Fifty Years* (2012) 170, at 170–171.

[79] Fahner, 'From Dispute Settlement to Judicial Review? The Deference Debate in International Investment Law', in M. Duchateau et al. (eds.), *Evolution in Dispute Resolution: From Adjudication to ADR?* (2016) 61, at 69.

[80] See, among others, R. Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (2012); M. Oesch, *Standards of Review in WTO Dispute Resolution* (2003).

[81] See Van Harten, *supra* note 71; De Brabandere, *supra* note 59.

[82] For this reason, some commentators warn about the link between investor-State arbitration and domestic public courts and claim that an apt description of investor-State arbitration must be limited to acknowledging its 'hybrid' nature. See J. E. Alvarez, *Is Investor-State Arbitration 'Public'?*, Institute for International Law and Justice, available at https://www.iilj.org/working-papers/is-investor-state-arbitration-public/ (last visited 26 March 2021).

is usually combined with treaty-based arbitration (without privity), as explained above.

As a result, the State exposes itself to an indeterminate class of potential claims, while renouncing to the preliminary screening of its domestic courts: conducts of the State that transcend the realm of merely contractual commitments and that are expression of its sovereign powers in the form of the adoption of legislation, regulatory actions, or judicial decisions –usually subject to review by domestic courts– are dealt with by investment arbitral tribunals.[83] At the same time, arbitral awards are generally subject only to limited grounds of review by domestic courts under arbitration rules in the UNCITRAL regime,[84] and are screened from domestic review under ICSID rules.[85] Furthermore, investors can seek economic redress for alleged damages that follow the exercise of the State's public powers directly against the State, in a similar fashion to domestic public-law adjudication.

The only other international systems that show a similar structure are the human rights systems and the EU system, although in both cases the ability of individuals to claim damages is more limited than in investment arbitration.[86] For the above-

[83] Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State', 56 *The International and Comparative Law Quarterly* (2007) 371; Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *European Journal of International Law* (2006) 121, at 379.

[84] The UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, vol. 330 U.N.T.S. p.3, at Art.V, provides limited grounds for annulment before 'the competent authority where the recognition and enforcement is sought'. Similar grounds are provided by Art.17 of the UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006.

[85] The ICSID Convention, *supra* note 10, at Art.53(1), limits the appeal of ICSID awards to the grounds listed in Article 52 exclusively before ICSID ad-hoc committees. .

[86] In the systems of international human rights protection, the primary obligation falls upon the State and international tribunals can be resorted to by individuals only after having exhausted local remedies where the State has failed to afford the necessary redress. See T. Buergenthal, *Human Rights*, March 2007, Max Planck Encyclopedia of Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e810 (last visited 5 June 2018). In the Eu system, individuals are considered so-called 'non-privileged applicants' and can seek damages for alleged violations of EU law before the European Court of Justice subject to the

mentioned reasons, the submission of a dispute to investment treaty arbitration has been equated, in recent years, to the decision of an individual to seek damages against the State in domestic public law proceedings, as it allows judicial review of governmental conducts initiated by private parties,[87] and has led some commentators to consider investment arbitration as a form of global administrative law.[88]

Both the public-international-law approach and the public-law one allow to apply a deference-based analysis of the standard of review to international investment arbitration. The most-recent doctrine, however, aptly notes how the public-international-law approach bears the risk of overlooking some of the peculiarities of the dispute-resolution system.

First, ISDS constitutes an unprecedented method of dispute resolution: no international tribunal has been granted *general* jurisdiction over disputes between States and foreign nationals, with the sole exception of the Central American Court of Justice operating between 1907 and 1918.[89] Traditionally, international tribunals that authorize individuals to refer directly to them are either constituted on an ad-hoc basis or with jurisdiction limited to a defined period of time or subject matter.[90]

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requirements of Consolidated Version of the Treaty on the Functioning of the European Union, 2008/C 115/01, 1 December 2009, which reads, at Article 263(4): 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

[87] Wälde, *supra* note 64, at 83–84.

[88] See, among others, Van Harten and Loughlin, *supra* note 83; S. Cassese et al. (eds.), *Global Administrative Law: Cases, Materials, Issues* (2nd ed., 2008); Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011) 145; B. Kingsbury and M. Donaldson, *Global Administrative Law*, April 2011, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e948 (last visited 22 October 2019).

[89] Hudson, 'The Central American Court of Justice', 26 *American Journal of International Law* (1932) 759, at 765.

[90] As a matter of example, the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) limited the scope of the

Consequently, investment arbitral tribunals exercise a more incisive governance function than other international tribunals, as they are called to shape the meaning of international norms in a number and to an extent previously unknown to international adjudication.[91] Second, a purely public-international-law perspective has been considered as oversimplifying the role that domestic structures perform in the creation of the State's behaviour: as a matter of example, administrative agencies' decisions stem from a different process than acts emanated from democratically elected legislators and such differences should reflect in the scrutiny by arbitral tribunals.[92]

Given all the above, the public-law paradigm seems to better grasp the peculiarities of the ISDS system, while at the same time correctly framing the relationship between Sovereign entities and foreign investors. The present work, however, does not need to engage in the debate on which analogy prevails, if the public-international-law or the public-law one. Of relevance here is the possibility to discard the private-law approach, as it seems unfit to describe the dynamics of treaty-based investment arbitration. Framing the latter in a public context (either purely international or displaying domestic traits) allows the analysis of investment jurisprudence to be based on the standard of review employed by arbitral tribunals.[93]

3.2. Employing public-law tools: the standard of review

The term *standard of review* originates in domestic legal systems, where it indicates the degree of scrutiny that courts apply when confronted with decisions

tribunal's jurisdiction, at Art.2, to 'debts, contracts [...], expropriations or other measures affecting property rights'. See, for an analysis of the tribunal's jurisdiction, C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (1998), at 27 ff.

[91] See Berman, 'The Investment Treaty Arbitrator as Agent of Global Governance', in A. J. van den Berg (ed.), *Arbitration: The next Fifty Years* (2012) 166.

[92] Schill, *supra* note 69, at 591.

[93] Furthermore, see Vadi and Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal', 16 *Journal of International Economic Law* (2013) 613, at 632: 'The standards of review adopted in international law and public law systems with regard to public-policy-related disputes are no so different, as both grant a degree of deference to a given state's authorities at the national and international niveaux respectively'.

taken by other authorities. It stems from the common law tradition – especially the North American one– where it has been defined as 'the lens through which a tribunal will evaluate the determination of a prior authority'.[94] In the domestic public-law context, the standard of review relates to the nature and intensity of review by the competent judicial body of decisions taken by an authority pertaining to a different branch of the State power, be it legislative or executive.[95] As such, it constitutes a fundamental part of the system of checks and balances of governmental action, as it ensures the separation of powers through the leeway that a judge grants to the legislator or the regulator.[96]

Similarly, in the international realm, the standard of review indicates the nature and intensity of an international court's scrutiny of measures adopted by a decision-maker, usually legislative or administrative.[97] It defines whether, and to what extent, the adjudicator should respect the State's measures and determinations or whether it should substitute its findings for those of national authorities.[98] It concerns the allocation of powers between the decision-maker and the judicial body called to review the actions of the former, since the judicial organ may not be the ideal actor to make final determinations in every given case and may be required to exercise a certain degree of restraint.[99] As such, it touches upon the vertical relationship between international adjudicators reviewing acts of sovereign States and

[94] supreme.court, *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, No. 91-904, 508 U.S. 602 (1993), 14 June 1993.

[95] The notion of standard of review encapsulates two different meanings: the one described in the text is usually referred to as the 'broad' notion of the concept, as opposed to a 'narrow' understanding, which is reserved to intra-judicial review. See Bílková, 'The Standard of Equivalent Protection as a Standard of Review', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 273, at 272–273.

[96] Bohanes and Lockhart, 'Standard of Review in WTO Law', in D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law* (2012) 378, at 379; Cheng, *supra* note 40, at 26.

[97] Ehlermann and Lockhart, 'Standard of Review in WTO Law', 7 *Journal of International Economic Law* (2004) 491, at 493.

[98] Oesch, *supra* note 80, at 13–14.

[99] Chen, 'The Standard of Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement', 5 *Contemporary Asia Arbitration Journal* (2012) 23, at 28.

States themselves, and allows to understand the balance between the State's international obligations and the State's autonomy to regulate the domestic sphere.[100]

The standard of review can also be described as 'the degree of *deference* […] that the court accords to legislators and regulators'.[101] Accordingly, in the international realm, deference indicates the recognition by international courts of an ambit of discretion enjoyed by the primary decision-maker, and thus a 'limitation in a court's or tribunal's level of scrutiny concerning decisions taken or determinations made by a host [S]tate institution because the adjudicator respects the reasons for a state's decision or conduct even if its own assessment was different.'[102]

The link between deference towards national measures and State sovereignty is widely recognized in international adjudication as it emerges, among others,[103] in

[100] Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', 4 *Journal of International Dispute Settlement* (2013) 197, at 199.

[101] Bohanes and Lockhart, *supra* note 96, at 379 (emphasis added). See also, among others, Becroft, *supra* note 80, at 4–5; Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis', 29 *ICSID Review - Foreign Investment Law Journal* (2014) 595, at 600.

[102] Schill, *supra* note 69, at 582. See also G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013), at 24, defining deference as the tribunal's choice 'to adopt a less intensive approach to reviewing a decision due to the complexity of the decision or the relative expertise of the decision-maker'.

[103] For additional fields not mentioned in the text, see, e.g., Ragni, 'Standard of Review and the Margin of Appreciation before the International Court of Justice', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 319; Rayfuse, 'Standard of Review in the International Tribunal for the Law of the Sea', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 337.

the practice of the International Criminal Court,[104] in WTO adjudication,[105] and has found reflection in the different and specular theoretical framework of the margin of appreciation doctrine applied by the European Court of Human Rights (ECtHR).[106] This interconnection is equally reflected in the international investment context[107] and permeates, as will be seen below, the reasoning of arbitral tribunals.[108] By offering a measure of the respect that international courts pay to the determinations of the State in the exercise of its regulatory powers, the standard of review –informed by the level of deference employed by the tribunal– is apt to describe the respect for the State's sovereign authority. For this reason, it will be employed in the present research as the parameter that indicates the role given to State sovereignty in the jurisprudence of investment arbitral tribunals.

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[104] See Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness', 12 *Washington University Global Studies Law Review* (2013) 451, at 451, speaking of 'the built-in deference of the ICC to national prosecutions [that] respects state sovereignty and places significant control within national jurisdictions'. See also Wierczynska, 'Deference in the ICC Practice Concerning Admissibility Challenges Lodged by States', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 355.

[105] '[I]f the term [sovereignty] refers to policies and concepts that focus on an appropriate allocation of power between international and national governments, and if one is willing to recognize that nation-states ought still to retain powers for effective governing of national (or local) democratic constituencies in a variety of contexts and cultures-perhaps using theories of "subsidiarity"-then a case can be made for at least some international deference to national decisions, even decisions regarding interpretations of international agreements.' Croley and Jackson, *supra* note 60. See also Ioannidis, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 91, at 100 ff.

[106] See A. Legg, *Deference: Reasoning Differently on the Basis of External Factors* (2012).

[107] See, among others, Van Harten, *supra* note 102, at 18 ff; Burke-White and von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 48 *Virginia Journal of International Law* (2007–2008) 307, at 374 ff; Schill, *supra* note 69.

[108] see, e.g., *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, at paras. 198-199; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at para. 122.

The terminology associated with the standard of review differs widely in international scholarship and often overlaps in the use of courts and tribunals, making it difficult to provide a clear definition of the concepts involved. Conceptually, the standard of review differs from the *method of review*, where the method of review indicates the technique resorted to by the adjudicator to balance competing interests, while the standard of review refers to the intensity of the scrutiny.[109] Examples of methods of review employed by international courts are the proportionality analysis (resorted to, among others, by the ICJ or the ECtHR)[110] or the test of least-restrictive alternative means (applied by WTO Dispute Settlement Bodies).[111]

Although some commentators conflate the two concepts, the identification of the method of review is not sufficient to determine the intensity of the scrutiny carried out by a judicial body. As a matter of example, the proportionality analysis forms the most-structured method of review currently available to courts, being considered as comprising three –or four– distinct sub-elements, also referred to as stages: the evaluation of the legitimacy of the regulatory objective, suitability, necessity, and proportionality *stricto sensu*.[112] This notwithstanding, it is silent on the weight to be attributed to competing interest and will produce different outcomes based on the different standard of review applied.[113] Consequently, the identification of the method of review remains silent on the deferential (or not deferential) approach of arbitral tribunals.

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[109] See C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015), at 24–25; see also Kingsbury and Schill, 'Public Law Concepts to Balance Investor's Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 75.

[110] E. Crawford, *Proportionality*, May 2011, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459 (last visited 23 May 2019).

[111] See Burke-White and von Staden, *supra* note 61, at 302–314.

[112] See, e.g., A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012); Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008–2009) 72.

[113] Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 15 *Journal of International Economic Law* (2012) 223, at 239.

Of greater importance for the present analysis is the relationship between the standard of review and the standard of investment protection. Conceptually, the standard of protection regards the interpretation of the treaty provision in a manner that grants greater (or lesser) regulatory autonomy to the State. On the other hand, the standard of review concerns the intensity of the scrutiny carried out by the adjudicating body and the deference it grants to determinations made by the decision-maker.[114] However, the two notions are closely linked and not always distinguishable in practice. If this already emerges in the jurisprudence of international courts,[115] it is particularly evident in the hermeneutic activity of investment arbitral tribunals when confronted with the application of malleable standard-type norms as opposed to rule-type ones, such as FET or indirect expropriation provisions: the standard of review will be influenced by the interpretation of the standard of protection in the first place.[116]

Accordingly, some commentators consider the standard of review as an umbrella term encapsulating two different but connected types of review, namely a review of the content of the substantive standard ('scope of review'), on the one hand, and the 'intensity of the review', influenced by the first determination, on the other.[117] Framing the standard of review analysis as a combination of two moments,

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[114] Schill, *supra* note 69, at 582; Henckels, 'Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (2014) 305, at 310.

[115] Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* (2005) 907, at 910; in the WTO context, see Croley and Jackson, *supra* note 60, at 200 ff.

[116] This link is recognized, to different extent, by scholars: some consider the standards of review and standards of protection as overlapping or as having closely-connected content: see Schill, *supra* note 69, at 582 at footnote 27; Henckels, *supra* note 114, at 310. Other commentators match the two concepts, identifying the standard of review with the set of 'rights' set forth by the investment treaty, designed to 'protect investors from regulation or interference by the state.' See Van Harten, *supra* note 71, at 81.

[117] In the terminology coined by Ortino and Mersadi Tabari, 'International Dispute Settlement: The Settlement of Investment Disputes Concerning Natural Resources', in E. Morgera and K. Kulovesi (eds.), *Research Handbook on International Law and Natural Resources* (2016) 496, at 507 ff; Shirlow, *supra* note 101, at 598; Maloy, 'Standards of Review- Just a Tip of the Icicle', 77 *University of*

namely the scope-of-review analysis and the intensity-of-review analysis, allows to coherently frame the interpretation of the standard of FDI protection under the standard of review doctrine. This approach avoids opposing the standard of review analysis and treaty interpretation as different and non-communicating moments of the application of treaty norms.[118]

In other words, in the evaluation of the conformity of a regulatory measure with treaty obligations stemming from an IIA, the arbitral tribunal will: at a first stage, determine whether the action of the State is hypothetically covered by (and thus capable of breaching) the standard of protection; at a second stage, grant a margin of discretion (if any) to the decision-maker. The first determination will influence the second one, as it will restrict or enlarge the scope of the tribunal's analysis. The combination of the two elements will then give back the standard of review employed by the arbitral tribunal.[119]

Detroit Mercy Law Review (1999–2000) 603, at 608. In a slightly different manner, others consider the standard of review as encapsulating the standard of protection and not being independent from or additive to it. See Moloo and Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law', in A. K. Bjorklund (ed.), *Yearbook on International Law and Politics 2011-2012* (2013) 539. Such an approach does not disregard the conceptual distinction between interpretation of a norm and its application and is used merely to determine the intrusiveness of the tribunals' review in the evaluation of State measures. On the difference between interpretation and application in investment arbitral jurisprudence, see Paine, 'On Investment Law and Questions of Change', 19 *Journal of World Investment & Trade* (2018) 173. For alternative wordings of the same approach see Shany, *supra* note 115, at 552, indicating the two different stages by the name of 'normative flexibility' and 'judicial deference'.

[118] For an example of the problems that arise when applying the standard of review analysis without including the scope-of-review phase, see Oesch, *supra* note 80, at 183 ff.

[119] Ortino and Mersadi Tabari, *supra* note 117, at 507–509. See also Ortino, 'The Investment Treaty System as Judicial Review', 24 *American Review of International Arbitration* (2012) 437. In the words of Henckel, 'the narrower the interpretation of [FET], the greater the potential for more deferential review of governmental conduct that falls short of the customary international law threshold for breach'. See Henckels, 'The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 113, at 118.

3.3. Deference in investment arbitration

The two moments of the standard of review outlined above can be also described in terms of deference,[120] although, conceptually, they reflect two distinct notions of deference.

As to the scope-of-review phase, framing treaty interpretation in terms of deference reflects the idea that international tribunals can identify the meaning of the text in a manner that is more or less conscious of State sovereignty.[121] Although customary rules on treaty interpretation as reflected in the VCLT are aimed at resolving possible ambiguities in the treaty text and at precluding multiple readings,[122] their application can still, at times, lead to identifying more than one permissible meaning.[123] In this case, adopting a sovereignty-conscious approach is expressed by the Latin maxim *in dubio mitius* (or restrictive interpretation)[124] and has been described as 'deference through interpretation'.[125] More precisely, when confronted with terms the meaning of which is ambiguous, the principle *in dubio mitius* will lead to a narrow construction of the scope of the obligation and result in an interpretation that is deferential to the sovereignty of the respondent State.[126]

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[120] Ortino and Mersadi Tabari, *supra* note 117, at 508; Shany, *supra* note 115, at 910.

[121] See Jaime, 'Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements Note', 46 *Georgetown Journal of International Law* (2014–2015) 261; J. H. Fahner, *Judicial Deference in International Adjudication* (2020).

[122] Croley and Jackson, *supra* note 60, at 200.

[123] Gomula, 'Standard of Review of Article 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to Other WTO Agreements, The', 23 *Polish Yearbook of International Law* (1997–1998) 229, at 242–243.

[124] R. J. Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012), Treaty Interpretation in Investment Arbitration, at 150.

[125] Oesch, *supra* note 80, at 47. In similar terms, see L. Crema, *In Dubio Mitius*, September 2019, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2678.013.2678/law-mpeipro-e2678?prd=MPIL (last visited 12 April 2021), at para. 13.

[126] Petsche, 'Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law', 37 *Journal of International Arbitration* (2020) 1, at 4.

This situation seems to describe well the nature of international investment adjudication, where arbitral tribunals are confronted with substantive provisions that embody broadly defined *standards* of FDI protection (as opposed to rules).[127] The rules of interpretation provided by the VCLT have proven to be relatively ineffective in the definition of the content of the specific standard, leading arbitral tribunals to find additional avenues, such as resorting to arbitral precedent, to identify the meaning of treaty provisions.[128] Consequently, according to some commentators, the principle *in dubio mitius* is apt to 'provide[…] a potential justification for deference in the context of treaty interpretation on grounds of State sovereignty'[129] when specifically dealing with the hermeneutic activity of arbitral tribunals.

It must be acknowledged that the maxim is much-criticized as a principle of interpretation of international law[130] and has been rejected by part of investment arbitral jurisprudence,[131] as well as by courts operating in other regimes such as the human rights one.[132] However, it has occasionally found reflection in the case law

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[127] Ortino, 'Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making', 28 *ICSID Review: Foreign Investment Law Journal* (2013) 152, at 154. See also Kaplow, 'Rules Versus Standards: An Economic Analysis', 42 *Duke Law Journal* (1992–1993) 557, cited in the text; Schaefer, 'Legal Rules and Standards', 33 *UCLA Law Review* (1985) 379.

[128] When focusing on the FET, see, e.g., Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), at 155 ff. An example can be found in the effort to clarify the ordinary meaning of FET carried out by the tribunal in MTD v. Chile, wich stated that '[i]n their ordinary meaning, the terms "fair" and "equitable" used in [...] the BIT mean "just", "even-handed", "unbiased", "legitimate"'. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, at para. 113. For a focus on indirect expropriation, see Shirlow, *supra* note 101.

[129] Fahner, *supra* note 121.

[130] See, e.g., Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', 21 *European Journal of International Law* (2010) 681; Schill, *supra* note 69, at 581.

[131] See, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, at para. 258.

[132] Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights Focus Section: The Law of International Treaties in the 21st Century', 42 *German Yearbook of International Law* (1999) 11, at 14. However, for a voice that argues for an increasingly State-conscious interpretation by the ECtHR, see Orakhelashvili, 'Restrictive Interpretation of Human

of the ICJ[133] and has, more frequently, been explicitly resorted to by WTO Dispute Settlement Bodies[134] when interpreting unclear or not-well-defined treaty norms.[135] In addition, it has been equally employed by a different line of investment arbitral jurisprudence.[136]

Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *European Journal of International Law* (2003) 529.

[133] ICJ, *Case concerning Elettronica Sicula S.P.A. (Elsi) (United States of America v. Italy)*, General List No. 76, 20 July 1989, at para. 50.

[134] See the Appellate Body in the EC - Hormones case, which stated that 'The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary'. *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R; Report AB-1997-4, 16 January 1998, at para. 165. See also, among others,, *supra* note 16, part H.2.(c), at 31; *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, Appellate Body Report, AB-1996-1, part V, at 30.

[135] Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *European Journal Of International Law* (2011) 39, at 63 ff; Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in P. C. Mavroidis, Patrick. Blatter and T. Cottier (eds.), *The role of the judge in international trade regulation: experience and lessons for the WTO* (2003) 11, at 35 ff; Oesch, *supra* note 80, at 28 ff; L. E. Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools* (2018), at 287 ff. For an opposing view, see I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), Treaty Interpretation by the WTO Appellate Body, at 61 ff.

[136] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, at para. 171: 'Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as in dubio pars mitior est sequenda, or more tersely, in dubio mitius'.

This notion of deference in treaty interpretation is different from that adopted by part of the scholarship. According to some authors, deference at this stage refers to the idea that international courts are called to give effect to the will of the Parties to the treaty,[137] respecting it as it emerges from the treaty text through the rules on treaty interpretation. Deference here describes the basic functioning of international adjudicatory bodies, concerning 'the limits of a court's or tribunal's power to interpret the governing law vis-à-vis [S]tates as the masters of the treaty in question',[138] and includes subsequent agreements between the Parties regarding the interpretation of the treaty under Art. 31(3)(a) of the VCLT and subsequent practice, according to Art. 31(3)(b) of the VCLT.[139] As a matter of example, the tribunal in *Pope & Talbot v. Canada* justified its rejection of the US's interpretation of Art. 1105 NAFTA for not being supported by evidence by stating that

> 'the suggestions of the United States on this matter do not enjoy *the kind of deference that might otherwise be accorded to representations by parties to an international agreement* as to the intentions of the drafters with respect to particular provisions in that agreement.'[140]

Framed in these terms, however, deference is silent on the role that the adjudicator recognizes to State sovereignty when interpreting the treaty, as it solely describes the role of the adjudicator as that of correctly identifying the meaning of the

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[137] Schill, *supra* note 69, at 581.

[138] *Ibid.*

[139] Some authors argue that subsequent practice can include interpretations contained in State Party pleadings and submissions by non-disputing Parties made in previous proceedings, taken together. See L. Johnson and M. Razbaeva, *State Control over Interpretation of Investment Treaties*, April 2014, Vale Columbia Center on Sustainable International Investment, available at http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf; Magraw, 'Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties', 30 *ICSID Review - Foreign Investment Law Journal* (2015) 142; 'The Role of State Party Pleadings in the Evolutionary Interpretation of International Investment Agreements', in G. Abi-Saab et al. (eds.), *Evolutionary Interpretation and International Law* (2019) 267.

[140] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award on the merits of phase 2, 10 April 2001, at para 114 (emphasis added).

international text. This is confirmed by the FTC Note in the NAFTA framework,[141] that will be address in the following section. By incorporating and authentic interpretation by the NAFTA Parties, arbitral tribunals were bound to conform to it in their reasoning. While the Note influenced the analysis in that it precluded the adoption of overly broad interpretations, it ultimately did not tell much on the deference at the scope-of-review phase.

Other scholars frame deference in treaty interpretation as describing how the tribunal construes its own function.[142] More precisely, deference can either express judicial restraint and indicate strict adherence to the treaty text by the tribunal, or encompass judicial activism when gaps are discovered in the relevant provision.[143] Framed in these terms, when the treaty text does not offer clear guidance as to the content of the international obligations, the tribunal can either 'defer to the sovereignty or presumed innocence of the party whose obligations are assessed'[144] or adopt a more-autonomous approach and construct the applicable rule. While focusing on the role of international courts and tribunals in their relationship with States Parties to the international treaty, this approach does not seem to differ, in practical terms, from the deference through interpretation reflected in the principle *in dubio mitius* recalled above.

Commentators that identify the standard-of-review analysis as encompassing two distinct prongs (scope of review and intensity of review) frame treaty interpretation though the lens of deference in terms that correspond to the principle *in dubio mitius*. Ortino and Merashi, for instance, claim that

> 'an interpretation of the fair and equitable treatment […] standard that requires bad faith in order to establish a breach of the investment treaty may be seen as more

[141] See, in the case of NAFTA arbitration, Berner, 'Authentic Interpretation in Public International Law', 76 *Heidelberg Journal of International Law* (2016) 845, at 867–871.

[142] J. Pauwelyn and M. Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, SSRN Scholarly Paper (2011), available at https://papers.ssrn.com/abstract=1938618. (last visited 2 April 2021).

[143] On the link between judicial restraint, activism and deference, see S. A. Lindquist and F. B. Cross, *The Political and Academic Debate Over Judicial Activism* (2009), at 13, 21.

[144] Pauwelyn and Elsig, *supra* note 142.

deferential than one that requires, inter alia, a host State to maintain a stable legal and business environment.'[145]

Similarly, while dealing with indirect expropriation, Shirlow criticizes standard-of-review analyses that solely focus on the second prong, namely the intensity of review, arguing that

'deference might influence a tribunal to expand or restrict its scope of review. In fact, the delineation of 'effect' and 'purpose' at the scope of review stage is one key way in which the indirect expropriation enquiry can be structured to be more 'State conscious'.'[146]

This approach –and the corresponding notion of deference in treaty interpretation– will be followed in the present analysis. While this choice is devoid of normative character (the present analysis does not, in other terms, argue that tribunals *should* employ a deferential interpretation based on the principle *in dubio mitius*), it is the one that better seems to describe the respect for State sovereignty at the scope-of-review phase. This is confirmed also by the peculiar nature of investor-State arbitration, which differs from traditional international adjudication in that, in ISDS proceedings, a State appears solely as respondent vis-à-vis a private party. Consequently, narrower interpretations of the State's obligation seem to entail a greater consideration for the State's sovereignty than broad ones.

From an operational point of view, given that 'broad' and 'narrow' are relative terms and can only be identified when compared to something, the respondent State's party pleadings will be here used as a basis for comparison when determining if the interpretation given by the tribunal in the specific case under scrutiny is deferential or not.[147] Deference at the scope-of-review phase will therefore be detected by analyzing how broad or narrow the interpretation adopted by the tribunal

[145] Ortino and Mersadi Tabari, *supra* note 117, at 508.

[146] Shirlow, *supra* note 101, at 607.

[147] This is not to advocate the interpretative value of State party pleadings. The latter has been considered as self-serving and determined by the desire to influence the tribunal's decision in favour of the State offering the interpretation. See Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 129, at 146.

is as opposed to the interpretation supported by the State: deferential interpretations will be identified in those that adhere to the narrow reading of the treaty obligation supported by defending the State, while non-deferential interpretations will be those which depart from the State's view to embrace a broader meaning of the text.

Once the first branch of the review is carried out, the tribunal will engage in the second one, namely the intensity of review of the State's measure(s). Here, deference indicates the limits or restraints that arbitral tribunals apply in relation to the regulatory measures being reviewed.[148] Similarly to the scope-of-review prong, the application of this type of deference by arbitral tribunals may reveal problematic, in the absence of any indications in the treaty text.[149] Although, occasionally, the appropriate level of deference finds its genesis in the treaty text,[150] these provisions are rare in the international panorama, IIAs being no exception.[151] Some kinds of clauses, such as declaratory right to regulate provisions (see *supra*, Chapter 2,

[148] Becroft, *supra* note 80, at 4–5.

[149] The debate outlined above on the public/private nature of investment arbitration reflects on the very applicability of a deference-based analysis of the standard of review in international investment arbitration: while some commentators indicate it as a necessary tool to enhance the coherence and legitimacy of the ISDS system, others argue for its non-applicability, or lack of necessity thereof, to the field of international investments. For voices against the application of deference in investor-State arbitration, see, among others Fahner, *supra* note 79. For an argument against additional deference, see Moloo and Jacinto, *supra* note 117. For positions supporting the need for deference, see, among others Henckels, *supra* note 119; Schill, *supra* note 69; Cheng, *supra* note 40, at 29.

[150] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, vol. 1186 U.N.T.S. 2, 1 January 2008, Art.17(6): 'In examining the matter referred to in paragraph 5: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations' (emphasis added).

[151] Gruszczynski and Werner, 'Introduction', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 1, at 1.

Paragraph 3.1), or general or essential security exceptions (see *supra*, Chapter 2, Paragraphs 3.2.1 and 3.2.2.), can influence the standard of review in the sense of a greater deference towards the State's actions, as they limit the reviewer's role in defined ambits covered by the treaty text.[152]

On a regular basis, however, the capacity of the international judicial body to apply a particular standard of review is usually derived from the doctrine of inherent powers of international courts.[153] Numerous international courts and tribunals have established deferential standards of review when evaluating governmental conducts without an explicit reference to deference in the underlying treaty.[154] This operation is allowed, according to some commentators, when norms have open-ended wording such as ''necessity', 'proportionality' […] 'excessiveness', 'good faith', 'reasonable'',[155] or similar indications, but it equally applies to the vague wording contained in FET or indirect expropriation provisions.[156]

The application of deference here is usually justified on the basis of two main considerations, namely the limited expertise of the reviewing body as opposed to the decision-maker, and the greater legitimacy and accountability of domestic authorities as opposed to international arbitral tribunals.[157]

As to the first reason, disputes can involve complex factual determinations of scientific character or technical questions for which international courts or arbitral tribunals may lack competence, expertise or time, and run the risk of rendering wrong decisions.[158] Similarly, adjudicators can be called to judge over disputes

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[152] J. Paine, *Standard of Review: Investment Arbitration*, January 2018, Max Planck Encyclopedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3664.013.3664/law-mpeipro-e3664 (last visited 30 October 2019).

[153] Shany, *supra* note 115, at 911.

[154] Roberts, *supra* note 78, at 177.

[155] Shany, *supra* note 115, at 914. On the role of good faith in the reasoning of investment arbitral tribunals, see Tanzi, 'The Relevance of the Foreign Investor's Good Faith', in A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (2018) 193.

[156] See Ortino and Mersadi Tabari, *supra* note 117, at 508.

[157] Paine, *supra* note 152.

[158] Gruszczynski and Vadi, 'Standards of Review and Scientific Evidence in WTO Law and

deeply embedded in the domestic public or constitutional framework they lack expertise on.[159] These circumstances are normally considered as calling for a higher degree of deference by the international court with respect to the evaluations carried out by the domestic entity.[160]

Some commentators have then underlined that the relative expertise of international adjudicators when compared to domestic decision-makers is an inherent trait of international adjudication and have defined international judicial bodies as 'sub-optimal decision-makers':[161] however, this conclusion does not lead these commentators to conclude that the adjudicator should grant total deference to the choices of the domestic decision-maker. International courts are generally considered as being better placed to evaluate the State's international obligations than domestic authorities.[162] National authorities do not always possess more expertise regarding technical issues and arbitral tribunals may appoint experts to clarify them.[163] Furthermore, the technical expertise of the primary decision-maker does not automatically entail that the latter has effectively relied on it (for instance, by not relying on a risk assessment where risk is relevant to the decision).[164]

The second consideration pertains to the lack of democratic mandate of international adjudicators to question the legitimacy of decisions adopted by majoritarian decision-makers. Choices made by elected governments are (ideally) embedded in the mechanism of representation and accountability or involve public

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International Investment Arbitration: Converging Parallels?', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 152, at 165.

[159] Burke-White and von Staden, *supra* note 61, at 330–331.

[160] von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10 *International Journal of Constitutional Law* (2012) 1023.

[161] Shany, *supra* note 115, at 918–919.

[162] *Ibid.*, at 919.

[163] Fahner, 'Margin of Appreciation in Investor-State Arbitration: The Prevalence and Desirability of Discretion and Deference, The', 26 *Hague Yearbook of International Law* (2013) 422, at 488.

[164] Henckels, *supra* note 109, at 40.

participation in the process of enacting the measure.[165] On the contrary, international tribunals –and international investment tribunals in particular– are perceived by some as lacking both public participation and accountability to the citizens of a State.[166]

However, the democratic argument as a basis for deference is debated. Governments can lack a strong democratic legitimacy, they can adopt measures by stretching domestic constitutional rules designated to that end or without the participation of the public in a specific case.[167] Moreover, the constitution of an international dispute resolution mechanism trough an international treaty respects the principle of democratic representation: States bind themselves to international obligations to pursue policy objectives, and the creation of an international tribunal grants that States will not renege on such obligations.[168] This notwithstanding, the democratic argument holds value when international tribunals are confronted with measures that stem from the legislative process, especially in cases where the determinations made by lawmakers have been disputed both in parliament and in public debate.[169] In such cases, the employment of a deferential standard of review is expected from the international court or tribunal while reviewing legislative decisions.[170]

As to the degree of deference that the judicial body grants to the decision-maker, although every legal system develops its own standards of review,[171] it is usually submitted that the standards of review may range within a spectrum that

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[165] *Ibid.*, at 42.

[166] Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit', *Vanderbilt Journal of Transnational Law* (2008) 775, at 783.

[167] Roberts, *supra* note 78, at 178.

[168] Ulfstein, 'The International Judiciary', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009) 126, at 148. See also Crawford, 'Democracy and the Body of International Law', in G. H. Fox, B. R. Roth and J. T. Crawford (eds.), *Democratic Governance and International Law* (2000) 91.

[169] Leonhardsen, 'Treaty Change, Arbitral Practice and the Search for a Balance', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 135.

[170] Van Harten, *supra* note 102, at 4.

[171] Bohanes and Lockhart, *supra* note 96, at 380.

stretches from *de novo* review to full deference.[172] De novo review entails the least degree of deference recognized to the decision-maker's determination, as the judicial body substitutes its own appreciation to that of the decision-maker in a similar fashion to the review carried out by domestic courts of appeal. At the opposite end, full deference implies that the judicial body will not scrutinize decisions adopted by the decision-maker, yielding to the justification provided or to the analysis performed by the latter.[173] Within these two extremes, the standard of review has been framed in a number of different ways, such as in the form of reasonableness[174] or good faith review, among others,[175] always informed by the degree of deference granted by the tribunal.[176]

The present analysis does not address what is the correct measure of deference that should be employed by arbitral tribunals. Commentators who admit its use in international investment arbitration have extensively debated on which standard of review and which measure of deference would correctly understand the State's sovereign prerogatives, without yet reaching a common ground.[177] What is at focus

[172] Gruszczynski and Werner, *supra* note 151, at 1–2.

[173] Henckels, *supra* note 114, at 309–310. Although this constitutes a merely theoretical scenario, since no international tribunals grant total deference to the national decision-making process. See Shany, *supra* note 115, at 910.

[174] See, among others, Ragni, *supra* note 103; Cannizzaro, 'Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?', 27 *European Journal Of International Law* (2016) 1061.

[175] Burke-White and von Staden, *supra* note 61, at 311 ff; Shirlow, *supra* note 101, at 600 ff. See also Ortino, *supra* note 119, at 458: '[c]oncepts like full review, de novo review, anxious scrutiny, intermediate scrutiny, light touch review, minimum review, total deference are often used to describe the different level of intensity of review carried out by an investment tribunal as well as a constitutional or administrative court'.

[176] For other classifications in the international realm see, among others, Bílková, *supra* note 95.

[177] Among the numerous scholars that have worked on the issue, and with no ambition of completeness, see the different considerations expressed by Burke-White and von Staden, *supra* note 74; Kingsbury and Schill, *supra* note 109; Fahner, *supra* note 163; Henckels, *supra* note 119; Henckels, *supra* note 109; Vadi, 'Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration', in A. K. Bjorklund (ed.), *Yearbook on International Law and Politics 2013-2014* (2015) 201; V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018)

here is the variation in the level of deference employed by tribunals in different cases, as it can indicate whether any shift in their approach towards State sovereignty exists.

Following the conceptualization explained above, the standard of review analysis will be formed of two prongs, namely the scope of review and the intensity of review. Initially, the study of a specific case will commence with the interpretation of the treaty provision adopted by the tribunal, confronted with the offered by the defending State. Broader interpretations will entail that the tribunal's focus will span over a greater factual basis than narrow interpretations and will subject the State to the scrutiny of a wider range of elements. This enquiry will then inform the intensity-of-review analysis, which will be based on the intrusiveness of the tribunal's scrutiny of State measures. The result will be that the intensity of review, as informed by the interpretation of the treaty provision, will reflect the *overall* standard of review employed.

In order to allow a comparison between the cases addressed, the focus will be exclusively on the level of deference displayed by the tribunal in its reasoning, without delving on the specific name given to the standard of review (among the many: full review, anxious scrutiny, intermediate scrutiny, light touch review, minimum review)[178] or the method of review used by the tribunal. The overall standard of review will be classified according to the following qualifications:

- 'highly deferential': i.e. based on deferential intensity of review and deferential scope of review
- 'overall deferential/deferential': i.e. based on deferential intensity of review but little-deferential scope of review
- 'little-deferential': i.e. based on little-deferential intensity of review but deferential scope of review
- 'least-deferential: i.e. based on little-deferential intensity of review and little-deferential scope of review.

[178] Ortino, *supra* note 119, at 458.

4. Restricting the scope of the analysis

Once the working parameter has been identified, the analysis will be restricted to a sample of disputes that can reliably indicate the respect of arbitral tribunals for the State's regulatory authority. These are identified, as will be explained below, in regulatory disputes where the alleged violation of the FET standard is at focus.

As explained in Chapter 1, Paragraph 3., among the multiple manifestations of the principle of State sovereignty,[179] the continuous capacity of the State to regulate within the limits of international law has arisen as one of the most-problematic aspects of the system of investor protection created by international investment agreements. This aspect has emerged prominently in international arbitration where arbitral tribunals, in determining whether the behaviour of the State was in violation of the obligations contained in the relevant IIA, are often called to analyse the enactment of regulatory acts adopted by States.

ISDS proceedings in which the exercise of the host State's public powers is at stake are usually identified with the term 'regulatory disputes' by international investment scholarship, although with different meanings. Some authors use the term to indicate every investor-State proceedings, distinguishing them 'from other 'public' disputes (i.e. between [S]tates or between different entities of a [S]tate) on the ground that they involve a claim made directly against the [S]tate by a private party.'[180] The term is, however, more-often resorted to classify investment disputes that stem from a display of governmental authority, regardless of the architecture of the claim: as such, proceedings that deal with 'ordinary governmental regulatory activities'[181] or 'concerning regulatory or administrative measures'[182] are generally considered as falling within the category.

In line with the general trend and following the definition of State regulatory authority adopted in the present work that embraces the State's legislative power

[179] See Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 53 *British Yearbook of International Law* (1983) 1, at 1.

[180] Van Harten, *supra* note 71, at 48.

[181] Maupin, 'Differentiating Among International Investment Disputes', in *The Foundations of International Investment Law: Bringing Theory into Practice* (2012) 467, at 490.

[182] Henckels, *supra* note 109, at 6. But see also Kingsbury and Schill, *supra* note 109, at 2.

and the actions of the executive power (as explained in Chapter 1, Paragraph 5. above), regulatory disputes will be here identified with proceedings that arise out of the exercise of legislative and regulatory actions designed to address general conduct in an area of public interest.[183] While these proceedings do not exhaust the range of cases in which State sovereignty is at stake,[184] they can offer, as said above, an insight into the consideration of State sovereignty by arbitral tribunals.

The analysis of arbitral jurisprudence is then commonly classified on the basis of the standard of protection allegedly violated by the State's action. Grounds of FDI protection which have so far proven most capable of affecting the State's exercise of regulatory authority can be identified in the protection from indirect expropriation, the FET standard, and treaty or customary exceptions[185] or, as defined by some, non-precluded measures.[186] While, ideally, the analysis of regulatory

[183] Adopting the concept expressed by Moloo and Jacinto, *supra* note 117, at 541.

[184] As in disputes that address the action of the judiciary, that is yet another of the ramification of the State. See, e.g., J. Paulsson, *Denial of Justice in International Law* (2009).

[185] The most famous example in this regard concerns the Argentinian cases that arose out of the 2001 economic crisis, where tribunals focused on two main aspects, namely the application of the necessity defence under customary international law and the interpretation of the NPM clause contained in the Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991), 20 October 1994. The latter reads, at its Art.XI: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.' The customary rule of necessity is recognized at Art.25(1) of the Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/62/61, 6 December 2007, which reads: 'Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or State towards which the obligation exists, or of the international community as a whole.' For a summary of the situation that led to the Argentinian economic crisis and the proceedings that stemmed from it, see G. Bücheler, *Proportionality in Investor-State Arbitration* (2015), at 211–252.

[186] See, e.g., Burke-White and von Staden, *supra* note 107; Ismailov, 'Necessity Revisited: Interpreting the Non-Precluded Measures Clause of the U.S.-Argentina BIT under Systemic Integration Approach', 13 *Transnational Dispute Management (TDM)* (2016) 1.

disputes should cover the reasoning of arbitral tribunals when confronted with all these grounds, the three-year timeframe given to the present research imposes a limitation to the scope of the analysis. The latter will be circumscribed to regulatory disputes that deal with alleged violations of the FET standard, such restriction finding its reason on two main supporting arguments.[187]

First, the FET standard provides arbitral tribunals with a greater degree of flexibility than any other standard of investment protection. Such flexibility stems from its open-ended text, which offers little to no indication about its exact content.[188] The primary purpose of the FET provision in investment treaties was originally that of filling the gaps that might have been left by other standards, in order to reach the level of protection intended by the investment treaty.[189] This aim was reflected in the vaguely worded clauses contained in early-generation investment treaties that have remained relatively untouched until recent years, as seen above in Chapter 2, Paragraph 3.3.2.

The majority of IIAs contain so-called 'unqualified' FET clauses, which simply indicate that '[e]ach Contracting Party shall at all times ensure fair and equitable treatment to investments',[190] or use similar wording.[191] In a similar fashion,

[187] A third argument pertains to the necessity to fit the enquiry in the three-year timeframe provided for the present doctoral research.

[188] See Juillard, 'L'évolution Des Sources Du Droit Des Investissements', in *Recueil Des Cours* vol. 250 (1994) 9, at 133: 'l'imprécision qui affecte des notions telles que le traitement juste et équitable, ou encore la pleine et entière protection et sécurité, ne fait que mettre en lumière l'incapacité où se sont trouvés es Etats à donner un contenu à ces principes'. See also, Wälde, 'In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v. The Republic of Latvia - Legal Opinion by T.W. Wälde', 2 *Transnational Dispute Management (TDM)* (2005) 1: '"Fair and equitable treatment" and its affiliated formulations ("no unreasonable impairment..") have been "dormant" throughout most of the relevant history, but have suddenly been revived by arbitral tribunals, under the NAFTA and BITs since the 1990s, because they provide a flexible in-strument to assess governmental conduct relying on modern and evolving concepts of good-governance'.

[189] Dolzer and Schreuer, *supra* note 6, at 122.

[190] Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments (1995), 1 November 1997 (Australia - Argentina BIT), Art.4(1).

[191] According to the UNCTAD Investment Agreement Navigator, 1986 out of 2577 mapped treaties

'qualified' provisions, that link the content of the standard to a parameter such as the MST under customary international law, do not offer much guidance to arbitral tribunals as to the exact content of the standard. [192] The identification of the scope of the standard has thus been left entirely to the hermeneutic activity of investment arbitral tribunals, that have built up a body of jurisprudence mostly based on references to arbitral precedent and have identified some typical factual situations –or elements– to which the principle has been applied.[193]

In addition, the standard offers no indication on how tribunals are to direct the analysis of State measures. As a matter of example, when deciding upon alleged violations of the protection from indirect expropriation, tribunals are confronted with measures that have 'effect equivalent to nationalization or expropriation'.[194] Their analysis is directed to determining whether the contested measures have led to a deprivation of all the investor's rights on the investment in a manner equivalent to that of direct expropriatory action. Differently, FET provisions do not fetter tribunals' decisions to an equally identifiable parameter, allowing tribunals to shape

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contain unqualified FET clauses. See International Investment Agreement Navigator, *supra* note 45. For a broad-spectrum study of different FET clauses in IIAs, see I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008).

[192] The most famous provision adopting this approach is the provision of NAFTA, *supra* note 17, Art.1105(1), which states: '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.'. See UNCTAD, *Fair and Equitable Treatment - A Sequel*, UNCTAD/DIAE/IA/2011/5 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last visited 24 July 2018), at 28–29.

[193] A consistent body of academic literature has been written on the elements of the FET standards. See, to mention but a few, Dolzer and Schreuer, *supra* note 6; R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2011); A. Reinisch, *Recent Developments in International Investment Law* (2009); Tudor, *supra* note 191; Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 111; Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* (2013–2014) 7.

[194] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and the Protection of Investments (1990), 19 February 1993, at Art.5(1).

their approach towards regulatory measures the way they deem most appropriate under the relevant treaty, granting more (or less) leeway to the State's determinations. Broad interpretations can affect the exercise of the State's prerogatives potentially beyond the level intended in investment treaties: for this reason, the standard has been defined as having the capacity to 'reach further into the *domaine réservé* of the host [S]tate than any one of the other rules of [investment] treaties',[195] making it a viable indicator of the understanding of State sovereignty by arbitral tribunals.

Secondly, violations of the FET standard have been invoked more often than any other standard of treatment before arbitral tribunals.[196] Clearly, not all not the proceedings that deal with alleged violations of the FET standard can be employed in the present analysis,[197] although the sample of regulatory disputes in which a violation of FET was contested offers a sufficiently broad sample to determine if any variation has occurred in the approach undertaken by arbitral tribunals, as will be seen below. In this regard, arbitral jurisprudence on FET provisions differs from that on exceptions, that is mostly limited to the cases stemming from the recent Argentinian economic crisis and that is not enough to lead to general considerations on the understanding of State sovereignty by arbitral tribunals.[198]

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[195] Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law', 37 *International Law and Politics* (2005) 953, at 964.

[196] According to the UNCTAD Dispute Settlement Navigator, violations of the FET standard were raised on 483 of the 582 cases mapped. See *Investment Dispute Settlement Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 23 March 2021). The standard is invoked so often in contemporary investor-State arbitration that Dolzer has labelled it 'an almost ubiquitous presence' in investment litigation. See Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 *International Lawyer* (2005) 87, at 87.

[197] Proceedings that focus on the exercise of regulatory powers do not cover all violations that can be connected to the FET treatment, limiting the analysis to alleged violations of requirements such as the stability, predictability and consistency of the legal framework, the protection of investor's legitimate expectations, the protection from arbitrary treatment.

[198] For an overview of the Argentinian cases that dealt with the necessity defence under customary international law, see Alvarez-Jiménez, 'Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law', 27 *Journal of International Arbitration* (2010) 141. For an analysis of the cases dealing with the NPM measures,

5. The method employed in the present analysis

Given all the above, it seems now possible to summarise the method that will be employed in the following Chapters.

The scope of the analysis will be restricted to regulatory proceedings that deal with alleged violations of the FET standard. These are considered, for the reasons explained above, to be a reliable indicator of the role of State sovereignty in the jurisprudence of arbitral tribunals. The study draws from the dataset of arbitral awards mapped by the UNCTAD's *Investment Dispute Settlement Navigator* as dealing with alleged violations of the FET and MST,[199] for a total of 542 proceedings initiated between 1997 and 2020. Upon this dataset, regulatory disputes that had resulted in an award on the merits by October 2020 (date when the present analysis was concluded) and that are available in English were individually singled out. The result is the 69 awards that constitute the sample of the present research.[200]

The analysis will then proceed to the identification of level-playing fields, that is the most-uniform conditions in which arbitral tribunals are called to operate. Doing so proves necessary to compare the approach of different arbitral tribunals and to detect *variations* in arbitral jurisprudence. The first and most-obvious difference can be found in the wording of FET provisions. As seen in the previous paragraph and *supra* in Chapter 2, Paragraph 3.3.2., FET provisions come in a variety of forms, either as granting 'unqualified' FET with no further indications or linking the standard to the MST under customary international law, or to the sole international law, among others.[201]

Theoretically, diverging treaty language might justify different interpretations of the FET standard given by arbitral tribunals. This argument does not seem

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see Bücheler, *supra* note 185, at 211–253. On the relationship between the two grounds, see Alvarez-Jimenez, 'The Interpretation of Necessity Clauses in Bilateral Investment Treaties after the Recent ICSID Annulment Decisions', in K. P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010/2011* (2012) 419.

[199] Investment Dispute Settlement Navigator, *supra* note 196.

[200] The text of the awards (and of the related documents, where available) was retrieved in the databases *Italaw*, available at https://www.italaw.com/; and *Investor-State Law Guide*, available at https://www-investorstatelawguide-com.

[201] See the seven types of typical FET clauses identified by Tudor, *supra* note 191.

convincing to part of international scholarship and to the arbitral tribunals that support the so-called 'theory of convergence' of the meaning of FET clauses, especially between unqualified FET and MST under customary international law.[202] The issue has attracted much attention in relation to Article 1105 of NAFTA,[203] where the tribunal in *Merrill and Ring v. Canada* explicitly endorsed the theory of convergence,[204] and has found fortune in a handful of other arbitral awards.[205]

The theory of convergence is, however, opposed to by the majority of writers, who endorse the so-called 'plain meaning approach' to the FET standard and argue for its autonomous and independent nature from the MST,[206] at least in the case of

[202] See, among others, Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', 41 *Journal of World Trade* (2007) 273; Orellana, 'International Law on Investment: The Minimum Standard of Treatment (MST)', 1 *Transnational Dispute Management (TDM)* (2004), at 7; Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far', 9 *Journal of World Investment & Trade* (2008) 255, at 265 ff; Schill, *supra* note 29, at 153. Hypothesis envisaged also by the UNCTAD, see: UNCTAD, *supra* note 192, at 8.

[203] Some tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment described in the Neer standard. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at para. 116; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, at para. 181; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at para. 93. See also R. Klager, *'Fair and Equitable Treatment' in International Investment Law* (2011), at 61.

[204] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, at para. 189.

[205] See, e.g., *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL / LCIA Case No. UN3467, Final Award, 1 July 2004, at para. 190*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, at paras. 282-284; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, at para. 337.

[206] See, among the many, Dolzer and Schreuer, *supra* note 6, at 124–128; R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), Bilateral Investment Treaties, at 60; P. Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (2013), at 50 ff; Klager, *supra* note 203, at 59 ff; Mann, 'British Treaties for the Promotion and Protection of Investments', 52 *British Yearbook of International Law* (1982) 241, at 244; P. T. Muchlinski, *Multinational Enterprises & the Law* (2nd Edition, 2007), at 635–647; Schreuer, 'Fair and Equitable Treatment

unqualified FET clauses.[207] More precisely, FET and MST are seen as sharing a core content, although the MST entails a higher liability threshold if compared to unqualified FET obligations.[208] The plain meaning approach finds reflection in the case law of arbitral tribunals.[209] As a matter of example, the tribunal in *Glamis Gold v. Canada*, while dealing with the interpretation of the protection offered by FET under customary international law in the context of Art. 1105 NAFTA, rejected the use of arbitral jurisprudence on BITs that contained unqualified provisions, since 'arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.'[210] Along the same line, the tribunal in *Saluka v. Czech Republic*, called to decide over an alleged breach of the unqualified FET provision contained at Art. 3(1) of the Czech Republic-Netherlands BIT, clarified that

> '[t]hat Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the [FET] standard to the

(FET): Interactions with Other Standards', in G. Coop and Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty* (2008) 63; Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', 70 *British Yearbook of International Law* (2000) 99, at 144: 'These considerations point ultimately towards the conclusion that the two standards in question are not identical: both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors'.

[207] Dumberry, 'Fair and Equitable Treatment: Its Interaction with the Minimum Standard and Its Customary Status', 1 *Brill Research Perspectives in International Investment Law and Arbitration* (2017) 1, at 28.

[208] UNCTAD, *supra* note 192, at 60.

[209] See, among the many, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, at paras. 503 ff; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017.

[210] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL Award, 8 June 2009 (Glamis Gold v. USA, Award), at para 608. See also, among others, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Cargill v. Mexico, Award), at para 278.

customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a [FET] standard such as the one laid down in Article 3.1 of the Treaty.'[211]

The plain meaning approach then finds confirmation in the drafting effort of States, that are attempting to reduce the discretion of arbitral tribunals by, among other things, explicitly linking FET clauses to the MST under customary international law,[212] as seen above in Chapter 2, Paragraph 3.3.2. By linking FET to the MST, treaty drafters aim to prevent the so-called *semantic* approach to the clause, averting arbitral tribunals from giving unfettered interpretations of FET.[213] At the same time, it is employed as a means to raise the State's liability threshold,[214] since the MST is considered as requiring more-stringent parameters then unqualified FET wording.

Consequently, it seems methodologically sound to separate the analysis of qualified FET provision from that of unqualified ones, as they will often deal with different interpretations of the standard and with a different level of FDI protection. Within these two different ambits, the study will identify more-precise level-playing fields with even more elements in common. As to qualified provisions, these

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[211] *Saluka Investment BV (The Netherland) v. The Czech Republic*, PCA, Partial Award, 17 March 2006, at para. 294. See also *Infrastructure Services Luxembourg S.à r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ICSID Case No. ARB/13/31, at para. 533; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, at para. 497.

[212] Dumberry, *supra* note 207, at 38; UNCTAD, *supra* note 192, at 29.

[213] De Brabandere, 'States' Reassertion of Control over International Investment Law - (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation'', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2017) 285, at 297. See also Gélinas and Jadeau, 'CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation', 13 *Transnational Dispute Management (TDM)* (2016), available at https://www.transnational-dispute-management.com/article.asp?key=2319 (last visited 22 August 2018), at 14.

[214] Klager, 'Revising Treatment Standards - Fair and Equitable Treatment in Light of Sustainable Development', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 65, at 71.

will be identified in proceedings that stem from alleged violations of Art. 1105 of the NAFTA and proceedings based on other BITs with qualified FET clauses. The NAFTA framework offers a common treaty background that has given rise to a considerable body of jurisprudence on the FET standard. The changes identified in this selected ambit will then be confronted with the scarce jurisprudence based on the remaining BITs with qualified FET clauses.

As to unqualified provisions, level-playing fields will be identified in proceedings based on Art. 10 of the ECT; in proceedings emerged in the context of the 2001 Argentine economic crisis (the so-called 'Argentine cases'); and in arbitral jurisprudence stemming from the remaining treaties with unqualified FET provisions. The ECT constitutes a 'mini system' of international investment law and provides a peculiar FET clause which justifies a separate analysis from other treaties with unqualified FET provisions. The Argentine cases offer a common factual background, as well as similar treaty provisions. Finally, the analysis will move on to the jurisprudence based on the remaining BITs, to cover the remaining cases.

The enquiry will then be based on the standard of review applied by investment arbitral tribunals, informed by the degree of deference towards the host State's regulatory measures, that will be adopted as the parameter of respect for State sovereignty. A more deferential standard of review will be considered as indicating a greater respect for State sovereignty than a less deferential one.

To this end, declarations made by arbitral tribunals are not necessarily informative. Investment arbitral tribunals sometimes expressly indicate that they will make use of a deferential standard of review to justify the intensity of their scrutiny of State measures and to explain their role vis-à-vis States. For instance, the tribunal in *TECO Guatemala Holdings LLC v. Guatemala*, stated that '[t]he Arbitral Tribunal, in deciding this dispute, *is mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers*.'[215] On other occasions, they

[215] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (TECO v. Guatemala, Award), at para. 490. See also *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012: 'Where, however, a valid public policy does exist, and especially where the action or decision taken relates to the State's responsibility "for the protection of public health, safety, morals or welfare, as well as other

resort to wording that does not directly indicate the application of a degree of deference but tantamount to it in substance.[216] This notwithstanding, tribunals often recall the concept of deference in their determination of the appropriate standard of review like a mantra,[217] without necessarily applying it in their decisions or developing a coherent approach. For this reason, the analysis will not be limited to the statements made by arbitral tribunals, but it will address the *actual* approach adopted by the latter, independently of the *declared* approach.

Finally, the analysis of the standard of review will be carried out through the two-pronged test described above: it will focus first on the deference that emerges in the interpretation of the FET standard, identified through a comparison with the narrow interpretation supported by the defending State. Secondly, it will address the deference towards the determinations made by the State in the adoption of the measure. The two moments will offer the overall standard of review adopted by the tribunal in the specific case and ultimately the consideration of State sovereignty adopted by the arbitral tribunal.

6. Conclusion

The present Chapter has provided an answer to the first research question presented in the introductory paragraph, namely: is it possible to pinpoint a parameter that indicates the respect that arbitral tribunals pay to the host State's sovereign regulatory authority and that allows to compare arbitral jurisprudence under the lens of State sovereignty? This question has been answered in the positive, and the relevant working parameter has been identified in the deference reflected in the

functions related to taxation and police powers of states," such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders' (emphasis added).

[216] See, as a matter of example, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010: 'As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State's own cultural policy'.

[217] In the words of Schill, *supra* note 69, at 581.

standard of review employed by arbitral tribunals when analyzing State regulatory measures.

The selected method will now be applied to the survey of arbitral jurisprudence, through the schedule set up above. The next Chapters will be dedicated to answering the second research question asked at the beginning of the present Chapter, and will therefore focus on whether it is possible to identify any consistent tendency or trend towards State sovereignty in investment arbitral jurisprudence.

CHAPTER IV

State sovereignty in international investment arbitral jurisprudence: 'qualified' FET provisions

1. Introduction: arbitral jurisprudence based on qualified FET clauses: an overview – 2. Arbitral jurisprudence in the NAFTA framework – 2.1. Arbitral cases prior to the 2001 FTC Note – 2.2. The post-FTC Note cases – 2.3. NAFTA jurisprudence of the last decade – 2.4. Preliminary assessment of the NAFTA framework – 3. Arbitral jurisprudence based on other treaties with qualified FET clauses – 4. Conclusion: a detectable trend towards the recognition of a greater role for the State in arbitral jurisprudence based on qualified FET clauses?

1. Introduction: arbitral jurisprudence based on qualified FET clauses

The first stream of investment arbitral jurisprudence here analysed stems from qualified FET clauses that link the content of the FET to that of customary international law[1] or to the MST under customary international law.[2]

As indicated in Chapter at section 3.3.2., the link to customary international law is far from being indicative of the protection offered by the standard. The very existence of an international minimum standard in international law has historically been controversial and,[3] in the proceedings included in the present section, much debate surrounds the identification of the threshold for a violation of the standard.

[1] See, among others, The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (2016), (not in force), Art.3(4): 'Fair and equitable treatment is to be interpreted and applied as the treatment provided to aliens in accordance with the principies of customary international law'.

[2] See, among others, Burkina Faso - Canada BIT (2015) Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (2015), 11 October 2017, Art.6: '1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 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] See M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., 2010), at 334 ff.

Consequently, the identification of the elements that shape the standard plays a pivotal role in the analysis carried out by tribunals, and covers a considerable part of the tribunal's reasoning.

Through the analysis of the arbitral awards based on qualified FET clauses, it will emerge that customary international law offers a lower level of protection than that provided by the autonomous standard identified with unqualified FET. This notwithstanding, the narrower protection provided for by qualified clauses (as opposed to that granted by unqualified FET provisions) does not entail the employment of a less-deferential standard of review by arbitral tribunals. Qualified formulations constitute a separate level-playing field upon which the differences in the tribunals' approach are to be tested, irrespective of the level of protection offered to investors in absolute terms. More precisely, the present Chapter will aim at answering the following research question: is it possible to identify any consistent tendency or trend in investment arbitral jurisprudence based on qualified FET provisions with regard to the respect that arbitral tribunals pay to State sovereignty?

Treaties that resort to qualified FET provisions are but a fraction of the overall number of IIAs, as they are included in only 102 treaties out of over 2500 IIAs mapped in the UNCTAD's *International Investment Agreements Navigator*.[4] Accordingly, they give rise to a relatively small number of proceedings before arbitral tribunals. However, their relevance is by no means belittled, since among the treaties that include qualified FET formulations is the NAFTA (and now the USMCA), which has created one of the world's biggest trade and investment blocks, and which has served as legal basis for more than 60 cases brought before investment arbitral tribunals since its entry into force in 1994.[5] Among these, 31 cases dealt

[4] International Investment Agreements Navigator *International Investment Agreements Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 10 March 2021).

[5] To date, 66 investment cases have arisen from the NAFTA. See Dispute Settlement Navigator *Investment Dispute Settlement Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 23 March 2021) .

with alleged violations of the FET provision contained in Art. 1105,[6] 12 of which related to regulatory disputes in the sense described above. NAFTA cases almost completely exhaust the sample of regulatory disputes arising out of qualified FET provisions: as will be seen below, only one additional case, namely *TECO v. Guatemala*,[7] falls within the scope of the present analysis.

2. Arbitral jurisprudence in the NAFTA framework

NAFTA arbitration shows some peculiarities that differentiate it from the rest of arbitral jurisprudence, even when compared to the one that stems from a common treaty basis such as the ECT. NAFTA proceedings are clearly self-referential, with arbitral tribunals giving little to no mention to investment disputes based on other IIAs. Accordingly, NAFTA tribunals justify their decisions through previous jurisprudence or make some effort to explain the rejection of previous tribunals' findings almost exclusively in the NAFTA framework.[8] In addition to that, Chapter 11 of the treaty sets up an architecture characterized by two traits that are of particular relevance when carrying out considerations on State sovereignty.

The first one is the possibility for non-disputing States Parties to the treaty to 'make submissions to a Tribunal on a question of interpretation of [the] Agreement'[9] pursuant to Art. 1128 NAFTA,[10] with the ensuing *right* of non-disputing Parties to inform arbitral tribunals on questions of interpretation without incurring in the preliminary screening over the admissibility of third-party submissions. NAFTA Party submissions ex Art. 1128 on the interpretation of Art. 1105 are often resorted to by NAFTA States Parties and are highly consistent, often being in support of the interpretation provided by the State party to the dispute, irrespective of

[6] Source: *Investor-State Law Guide*, available at https://www-investorstatelawguide-com.

[7] TECO v. Guatemala, Award *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013.

[8] Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims', 45 *Virginia Journal of International Law* (2005) 809, at 857.

[9] NAFTA North American Free Trade Agreement, 32 ILM 289, 605 (1993), 1 January 1994, Art.1128 (NAFTA).

[10] Since all articles mentioned in the present section refer exclusively to the NAFTA, the reference to the latter will be omitted and will be considered automatically included.

the nationality of the investor. Submissions ex Art. 1128 can be considered by the tribunal as subsequent practice under Art. 31(3)(b) VCLT when made by all the NAFTA Parties, and can influence the determination of the scope of the treaty provision towards readings that are more deferential to the sovereignty of the disputing State Party.

The second trait is the existence of a central institution composed of ministerial-level representatives from the three Member-Countries called Free Trade Commission (FTC), endowed, among other things, with the task of resolving disputes that may arise on the interpretation or application of the treaty.[11] Interpretations of NAFTA provisions given by the FTC are, under Art. 1131(2), binding on NAFTA tribunals, following a similar structure of several other IIAs concluded by the US and Canada.[12] Although the legal nature of FTC interpretations was subject to debate,[13] it is now generally accepted that it constitutes a binding subsequent agreement pursuant to Art. 31(3)(a) VCLT,[14] with obvious fallbacks on the hermeneutic activity of arbitral tribunals.

The only interpretative effort released to date by the FTC is the Notes of Interpretation of Certain Chapter 11 Provisions of 2001 (FTC Note),[15] which dealt with

[11] NAFTA, *supra* note 9, Art.2001(1).

[12] See, as a matter of example, the treaties enlisted in Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', in E. Gaillard and F. Bachand (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011) 175, at 176–178.

[13] See, among others, Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105', 46 *Virginia Journal of International Law* (2005–2006) 347; Brower, 'Investor-State Disputes under NAFTA: The Empire Strikes Back', 40 *Columbia Journal of Transnational Law* (2001–2002) 43; Weiler, 'NAFTA Investment Arbitration and the Growth of International Economic Law What Cures for Chapter 11 Ills: A Panel Discussion', 36 *Canadian Business Law Journal* (2002) 405.

[14] P. Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (2013), at 73–75. Foe an example in NAFTA jurisprudence, see, among others, *Methanex Corporation v. United States of America*, UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (Methanex v. USA, Award on Jurisdiction), at Chapter II, Part B, para 21: 'the FTC's Interpretation of 31st July 2001 is properly characterised as a "subsequent agreement" on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention'.

[15] NAFTA Free Trade Commission, North American Free Trade Agreement Notes of Interpretation

access to documents and the MST.[16] The FTC Note was released in reaction to three rulings rendered by NAFTA tribunals between 2000 and 2001,[17] namely *Metalclad v. Mexico*,[18] *S.D. Myers v. Canada*,[19] and *Pope & Talbot v. Canada*,[20] that had adopted broad interpretations of Art. 1105, considered by the States Parties as exceeding the scope of the provision. Art. 1105, titled 'Minimum Standard of Treatment', reads, in the relevant part,

> '[e]ach 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.'[21]

In two cases (*Metalclad v. Mexico* and *Pope & Talbot v. Canada*), arbitral tribunals had concluded that FET as provided by the NAFTA contained additive elements to the MST, while in the other case (*S.D. Myers v. Canada*) the tribunal stated that a breach of any other NAFTA provision would automatically entail a breach of the FET standard. The FTC Note was an evident reaction to such interpretations and constituted an attempt by the States Parties to fetter the interpretative discretion of arbitral tribunals.[22] It stated, in the relevant parts, that:

> '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.

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of Certain Chapter 11 Provisions, 31 July 2001.

[16] Since the relevant part here is only the note on the FET standard, it will be shortened by using the singular, namely FTC Note.

[17] Dumberry, *supra* note 14, at 66; S. W. Schill, *The Multilateralization of International Investment Law* (2009), at 104.

[18] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

[19] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Partial Award, 13 November 2000 .

[20] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Interim Award, 26 June 2000 (Pope & Talbot v. Canada, Interim Award).

[21] NAFTA, *supra* note 9, at Art.1105(1) (emphasis added).

[22] Brower II, *supra* note 13, at 352.

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)."[23]

By tying the FET standard contained in Art. 1105 to the MST under general international law, the States Parties have influenced the subsequent jurisprudence, given the importance of the identification of the scope of protection provided by the MST in NAFTA proceedings. This has led the debate over the nature of Art. 1105 to substantially differentiate from that of unqualified FET provisions, ultimately justifying a separation of the two branches of the analysis. It has also influenced the level of deference applied by arbitral tribunals in the identification of the scope of the measure, as will be seen below.

2.1. Arbitral cases prior to the 2001 FTC Note

Two out of three cases decided by arbitral tribunals before the release of the FTC Note dealt with the exercise of the host State's regulatory powers, namely *S.D. Myers v. Canada* and *Pope & Talbot v. Canada*. In these cases, the broad interpretations of the scope of review negatively affected the overall level of deference in the standard of review. Pre-FTC Note cases show, as will be seen in the present subsection, the least-deferential standard of review employed by NAFTA tribunals.

i. S.D. Myers, Inc. v. Government of Canada (2000)

S.D. Myers Inc. (the investor) was an American enterprise and the main operator in the Canadian market in the remediation of a highly-toxic chemical compound called PCB. The production and import and export of the substance was prohibited both in Canada and in the US since 1990. In 1995, the legal regime in the US was reversed by a unilateral exception that allowed the investor to import PCB from Canada into the US so to destroy the compound in its US facilities. Following the new American policy, Canada adopted an Interim Order, later turned into a Final

[23] NAFTA Free Trade Commission, *supra* note 15 (emphasis added).

Order temporarily banning the commercial export of PCB waste for disposal until 1997, when the border was briefly reopened for a few months, before being finally closed by a decision of the US Court of Appeal in the same year.[24] S.D. Myers asserted that the ban imposed by the Order between 1995 and 1997 undermined its ability to do business in Canada and instituted arbitral proceedings against Canada for the violation of the national treatment standard, stipulated in Art. 1102, Art. 1105, and Art. 1110.

During the proceedings, Canada argued for a narrow interpretation of the FET provision, identifying its content with the MST under customary international law. The latter was defined as an evolving version of the *Neer* standard that covered few widely accepted principles of 'substantial and procedural fairness such as free access to court, the right to have a fair hearing and that the administration of justice is not unduly delayed.'[25] Art. 1105 was considered to 'only apply to very serious cases of denial of justice, gross negligence or bad faith on the part of the government in the treatment of investments',[26] and therefore to not go as far as depriving other NAFTA obligations of any meaning, among which Art. 1102 on discrimination based on nationality.

The tribunal rejected the interpretation offered by the State, preferring a broad interpretation of the standard instead. By majority of its members, it adopted the definition of Dr. Mann, who identified the standard as going

> 'much further than the right to most-favored-nation and to national treatment....so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.'[27]

[24] S.D. Myers v. Canada, Partial Award, *supra* note 19, at paras 88-128.

[25] *S.D. Myers, Inc. v. Government of Canada, Respondent's Counter-Memorial*, 5 October 1999, at para 290.

[26] *Ibid.*, at para 305.

[27] S.D. Myers v. Canada, Partial Award, *supra* note 19, at para 265, recalling Mann, 'British Treaties for the Promotion and Protection of Investments', 52 *British Yearbook of International Law* (1982) 241.

Accordingly, the tribunal determined that the violation of NAFTA provisions such as the national treatment provision (Art. 1102)[28] could configure a violation of the MST and consequently of Art. 1105. In doing so, it showed a very low degree of deference to the State's arguments, adopting an interpretation in stark contrast with the view of Canada.

The tribunal then started the analysis of the measures under Art. 1105 with a statement recurrently cited in investment awards and scholarly writings as an expression of deference towards State measures. It stated that

> '[w]hen interpreting and applying the "minimum standard", a Chapter 11 tribunal *does not have an open-ended mandate to second-guess government decision-making*. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.'[29]

To then add:

> '[the] determination [of a breach of Art. 1105] *must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*.'[30]

Notwithstanding this statements, the tribunal proceeded by analysing the reasons at the basis of the measures, which, according to Canada's claim, had been adopted to deal with a significant danger to the environment or to human health.[31] In disagreeing with such a reconstruction, the tribunal identified the sole intent of the Interim and Final Order in the protectionist intent towards the Canadian industry, discriminating US operators.[32] In order to reach this conclusion, the tribunal looked into the domestic debate that led to the adoption of the export ban and

[28] S.D. Myers v. Canada, Partial Award, *supra* note 19, at para 266.

[29] *Ibid.*, at para 261.

[30] *Ibid.* at para 263.

[31] *Ibid.*, at paras 166, 176 .

[32] *Ibid.*, at para 162.

recalled testimonies by officers involved, to finally determine that the destruction of PCB in the US, prevented by the measure enacted by Canada, was to be considered 'a technically and environmentally sound solution'.[33] It thus concluded that

> 'there was no legitimate environmental reason for introducing the ban. Insofar as there was an indirect environmental objective - to keep the Canadian industry strong in order to assure a continued disposal capability - it could have been achieved by other measures.'[34]

Having already found a breach of the non-discrimination provision contained in Art. 1102, the tribunal refrained from addressing the State's Interim and Final order in its analysis of Art. 1105. In accordance with its broad interpretation of the scope of the standard, a violation of Art. 1102 was sufficient to determine a violation of Art. 1105. The whole analysis of the claim only stated that, '[b]y a majority, the Tribunal determine[d] that the issuance of the Interim and Final Orders was a breach of Art. 1105 of the NAFTA'.[35]

Notwithstanding the tribunal's statement in *S.D. Myers* on the adoption of a deferential standard of review would be recalled numerous times by subsequent arbitral jurisprudence as an example of deferential approach towards State's determinations,[36] the tribunal here employed a very little-deferential standard of review. Little deference was applied to the analysis of the measures adopted by the State, where the tribunal replaced the justifications of the State with its own reasoning, ultimately operating a *de novo* review. Such analysis was in the first place allowed

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[33] *Ibid.*, at para 164.

[34] *Ibid.*, at para 195.

[35] *Ibid.*, at para 268.

[36] See, among the many, Fahner, 'From Dispute Settlement to Judicial Review? The Deference Debate in International Investment Law', in M. Duchateau et al. (eds.), *Evolution in Dispute Resolution: From Adjudication to ADR?* (2016) 61, at 67; Fukunaga, 'Margin of Appreciation as an Indicator of Judicial Deference: Is It Applicable to Investment Arbitration?', 10 *Journal of International Dispute Settlement* (2019) 69, at 82; Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', 4 *Journal of International Dispute Settlement* (2013) 197, at 201; Katselas, 'Do Investment Treaties Prescribe a Deferential Standard of Review', 34 *Michigan Journal of International Law* (2012–2013) 87, at 118.

by the broad scope of review adopted by the tribunal, where no deference was paid to the State's interpretation of the FET provision, that allowed the violation of another NAFTA provision to be considered as a violation of Art. 1105. Overall, the *S.D. Myers* case will appear as the least-deferential award of the whole NAFTA jurisprudence analysed in the present Section.

ii. Pope & Talbot Inc. v. The Government of Canada (2001)

Pope & Talbot, Inc. (the investor) was a US enterprise operating some softwood lumber mills through its Canadian subsidiary and exporting to the US most of the softwood lumber it produced. Under the Softwood Lumber Agreement (SLA) signed between the two countries, Canada was required to place limitations on the export of softwood lumber and to collect a fee for quantities above the established base on a given year.[37] The investor claimed that certain implementations of the SLA were in breach, among other things, of Canada's FET obligation under the NAFTA.

The tribunal adopted an interpretation of the MST that was *additive* to the requirements of international law, meaning that 'investors under NAFTA are entitled to the international law minimum, *plus* the fairness elements.'[38] It reached this conclusion by looking at the genesis of Art. 1105, modelled after the 1987 US BIT,[39] and determined that 'compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.'[40]

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[37] Pope & Talbot v. Canada, Interim Award, *supra* note 20, at paras 27-40.

[38] Pope & Talbot v. Canada, Award on the merits of phase 2 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award on the merits of phase 2, 10 April 2001, at para 110. This approach was much-criticized by some commentators. See, for instance, Dumberry, 'The Quest to Define Fair and Equitable Treatment for Investors under International Law - The Case of the NAFTA Chapter 11 Pope & Talbot Awards', 3 *Journal of World Investment* (2002) 657, at 681; R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), Bilateral Investment Treaties, at 60.

[39] Although the FET provision contained therein provided a different formulation. See U.S. Model Bilateral Investment Treaty (1984), Art.II.2: 'Investments 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 [...]'.

[40] Pope & Talbot v. Canada, Award on the merits of phase 2, *supra* note 38, at para 101. In

In doing so, it starkly departed from the interpretation offered by Canada, which identified the scope of Art. 1105 with the MST under international law, by recalling its Statement on Implementation of the NAFTA Chapter 11.[41] There, Canada clarified that the article 'provide[d] for a minimum absolute standard of treatment, based on long-standing principles of customary international law.'[42] The violation of the MST required a high threshold, amounting to gross misconduct, manifest injustice, or an outrage, bad faith, wilful neglect of duty and was identified with the *Neer* standard,[43] as such not including treaty provisions or additional elements such as transparency. The State's interpretation of Art. 1105 was supported by the other NAFTA Parties through submissions ex Art. 1128.[44]

The tribunal then turned to the measures that were deemed by the investor as in breach of Art. 1105. Two of them, adopted by the Canadian Minister for International Trade, are relevant for the present analysis. The first measure was meant to adjust some perceived imbalances that originated from the allocation of quotas in the implementation of the SLA. The tribunal analysed it under the lens of reasonableness, through a suitability test:[45] it first looked at the reasons for the measure,

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concluding so, the tribunal quoted Mann, *supra* note 27.

[41] As pointed out by Schill, *supra* note 17, at 270, '[b]y endorsing its broad interpretation of fair and equitable treatment, the Tribunal took away considerable power of interpretation from the contracting States and shift ed it to the dispute settlement body'.

[42] Department of External Affairs, Canadian Statement on Implementation of the NAFTA Chapter 11, 1 January 1994, p. 149. *Pope & Talbot Inc. v. The Government of Canada, Canada's Counter-Memorial (Phase Two)*, 10 October 2000 (Canada's Counter-Memorial [Phase Two]), at para 324.

[43] Canada's Counter-Memorial (Phase Two), *supra* note 42, at paras 232, 309, and 329.

[44] Mexico identified the MST with the Neer standard. See *Pope & Talbot Inc. v. The Government of Canada, Mexico's Submission on the Interpretation of Article 1105 of the NAFTA*, 5 November 2000, at 10. The US criticized the broad interpretation of the S.D. Myers tribunal while explicitly excluding, among other things, national treatment and MFN treatment from their customary international law obligations. See *Pope & Talbot Inc. v. The Government of Canada, Fifth Submission of the United States of America*, 1 December 2000, at para 5; *Pope & Talbot Inc. v. The Government of Canada, Fourth Submission of the United States of America*, 1 November 2000.

[45] Other tests that can substantiate a substantive reasonableness analysis are identified in the necessity test and the proportionality test. See Ortino, 'From 'Non-Discrimination' to 'Reasonableness': A Paradigm Shift in International Economic Law?', *Jean Monnet Working Paper, 01/05* (2005) 1,

that were identified in the imbalances in the allocations of quotas,[46] and then focused on the effects of the measure, considered to be limited to producers operating in British Columbia (BC), where the imbalances had arisen.[47] It then concluded that 'the adjustments were a reasonable response'[48] to the unbalanced situation. In doing so, the tribunal did not second-guess Canada's choice and solely checked the existence of a relationship between the measure and objective, displaying a degree of deference towards the State's determinations.

The second measure reduced lumber export towards the US by introducing a so-called 'Super Fee' for exports. In doing so, it differentiated the treatment for producers operating in BC, ultimately reducing the export quota of the investor.[49] The tribunal acknowledged the difference in treatment, recognizing that

> 'Canada might have chosen another approach to settlement, one that shared the burden more equitably across the range of [British Columbian] producers that received the benefits of the […] reductions. *However, it is not the place of this Tribunal to substitute its judgment on the choice of solutions for Canada's*'.[50]

The tribunal noted that the measure affected a large number of BC producers, and that under the SLA, the treatment of producers was already differentiated under a hierarchical basis, ultimately finding that such approach was not in breach of Art. 1105. By recognizing that the issue could have been dealt in different ways but ultimately leaving to the State the choice over the preferred measure to tackle the problem, the tribunal recognized a space of manoeuvre enjoyed by the State and ultimately exercised deference in its analysis.

Overall, the tribunal in the *Pope and Talbot* case was certainly more deferential than that displayed in *S.D. Myers*. In the analysis of the measures, it resorted to a

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at 33–34.

[46] Pope & Talbot v. Canada, Award on the merits of phase 2, *supra* note 38, at para 126: 'The reallocation was to offset certain errors and omissions, which the B.C. Softwood Lumber Advisory Committee characterized as principally due to wholesaler error and the Canadian government officials considered to be largely related to the application of the B.C. averaging criteria'.

[47] *Ibid.*, at para 128.

[48] *Ibid.*, at para 127.

[49] *Ibid.*, at para 150.

[50] *Ibid.*, at para 155 (emphasis added).

reasonableness test with a deferential approach towards the State's determinations. However, the analysis was based on a broad and little-deferential determination of the scope of the standard, which included the additive element of fairness. Although it did not emerge whether this conclusion ultimately affected the tribunal's analysis, it lowered the requirement for the violation of the standard, and ultimately the overall level of deference showed by the tribunal in the analysis of the State's measures.

2.2. The post-FTC Note cases

The discussion before arbitral tribunals and the ensuing analysis of State measures found a turning point in the 2001 FTC Note, that marked the attempt of NAFTA Parties to fetter the interpretative power of arbitral tribunals, as seen above. The FTC Note clearly influenced the discussion in the post-2001 cases, although it was received with little enthusiasm by commentators[51] and by arbitral tribunals that were dealing with pending cases at the time the Note was released.[52] As such, the Note has influenced the debate on the scope of the standard, that after 2001 does not witness extremely broad and little-deferential interpretations of Art. 1105 like the one seen in the *S.D. Myers* case.

However, the Note has not rendered the present analysis useless: by identifying the FET with and equally vague concept such as the MST under customary international law, the debate has shifted to the identification of the content of the MST, with once again the need for the interpretative effort from arbitral tribunals and the possibility to exercise a greater or lesser level of deference in the determination of the scope of the MST. As will be seen below, the standard of review of the cases contained in the present subsection is, overall, more deferential than that employed by arbitral tribunals before the FTC Note.

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[51] See, e.g., Brower II, *supra* note 13, at 353 ff; Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement', 19 *American University International Law Review* (2003–2004) 679, at 699; Verhoosel, 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law', 6 *Journal of International Economic Law* (2003) 493, at 499.

[52] See, *supra* note 38, at para. 47; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at paras. 100-125.

i. GAMI Investments Inc. v. Mexico (2004)

The first case addressed here, namely *Gami v. Mexico*, shows a different factual situation from the other cases contained in this paragraph. In the *Gami* case, the alleged violation of the treaty did not stem from the adoption of State measures as an expression of the State's right to regulate, but from the lack of adoption of the regulatory framework envisaged by the existing legislation.

GAMI Investments Inc. (the investor) was an American enterprise participating in the shareholding of a Mexican company, which in turn owned five mills that produced standard sugar and refined sugar. The production of sugar fell under the regime of the so-called Sugarcane Decree of 1991, the requirements of which were never enforced by the government, negatively affecting the investment and making it unable to face the sugar crisis that hit Mexico in 1999, which in turn led to the expropriation of GAMI's mills. The investor claimed, among other things, that the State had failed to fulfil its regulatory functions violated Art. 1105. [53]

Mexico identified the protection offered by Art. 1105 with the MST under customary international law, in accordance with the FTC Note.[54] The standard required a high threshold for the determination of its violation,[55] that manifested in a treatment that was arbitrary, manifestly unjust, or that offended a sense of judicial propriety.[56] The tribunal did not engage in a discussion over the scope of Art. 1105 and limited its determination to whether the failure to fulfil the State's regulatory functions constituted an arbitrary or discriminatory conduct.

The tribunal recognized that the fulfilment of the regulatory objectives indicated by the Mexican legislation would have improved the investor's prospects and that the failure to implement the former was detrimental to the investor.[57] This

[53] *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL Final Award, 15 November 2004 (GAMI v. Mexico, Award).

[54] *GAMI Investments, Inc. v. The Government of the United Mexican States, Mexico's Statement of Defense*, 24 November 2003, at para 237.

[55] *GAMI Investments, Inc. v. The Government of the United Mexican States, Mexico's Rejoinder*, 11 March 2003, at para 97.

[56] *Ibid.*, at para 101.

[57] GAMI v. Mexico, Award, *supra* note 53, at para 87.

notwithstanding, it did not conclude that the adverse effects on the investor were in violation of the MST: in the absence of any kind of contractual or direct undertaking towards the investor,[58] a regulatory scheme did not constitute a guarantee of economic success.[59] The tribunal clarified that the its role was not that of apprising the content of domestic legislation, recalling to this end the deferential formulation towards the State's decision-making power mentioned in the *S.D. Myers* award.[60] The lack of regulation in violation of the State's domestic law was thus not considered to breach the MST.

The tribunal then turned to the scenario it considered capable of configuring 'an egregious failure to regulate'[61] and thus a violation of the MST, namely a situation where the government's self-assigned duty in the regulatory regime was simple and unequivocal, therefore entirely attributable to the government. This scenario was considered by the tribunal as theoretically similar to a violation of Art. 1105 through the adoption of a regulatory measure.[62] In the case at hand, the implementation of the regulatory regime required consultations and cooperation with the private sector, that had not taken place. Consequently, having found that the inaction did not entirely depend on the government, the tribunal found no breach of Art. 1105.[63]

The tribunal adopted a deferential standard of review in the analysis of the State's behaviour. It considered the inaction of the State as a matter of domestic law, ultimately falling within the State's space of manoeuvre. The analysis was influenced by the deference applied in the determination of the scope of the MST, where the tribunal agreed with the State's requirement for a high threshold for a violation of the standard, ultimately requiring some strict conditions (the State being the sole actor responsible for the lack of implementation) for a violation of the MST to be found.

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[58] *Ibid.*, at para 100.

[59] *Ibid.*, at para 85.

[60] *Ibid.*, at para 93. Quoting S.D. Myers v. Canada, Partial Award, *supra* note 19, at para 261.

[61] GAMI v. Mexico, Award, *supra* note 53, at para 105.

[62] *Ibid.*, at para 108.

[63] *Ibid.*, at para 110.

ii. Methanex Corporation v. United States of America (2005)

Methanex Corporation (Methanex) was a Canadian investor operating in the production of methanol, a key component in the production of a gasoline constituent called MTBE in the State of California. Between 1997 and 2004, California enacted three regulatory measures, grounding its policy on environmental and public health reasons,[64] that banned MTBE, and implicitly methanol, from the Californian market, taking away Methanex's share of the latter in favour of competing ethanol producers. The investor claimed that the three measures were in violation of, among things, Art. 1105 of the NAFTA.

The analysis of the substantive scope of Art. 1105 was heavily influenced by the release of the FTC Note during the proceedings. The US and the other NAFTA States Parties claimed that the FTC Note constituted an authentic interpretation of the meaning of the provision and not an amendment of the text of the treaty, deriving from this its applicability to the case.[65] In accordance with the Note, the State identified the meaning of Art. 1105 with the MST. Though not linking the discussion to the *Neer* standard, the US devoted much argumentation into characterizing the MST as an *absolute* standard, as such not incorporating *relative* obligations like the general obligation of non-discrimination. Accordingly, the US excluded that the FET could be breached through a violation of other treaty provisions and specifically the non-discrimination provision contained in Art. 1102 (as claimed by the investor).[66]

The tribunal agreed with the NAFTA Parties on the applicability of the FTC Note to the case and excluded that a breach of other NAFTA provisions might entail

[64] Methanex v. USA, Award on Jurisdiction, *supra* note 14, Part II, Chapter D, pp.3-8.

[65] *Methanex Corporation v. United States of America, Rejoinder of Respondent United States of America to Methanex's Reply Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation*, 17 December 2001. See also *Methanex Corporation v. United States of America, Third Submission of Canada Pursuant to NAFTA Article 1128*, 8 February 2002; *Methanex Corporation v. United States of America, Article 1128 submission of the United Mexican States*, 11 February 2002.

[66] *Methanex Corporation v. United States of America, Amended Statement of Defense of Respondent United States of America*, 5 December 2003, at paras 344-384.

a violation of Art. 1105,[67] specifying that 'the States parties explicitly excluded a rule of non-discrimination from Article 1105.'[68] It then linked the scope of Art. 1105 with the MST, though it gave it a broader substantive content than that identified by the State by admitting that, in some cases, discrimination could amount to violations of the MST.[69]

The tribunal started the analysis of the measures by deciding whether methanol constituted a risk for public health and the environment. In doing so, it recognized that scientific conclusions, especially on non-settled issues, might be subject to disagreement among the scientific community, and it accepted the experts' conclusions that led to the adoption of the measures.[70] The tribunal then moved on to focus on the procedural soundness of the regulatory process followed by the State of California, and considered that the measures at stake were based on the specific findings of the scientific report, that was 'subjected at the time to public hearings, testimony and peer-review; and [it emerged] as a serious scientific work from such an open and informed debate'.[71] As such, it did not engage in a *de novo* assessment of the dangers posed by the component and the reasons at the basis of the measures, reckoning that they were motivated by an 'honest belief, held in good faith and on reasonable scientific grounds' of the legislator and in the absence of discriminatory intent.[72] It thus concluded that the conduct of the State of California was not discriminatory in the sense required by customary international law and that it ultimately did not constitute a violation of Art. 1105.[73]

The *Methanex* case shows the effects of the 2001 FTC Note on the standard of review resorted to by arbitral tribunals. As will be seen also in the cases below, it is true that tribunals do generally agree with the defending State in that the standard is not additive to the MST: from this point of view, the FTC Note has certainly

[67] Methanex v. USA, Award on Jurisdiction, *supra* note 14, Part IV, Chapter C, para 17.

[68] *Ibid.*, at Part IV, Chapter C, para 25.

[69] *Ibid.*, at Part IV, Chapter C, paras 25-26.

[70] In the words of Henckels, *supra* note 36, at 212, '[t]his approach reflected the relative strengths of authorities and gave weight to their assessment of relevant matters'.

[71] Methanex v. USA, Award on Jurisdiction, *supra* note 14, at Part III, Chapter A, para 101.

[72] *Ibid.*, at Part III, Chapter A, para 102.

[73] *Ibid.*, at Part IV, Chapter C, paras 26-27.

limited the scope of the tribunals' analysis. However, the debate has shifted to the identification of the scope of the MST, still leaving leeway for arbitral tribunals to exercise –or to not exercise– deference in their analysis. Moreover, the case at hand is indicative of how the identification of the scope of review (first prong of the analysis) may affect the standard of review employed by the tribunal.

In the analysis of the measures, the tribunal applied a high level of deference to the State's determinations, justified on the basis of the two main arguments traditionally linked to the exercise of deference: the limited expertise of reviewing bodies as opposed to decision-makers, and the greater legitimacy and accountability of domestic authorities as opposed to international arbitral tribunals.[74] This notwithstanding, by adopting a little-deferential analysis in the identification of the MST, namely in finding that some cases of discrimination can amount to a violation of the MST, the tribunal enquired into the discriminatory nature of the measures, a scrutiny that would not have been carried out had discrimination not been considered as part of the MST.

iii. Glamis Gold, Ltd. v. The United States of America (2009)

Glamis Gold, Ltd. (the investor), was a Canadian investor operating in the exploration, development and extraction of precious metals. During the mid-nineties, it began securing the permits necessary to operate a mining project in the State of California. While the process was still pending, the State of California adopted more stringent standards and imposed new requirements for metallic mines located in proximity of native American sacred sites, such as complete backfilling and site recontouring, that rendered the investment not viable anymore. The investor claimed that changes in the federal legislation that imposed new requirements on mining concessions, including environmental and cultural assessment and the consideration of native American sacred sites, impacted the permitting process to its

[74] The deferential nature of the (intensity of review) analysis was recognized, among others, by Schill, *supra* note 17, at 274; 324 Henckels, 'Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (2014) 305.

detriment. The measures were considered as being in violation of, among other things, Art. 1105.[75]

The tribunal linked the FET granted by Art. 1105 to MST as indicated by the FCT Note. In the identification of the MST, the tribunal recognized that the NAFTA Parties agreed on the application of the *Neer* test by recalling the submissions of NAFTA Parties in other proceedings. It then considered that, while there were no elements to conclude that the MST had evolved from the *Neer* standard, the meaning of 'outrageous' treatment might have changed in time.[76] In doing so, it quoted Mexico on the fact that 'the standard is relative and that conduct which may not have violated international law [in] the 1920's might very well be seen to offend internationally accepted principles today'.[77] To this end, the tribunal brought as an example the element of bad faith, that was not necessary anymore to find a violation of the MST.[78] However, the threshold for a violation of the MST remained high, as it required

> 'an act that is 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. Such a breach may be exhibited by a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards;' or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.'[79]

In addition, the tribunal admitted that objective expectations created by the State *in order to induce investment* and protection from arbitrariness, could be useful factors in determining whether the treatment went far beyond the measure's mere illegality, constituting instead a sufficiently egregious and shocking act falling

[75] *Glamis Gold, Ltd. v. The United States of America, Notice of Arbitration*, 9 December 2003; *Glamis Gold, Ltd. v. The United States of America, Statement of Defense of Respondent United States of America*, 8 April 2005.

[76] Glamis Gold v. USA, Award *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL Award, 8 June 2009, at para 612.

[77] *Ibid.*, at para 601.

[78] *Ibid.*, at para 616.

[79] *Ibid.*, at para 627.

below the MST.[80] In doing so, the tribunal did not substantially depart from the interpretation offered by the State. The latter attributed a much-narrower scope to Art. 1105 than that argued by the investor,[81] claiming that the MST had been established in only a handful of areas and that it embodied the customary international law obligation of

> 'protection from unlawful expropriation, full protection and security, denial of justice when the treatment of aliens is notoriously unjust or carried out in an egregious manner which offends a sense of judicial propriety, leaving the State to conduct its affairs as it deems appropriate in areas not covered by the notion.'[82]

In the State's view, the protection of legitimate expectations was not a standalone element of the MST and could contribute to a breach of the MST only when integrating denial of justice or discrimination.[83] At the same time, the existence of a transparent and predictable framework and the protection from arbitrariness were not considered as part of the MST.[84]

The tribunal then analysed the regulatory measures at stake in the present case, both adopted by the State of California. The measures contested were a Senate Bill and an administrative agency regulation adopted on an emergency basis. They both required an additional element to new mining concessions in the vicinity of sacred native American sites, namely a mandatory complete backfilling of mines for the purpose of protecting cultural resources.

As to the first Bill, the tribunal did not enquire into the alleged discriminatory purpose of the measure, motivated by the fact that 'discerning legislative intent is always a difficult endeavor'.[85] In analysing whether it respected the formal requirements of general legislation, the tribunal looked at the Bill's *prima* facie general

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[80] *Ibid.*, at paras 621, 626, 627.

[81] *Ibid.*, at paras 545-548. See also *Glamis Gold, Ltd. v. The United States of America, Memorial of Claimant Glamis Gold LTD*, 5 May 2006, at 288–301.

[82] *Glamis Gold, Ltd. v. The United States of America, Counter-Memorial of Respondent United States of America*, 19 September 2006, at 221–222.

[83] Glamis Gold v. USA, Award, *supra* note 76, at para 576.

[84] *Ibid.*, at paras 580, 591.

[85] *Ibid.*, at para 792.

application and non-retroactivity, concluding that '[w]hether, in reality, this bill will only serve to limit the operation of the [investor's] Project, this Tribunal cannot say'.[86] Accordingly, it did not find any discriminatory nature.[87] It then rejected the claim on the violation of the investor's expectations by stating that a general piece of legislation was not sufficient to generate the specific inducement that was a prerequisite for any breach of Art. 1105.[88] Finally, the claim of arbitrariness was resolved by addressing whether the measure showed a *prima facie* rational relationship with its stated purpose and was reasonably drafted to address its objectives.[89] The tribunal found that the government 'had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy'.[90]

As to the second measure, the tribunal initially excluded the violation of the investor's expectations. It noted that the additional requirements imposed by the measure were 'completely novel, wholly unexpected, and even contrary to the recommendations of reputable organizations',[91] but focused on whether the government had made any specific assurances to induce the investment: since no assurances were given, the tribunal did not address the issue.[92] What followed was that, in the absence of specific assurances to the investor, the State's regulatory power remained intact. As stated by the tribunal, 'a claimant cannot have a legitimate expectation that the host [C]ountry will not pass legislation that will affect it.'[93] Finally, the tribunal addressed the claim for arbitrariness by referring to the scientific conclusions relied upon in the adoption of the act, and that such conclusions were rationally related to the goal of the act itself, finding no violation of At.1105.[94]

In the *Glamis Gold* case, the tribunal resorted to a broader interpretation than that supported by the State, including the protection of the investor's legitimate

[86] *Ibid.*, at para 796.

[87] *Ibid.*, at para 797.

[88] *Ibid.*, at para 802.

[89] *Ibid.*, at para 803.

[90] *Ibid.*, at para 805.

[91] *Ibid.*, at para 810.

[92] *Ibid.*, at para 811.

[93] *Ibid.*, at para 813.

[94] *Ibid.*, at para 818.

expectations as a standalone element of the MST and extending the analysis accordingly. It required, however, a high threshold for the violation of the standard, interpreting the concept of investor's expectations restrictively. In the analysis of the State's measures, it then granted considerable leeway to the State's determinations, limiting its analysis to a *prima facie* scrutiny and not delving into the reasons behind the adoption of legislative acts.[95] Consequently, the tribunals adopted an overall deferential standard of review.

iv. Cargill, Incorporated v. United Mexican States (2009)

Cargill, Inc. (the investor) was an American food company selling high fructose corn syrup in Mexico. Corn syrup was a sweetener produced from corn and used as a low-cost substitute for sugar in soft drinks. In response to an economic crisis that severely affected its sugar industry, Mexico adopted protective measures for the industry, among which the imposition of an additional 20% tax on soft drinks and the requirement of a permit issued by Ministry of Trade and Industrial Development for imports of high fructose corn syrup from the US.[96] The measures were considered by the investor as breaching, among other things, Art. 1105.

The tribunal's determination of the scope of the FET provision reflected the interpretation given by the State. Similarly to what Mexico argued,[97] the tribunal

[95] See, in this sense, Vadi, 'Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration', in A. K. Bjorklund (ed.), *Yearbook on International Law and Politics 2013-2014* (2015) 201, at 224; Cheyne, 'Deference and the Use of the Public Policy Exception in International Courts and Tribunals', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 38, at 50.

[96] Cargill v. Mexico, Award *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at paras 52-127.

[97] *Ibid.*, at paras 244-248. See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at para 154, according to which FET '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. The 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

adopted an intermediate notion of MST between the *Neer* standard from 1926, considered as not reflecting the current interdependent and intertwined world of economic relations, and the *Tecmed* one, seen as not reflecting the scope of customary international law.[98] It identified the standard with an adaptation of the *Neer* standard to current conditions, which implied four considerations, namely,

> '(1) [t]he failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law […] (2) A failure to satisfy requirements of national law does not necessarily violate international law […] (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements […] (4) The record as a whole –not isolated events– determines whether there has been a breach of international law.'[99]

Consequently, bad faith or wilful neglect of duty were not required to violate the MST, although their presence would be determinant of such a violation.[100] Furthermore, the tribunal excluded that the protection of investor's legitimate expectations to a stable and predictable environment, transparency, and discrimination were independent element of the MST,[101] in complete adherence with the State's arguments. [102] Also in the case of arbitrariness the tribunal agreed with the interpretation given by the State and set up a high threshold,[103] requiring

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such regulations'.

[98] In doing so, it quoted the tribunal in, *supra* note 52 (Mondev v. USA), at para 116, which stated that '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'. See Cargill v. Mexico, Award, *supra* note 96, at para 281.

[99] Cargill v. Mexico, Award, *supra* note 96, at para 287, quoting GAMI v. Mexico, *supra* note 53, at para 97.

[100] Cargill v. Mexico, Award, *supra* note 96, at para 296.

[101] *Ibid.*, at paras 290, 294, 295.

[102] *Cargill, Incorporated v. United Mexican States, Rejoinder of the Respondent*, 18 September 2009, at para 320, 264, 265.

[103] Cargill v. Mexico, Award, *supra* note 96, at para 259.

> 'the State's actions [to] move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.'[104]

A simple determination that a domestic agency or legislature incorrectly weighed the various factors could not justify a finding of arbitrariness.

As to the analysis of the measures, the Tribunal firstly recognized the right of Mexico to 'enact […] laws and regulations to aid [its] industry and its populace.'[105] It then went on to identify the purpose of the tax enacted by Mexico with the 'express intention of damaging [the investor's] investment to the greatest extent possible',[106] in order to induce the US to change its policies on sugar imports from Mexico. The tribunal identified this as the sole relationship between the means and the ends of the measure.[107]

In this regard, it did not consider the arguments of the State that the actions were justifiable as countermeasures under international law, given their adoption as part of a trade war between Mexico and the US. Since the measures were enacted solely towards American investors and did not provide any objective criteria according to which the companies could obtain a permit, the tribunal found them to be of 'manifest injustice',[108] surpassing the standard of gross misconduct, and constituting actions in bad faith,[109] ultimately being in violation of the MST. Having found bad faith in the enactment of the acts, the tribunal did not consider other contested issues such as the alleged poor administration of the government or the public purpose of the measures, nor their legality under domestic law.[110]

The *Cargill* tribunal is another example of how both the scope of review and the analysis of the measures influence the standard of review. The tribunal employed little deference in the analysis of the measures, substituting its evaluations

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[104] *Ibid.*, at para 293.

[105] *Ibid.*, at para 304.

[106] *Ibid.*, at para 298.

[107] *Ibid.*, at para 299.

[108] *Ibid.*, at para 300.

[109] *Ibid.*, at para 301.

[110] *Ibid.*, at para 303.

to those of the State as to their purpose, leaving no leeway to considerations of legitimacy of the State's behaviour under international law and ultimately finding that the measures were in breach of the MST.

However, the standard of review needs to consider that, by exercising a deferential approach in the interpretation of the FET provision, the tribunal precluded the analysis to encompass several alleged elements of the standard such as the protection of investor's legitimate expectations, transparency, or discrimination, and refrained from carrying out the analysis of those elements accordingly.[111] Consequently, the standard of review employed in the case at hand was certainly less deferential than other cases such as the one employed in the *GAMI* case or in the *Glamis Gold* one addressed above but did not reach the low level of deference that can be found in cases such as *S.D. Myers*.

v. Chemtura Corporation v. Government of Canada (2010)

Chemtura Corporation (the investor), through its wholly-owned subsidiary Crompton Canada, was an American investor that manufactured in Canada a lindane-based pesticide used to treat canola seeds. Although, by 1997, lindane usage had already been prohibited in several Countries, including the US, importation of lindane-treated canola seed from Canada to the US was permitted until 1998 to selected registrants, among which Chemtura. In late 1998, all registrants entered into a voluntary withdrawal agreement with Canada to phase out lindane-treated products, which the investor was the only one to pull out from, with the intention of continuing its production. In 1999, the competent Canadian agency (PMRA) carried out a Special review and adopted a regulation that banned lindane-treated seeds for posing health and safety risks. Chemtura initiated arbitration under the NAFTA for violation of, among other grounds, Art. 1105.[112]

The tribunal identified the FET standard with the MST under customary international law as prescribed by the FTC Note.[113] However, it focused on the evolving

[111] See Dumberry, *supra* note 14, at 265; Haeri, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law', 27 *Arbitration International* 27.

[112] *Chemtura Corporation v. Government of Canada*, UNCITRAL Award, 2 August 2010 (Chemtura v. Canada, Award), at paras 5-49.

[113] *Ibid.*, at para 120.

nature of customary international law, which it considered as being influenced by the great number of BITs concluded by States. Quoting the *Mondev* award, the tribunal identified a much-lower threshold than that contained in the *Neer* standard for the violation of the MST and stated that

> '[i]n holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.'[114]

The tribunal adopted a different and broader interpretation of the high threshold identified by the State. Although the latter similarly argued that the MST was no more reflected in the *Neer* wording,[115] it required grossly unfair or unreasonable judicial or administrative rulings (excluding the mere illegality of the measures),[116] State actions enacted in a 'wholly arbitrary' or 'grossly unfair' way,[117] or administrative actions grave enough to shock a sense of judicial propriety,[118] to identify a violation of the standard. Furthermore, in the State's view, the MST did not include independent elements such as good faith,[119] transparency,[120] or the investor's legitimate expectations of a stable and predictable legal framework.[121]

As to the analysis of the measures, the tribunal initially focused on the special review carried out by the PMRA. In doing so, it did not question the scientific determinations that formed the basis of the agency's decisions, noting that its role '[was] not to second-guess the correctness of the science-based decision-making of

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[114] *Ibid.*, at para 121, quoting Mondev v. US, *supra* note 52, at para 125.

[115] *Chemtura Corporation v. Government of Canada, Government of Canada, Counter-Memorial*, 20 October 2008, at para 678.

[116] *Ibid.*, at para 679.

[117] *Ibid.*, at para 681.

[118] *Ibid.*, at para 684. Recalling *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL Award, 26 January 2006, at para 200.

[119] *Chemtura Corporation v. Government of Canada, Government of Canada, Rejoinder Memorial*, 10 July 2009, at paras 186 ff.

[120] *Ibid.*, at paras 189 ff.

[121] *Ibid.*, at paras 192 ff.

highly specialized national regulatory agencies.'[122] The tribunal subjected the measure to a bad-faith test, thereby requiring a high threshold for the violation of the standard, and found that the special review had been undertaken by the PMRA in pursuance of its mandate and as a result of Canada's international obligations that restricted the use of lindane[123] and that it therefore constituted a 'legitimate regulatory concern'.[124] It then analysed the whole review process to determine whether it complied with the State's due process obligation intended as absence of bad faith or of 'procedurally improper behaviour by the PMRA which was both serious in itself and material to the outcome of its inquiry',[125] concluding that such a high threshold had not been met.

The second relevant measure concerned the termination of Chemtura's lindane registrations and the ensuing impossibility for the investor to sell any lindane product thereafter, as a matter of discrimination of the investor. In deciding whether the investor was entitled to a phase out of voluntary discontinuation of lindane products, the tribunal determined that, under domestic law, the PMRA enjoyed discretion on whether to offer such a treatment: even though such treatment had not followed the normal administrative process, it fell within the discretion of the agency and it was motivated by the imminent risk.[126]

The tribunal in the *Chemtura* case adopted a deferential standard of review in the analysis of the measures. It limited itself to verify the procedural propriety of the decision-making process, leaving scientific determinations to the State agency and concluding that, once the domestic procedures were followed, such determinations constituted a legitimate regulatory concern.[127] In this case, the standard of review was not affected by the little-deferential understanding of the scope of the standard. Although the tribunal found that the MST was informed by the multitude

[122] Chemtura v. Canada, Award, *supra* note 112, at para 134.

[123] *Ibid.*, at paras 136-137.

[124] *Ibid.*, at para 147.

[125] *Ibid.*, at para 148.

[126] *Ibid.*, at paras 190-192.

[127] See Cheyne, *supra* note 95, at 62; Henckels, *supra* note 36, at 212; Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577, at 602; Vadi, *supra* note 95, at 224.

of BITs, therefore providing a treatment more favourable than the high threshold identified by the State, it then resorted to a bad faith review in practice, requiring a high threshold for the violation of the standard.

2.3. NAFTA jurisprudence of the last decade

The last part of the present analysis covers the most-recent cases dealing with regulatory measures in the NAFTA framework. As will be seen below, with the notable exception of the *Bilcon* award, recent arbitral tribunals have openly adopted deferential standards of review.

i. Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada (2013)

Mobil Investments Canada Inc. and Murphy Oil Corporation (collectively, 'the investors') were two US corporations with subsidiaries located in Canada, each one holding interests in two petroleum development projects in the Canada-Newfoundland and Labrador offshore. According to the Canadian legislation, new oil development projects could begin operations only upon approval of the relevant administrative agency, namely the Canada-Newfoundland Offshore Petroleum Board ('the Board'). Applicants needed to submit a so-called Benefit plan for the employment of Canadians and, following the approval of the plan, were eligible for the approval of the development plan. The investors' projects were approved, respectively, in 1986 and 1984. According to the existing legislation, the Board was to adopt guidelines with respect to the application and administration of the Benefits Plan requirements.[128] A change in the guidelines in 2004, introducing the new requirement of fixed amounts of expenditures to be made, was deemed in violation of, among other things, Art. 1105, leading the investors to file a lawsuit before an international arbitral tribunal.

The claimants' sole argument with regard to the alleged breach of Art. 1105 concerned the violation of the investor's legitimate expectations by failing to provide a stable regulatory framework for the conduct of petroleum development

[128] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 (Mobil v. Canada, Decision on Liability), at paras 7-75.

projects in the region.[129] Under several aspects, the tribunal did not depart from the interpretation of the scope of the standard given by Canada,[130] and gave a narrow reading of the FET obligation contained at Art. 1105. It linked the standard to the MST under customary international law, the content of which was identified in the protection from a conduct that was 'arbitrary, grossly unfair, unjust or idiosyncratic, or [was] discriminatory and expose[d] a claimant to sectional or racial prejudice, or involve[d] a lack of due process leading to an outcome which offend[ed] judicial propriety.'[131] It thus considered the investor's legitimate expectations only as a 'relevant factor' in the determination of the treatment under customary international law, when clear and explicit representations were made by the State in order to induce the investment and were reasonably relied on by the investor.[132] Consequently, legitimate expectations were not seen a standalone element of the MST, in accordance with the interpretation offered by the State.[133] Investor's legitimate expectations then required clear and explicit representations made by the State in order to induce the investment and that the investor had reasonably relied on them.[134] In line with the State's arguments,[135] the tribunal excluded that the stability of the regulatory framework might be part of the MST:

> '[i]n a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens

[129] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, Claimants' Memorial*, 3 August 2009, at 96 ff.

[130] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, Government of Canada Counter Memorial*, 1 December 2009 (Government of Canada Counter Memorial), at para 246, quoting S.D. Myers v. Canada, Award, *supra* note 19 at para 263.

[131] Mobil v. Canada, Decision on Liability, *supra* note 128, at para. 152. A similar view was expressed by the State. See *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, Government of Canada Rejoinder*, 9 June 2010, at paras 122, 129.

[132] Mobil v. Canada, Decision on Liability, *supra* note 128.

[133] Government of Canada Counter Memorial, *supra* note 130, at paras. 252 ff.

[134] Mobil v. Canada, Decision on Liability, *supra* note 128, at para. 152.

[135] Government of Canada Counter Memorial, *supra* note 130, at para 268.

on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.'[136]

In the analysis of the measures, the tribunal thus looked for explicit representations from the administrative agency, together with an indication that reliance was placed upon such representations. It could find none, from the Board[137] nor from any person acting for or on its behalf.[138] In particular, the approval by the Board of the Benefit Plan did not constitute a contractual arrangement and an implicit undertaking that there would be no material changes, since Board's decisions amounted to an exercise of administrative or public authority.[139] The tribunal then looked at whether there was any indication in the existing laws preventing the government from changing the legislation, directly or indirectly, denying also this possibility.[140] Finally, the tribunal found that the Board had acted reasonably and lawfully in exercising its authority and applying the 2004 Guidelines. In doing so, it referred to the evaluation made by the Canadian Court of Appeal, without questioning the interpretation of domestic law given by the Court.[141]

The *Mobil* case is yet another example of how the interpretation of the scope of the FET provision may influence the analysis of the host State's regulatory measures. The case dealt with one particular trait of the FET, namely the protection of the investor's legitimate expectations: by adopting a narrow interpretation of such requirement, the tribunal limited its analysis to the presence of specific assurances from the State.[142] It then solely focused on the procedural soundness of the whole process and concluded that the enactment of legislation that changed the

[136] Mobil v. Canada, Decision on Liability, *supra* note 128, at para. 153.

[137] *Ibid.*, at para 161.

[138] *Ibid.*, at para 163.

[139] *Ibid.*, at paras 165-166.

[140] *Ibid.*, at para 159.

[141] *Ibid.*, at paras 167-169.

[142] On the inconsistencies of the tribunal's reasoning and, more generally, for a critical view of the tribunal's interpretation, see Laird et al., 'International Investment Law and Arbitration: 2012 in Review', in *Yearbook on International Investment Law & Policy 2012-2013* (2014) 109, at 152 ff.

previous framework could not be considered as in breach of the investor's expectations. Overall, the tribunal employed a deferential standard of review in the present case.

ii. Bilcon of Delaware et al v. Government of Canada (2015)

An exception to the high level of deference employed by the tribunals in the present subsection so far is the *Bilcon v. Canada* case. Bilcon of Delaware, Inc. (the investor)[143] was an American enterprise part of the Clayton Group of companies, that principally engaged in the supply of building materials. In 2002, it attempted to develop a quarry and marine terminal off the coast of Nova Scotia (Canada) in an ecologically sensitive area, to provide a reliable supply of aggregate for the companies of the Clayton group. Nova Scotia had a publicly stated policy of encouraging investment in its mining industry, while the overall regulatory framework in place in Nova Scotia and federal Canada included requirements for an environmental assessment and approval. The investor never obtained the approval to conduct tests to prove that the quarry would be safe for the environment, claiming that there was inappropriate political interference in the regulatory process. The project was subject to a rigorous review conducted by a Joint Review Panel (JRW), that ultimately decided that the project was incompatible with the community's core values. According to the investor, the process was in violation of several NAFTA provisions, among which Art. 1105.[144]

The tribunal agreed with Canada on the identification of the protection offered by Art. 1105 with the MST.[145] In disagreement with the State, it clarified that 'NAFTA awards make it clear that the international minimum standard is not limited to conduct by host [S]tates that is outrageous. The contemporary minimum international standard involves a more significant measure of protection'.[146]

[143] Acting as claimants in the present dispute were Bilcon of Delaware, Inc. and four members of the Clayton family, who managed the Clayton Group, which in turn incorporated Bilcon of Delaware, Inc..

[144] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction, Liability, 17 March 2015 (Bilcon v. Canada, Award on Jurisdiction), at paras 6-39.

[145] *Ibid.*, at paras. 152-153; 430, 432.

[146] *Ibid.*, at para 433.

Furthermore, it dismissed the *Neer* formulation as outdated.[147] This notwithstanding, the tribunal quoted the *Waste Management* award and required a high threshold for the violation of the standard, namely a State conduct that was 'arbitrary, grossly unfair, unjust or idiosyncratic, or [was] discriminatory and expose[d] a claimant to sectional or racial prejudice, or involve[d] a lack of due process leading to an outcome which offends judicial propriety'. [148]

In doing so, it substantially agreed with the formulation adopted by Canada, which identified the threshold with the same quotation from the *Waste Management* case, as recalled in turn by the *Mobil* case indicated by the respondent.[149] In addition, the tribunal considered the MST as not including a stand-alone obligation to protect legitimate expectations, although legitimate expectations might be relevant in determining whether a measure amounted to the type of egregious conduct that would breach Art. 1105,[150] contrary to the State's arguments.[151]

The analysis then focused on the alleged violation of the investor's legitimate expectations. First, the tribunal determined that such expectations could be based on the legal framework existing at the time the decision to invest was made. The legislation in force in Nova Scotia was welcoming investments in the mining sector, as advertising campaigns and statements of prominent officials were claiming.[152] The compatibility of new projects with the need for protecting the environment was then determined under the Canadian federal law, which set out an environmental assessment for new projects that could be carried out through various means

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[147] *Ibid.*, at para 440.

[148] *Ibid.*, at para 422. Recalling *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, 30 April 2004 (Waste Management v. Mexico), at paras. 98-99.

[149] *Bilcon of Delaware et al v. Government of Canada, Rejoinder of the Government of Canada*, 21 March 2013 (Rejoinder of Canada), at para 108, quoting Mobil v. Canada, Decision on Liability, *supra* note 128, at paras. 152-153. See also *Bilcon of Delaware et al v. Government of Canada, Submission of the United States of America*, 19 April 2013, at para 4, requiring a similarly-high threshold.

[150] Bilcon v. Canada, Award on Jurisdiction, *supra* note 144, at para 444.

[151] *Bilcon of Delaware et al v. Government of Canada, Counter Memorial of Canada*, 9 December 2011, at paras. 388 ff.

[152] Bilcon v. Canada, Award on Jurisdiction, *supra* note 144, at paras 465, 468, 469.

ranging from a screening, over a comprehensive study to a panel review (JRP).[153] According to the federal law, the responsible authority was called to determine whether the public interest, in the circumstances of the case, outweighed the existence of likely significant adverse effects after mitigation.[154] Consequently, in the tribunal's view, the investor had the legitimate expectation that it would obtain the environmental permission needed if the project satisfied the requirements of the laws of federal Canada and Nova Scotia.[155]

The tribunal then focused on the JRP review process in length, addressing, among other things, its composition, the time given to expert witnesses of each party, the guidelines used, and concluded that the JRP's findings, namely the infringement of community core values, was in violation of the investor's expectations. It reached this conclusion by questioning the JRP's interpretation of the term, and carrying out the analysis according to the different meanings of the term it autonomously identified.[156]

Following this operation, the tribunal addressed the lack of mitigation measures proposed by the JRP in respect of its point-by-point review of specific effects of the project. The JRP had stated that, while single issues could be resolved through mitigation measures, the whole project would infringe the community core values and could therefore not be mitigated.[157] The conclusions of the JRP were then accepted by the Governments of federal Canada and Nova Scotia. The Tribunal concluded that the whole JRP process was in violation of the investor's legitimate expectations and that, by not complying with Canada's federal laws, it was arbitrary and ultimately in violation of the MST.[158]

The standard of review adopted by the tribunal paid little deference to the State's determinations. The whole analysis was based on the alleged violation of the investor's legitimate expectations, considered by Canada as not being included

[153] *Ibid.*, at para 478.

[154] *Ibid.*, at para 479.

[155] *Ibid.*, at para 447.

[156] *Ibid.*, at paras 502-547.

[157] *Ibid.*, at paras 559-571.

[158] *Ibid.*, at paras 588-604.

in the MST in the first place.[159] The tribunal then substituted its judgment over the requirements of Canadian law, determining that the element of 'community core values' was not a lawful criterion under the existing legislation. Although it stressed that this was not an environmental assessment in substitution of that of the JRP,[160] the tribunal gave its own meaning to the terms and proceeded accordingly with the analysis, ultimately carrying out a *de novo* review.[161] In doing so, it was influenced by its consideration of the scope of review of Art. 1105: while formally adopting a high standard, the tribunal determined that a breach of domestic law (guiding the JRP process) could determine a breach of the MST.

Furthermore, although the tribunal spent a lengthy part of the award in explaining why there were specific representations that gave rise to the investor's legitimate expectations, its analysis showed that the expectations consisted in that, if the requirements of Canadian law (federal and provincial) regarding environmental assessment were met its investment could go ahead, ultimately arising from the regulatory framework.[162]

iii. Mesa Power Group, LLC v. Government of Canada (2016)

Mesa Power Group LLC (the investor) was a US enterprise operating in the field of renewable energies in the wind sector. The investor raised a claim against a program enacted by the Government of Ontario to promote the generation and

[159] For a critical voice on the broad intepretation of the investor's legitimate expectations adopted by the tribunal, see S. Dudas, *Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises*, 11 September 2015, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2015/09/11/broken-promises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/ (last visited 3 April 2021).

[160] Bilcon v. Canada, Award on Jurisdiction, *supra* note 144, at para 602.

[161] On the little deference emerging from the analysis of the tribunal, see Carfagnini, 'Too Low a Threshold: Bilcon v Canada and the International Minimum Standard of Treatment', 53 *Canadian Yearbook of International Law/Annuaire Canadien de Droit International* (2016) 244; S. Schacherer, *Clayton/Bilcon v. Canada – Investment Treaty News*, 18 October 2018, Investment Treaty News, available at https://www.iisd.org/itn/en/2018/10/18/clayton-bilcon-v-canada/ (last visited 3 April 2021).

[162] See also *Bilcon of Delaware et al v. Government of Canada, Dissenting Opinion of Professor Donald McRae*, 10 March 2015.

consumption of renewable energy in the province (FIT Program). Generators of renewable energy could, under this program, apply for 20 or 40-year power purchase agreements and would be paid a guaranteed price per kWh for electricity delivered into the Ontario electricity system. The investor filed six applications, none of which was awarded any FIT contract, and later filed for arbitration, claiming that the government had acted in violation of, among other things, Art. 1105 in the awarding of FIT contracts. In addition, it claimed that the Government had breached the same provision by contemporarily entering into an agreement with a Korean consortium, granting priority access in transmission capacity to the latter, to the detriment of FIT applicants.[163]

The tribunal dismissed the claimant's arguments on the need to interpret Art. 1105 unfettered by the FTC Note and requiring the consideration of sources other than customary international law. In doing so, it simply accepted the interpretation given by NAFTA Parties through the FTC Note, as argued by Canada[164] (and the US in its submission ex Art. 1128),[165] and identified the FET standard with the MST under customary international law.[166] The tribunals then agreed with the State on the high threshold required for a violation of the MST,[167] as stated in the *Waste Management* case,[168] and identified the following components:

> 'arbitrariness; "gross" unfairness; discrimination; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which

[163] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (Mesa Power v. Canada, Award), at paras 6-42.

[164] *Ibid.* at para 469.

[165] *Mesa Power Group, LLC v. Government of Canada, Submission of the United States of America*, 25 July 2014, at para 5.

[166] Mesa Power v. Canada, Award, *supra* note 163, at para 479: '[i]t is not for this Tribunal to determine whether – as the Claimant alleges – the FTC Note amounts to an amendment of the NAFTA or not. Rather, faced with an interpretation given by the Contracting States through the FTC, the Tribunal must simply apply it.'

[167] *Mesa Power Group, LLC v. Government of Canada, Government of Canada Post Hearing Submission*, 18 December 2014, at para 66.

[168] Waste Management v. Mexico, *supra* note 148, at paras 98-99.

> offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings.'[169]

At the same time, the tribunal agreed with the tribunal in *Bilcon* in the sense that

> 'there is a high threshold for the conduct of a host [S]tate to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour'.[170]

The tribunal then addressed the numerous measures indicated by the claimant as in breach of the FET obligation. Of relevance for the present analysis are the decision by the Government of Ontario to enter into an investment agreement with a Korean consortium, effectively reducing the market share available under the FIT Program and negatively affecting the investor's investment, and a Minister's direction that changed the FIT rules in one of the most-profitable regions for wind production.

As to the first measure, the tribunal (without explicitly stating it) resorted to a reasonableness test, as it analysed the objective of the measure, its means, and the relationship between objective and means. The objective for entering into a parallel investment agreement was found in the creation of substantial manufacturing facilities and thousands of jobs in the renewable energy sector, ultimately concerning local economic development.[171] In order to meet these objectives, the Government entered into an investment agreement which provided the commitment of an operator to serve as an anchor tenant; the generation of substantial quantities of green electricity; the attraction of manufacturing plants to Ontario; and the creation of jobs in time of economic difficulty.[172]

The tribunal did not question the goodness of the choice of the investment instrument:

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[169] Mesa Power v. Canada, Award, *supra* note 163, at para 502.

[170] *Ibid.*, at para 501, quoting Bilcon v. Canada, Award on Jurisdiction, *supra* note 144, at para 444.

[171] Mesa Power v. Canada, Award, *supra* note 163, at para 556.

[172] *Ibid.*, at para 565.

> 'these are all policy considerations and questions that were for the government of Ontario alone. It is not the Tribunal's role to act as an appellate body in this regard, or second guess or weigh the wisdom of Ontario's decision to enter into the GEIA at the time – even if sufficient renewable energy would possibly have been available through the FIT Program.'[173]

It then considered the measure as being reasonably related to its objective and thus justifying a separate investment agreement, provided that 'whether or not the [investment agreement] actually succeeded in its objectives is not a relevant consideration, as long as the conclusion of the [investment agreement] was pursuant to a bona fide policy decision by the Ontario government, at the time.'[174]

Finally, the tribunal concluded that a 'justification and reasonable relationship did exist. It is a different question, on which the [t]ribunal does not express a view, whether entering into the GEIA was a wise move under the circumstance'.[175] The tribunal clarified its approach by stating that

> '[i]n reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a [S]tate when it comes to assessing how to regulate and manage its affairs. This deference notably applies to the decision to enter into investment agreements'.[176]

Similarly, the tribunal applied a reasonableness test when analysing the second measure at hand, namely the Minister's direction that modified the FIT rules. The objective of the measure was to limit abrupt changes to energy prices in a situation of decreasing demand of electricity because of the effect of the economic recession.[177] In response to such situation, the Minister modified the process to allocate capacity in the region, to avoid the excesses that would have been created if sticking to the original FIT program.[178] Also in this case, the tribunal clarified that 'it is not for this Tribunal to second-guess a government's policy choices, or to ascertain

[173] *Ibid.*, at para 579. See, also, para 583.

[174] *Ibid.*, at para 573.

[175] *Ibid.*, at para 579.

[176] *Ibid.*, at para 553.

[177] *Ibid.*, at para 624.

[178] *Ibid.*, at para 625.

whether the policy goals of the government would have been better served by resorting to other means',[179] and concluded that Ministry took its decision in light of the prevailing circumstances based on reasonable and rational considerations.[180]

The standard of review employed in the *Mesa Power* case was highly deferential. The tribunal repeatedly avoided to question the determinations carried out by the State, expressly recalling the State's right to regulate its domestic affairs and the deference that investment arbitral tribunals should pay in such cases.[181] To this end, one relevant passage of the award reads

> 'the Tribunal wishes to recall that Article 1105 does not provide a guarantee against regulatory change. A State may amend its laws and regulations as it deems appropriate in light of changing circumstances.'[182]

Such conclusion was in line with the deferential approach kept by the tribunal in the determination of the scope of the MST under customary international law, considered as requiring a high threshold for the determination of its violation, as claimed by the State.

iv. Windstream Energy LLC v. Government of Canada (2016)

Windstream Energy LLC (the investor) was an American company that invested in an offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada. The Project was undertaken following Ontario's enactment in 2009 of the Green Energy and Green Economy Act, which introduced a feed-in-tariff (FIT) program whose rules, requirements and contracts were to be developed by an administrative agency, namely the Ontario Power Authority (OPA). The FIT Program established a 20-year fixed premium price to be paid by the OPA for energy from renewable sources, and in return FIT contract holders were required to bring their project into commercial operation within the time limit agreed on in the relevant contract.

[179] *Ibid.*, at para 632.

[180] *Ibid.*, at para 630.

[181] On the interpretation of the elements of the MST by the tribunal, see Carfagnini, *supra* note 161.

[182] Mesa Power v. Canada, Award, *supra* note 163, at para 619.

Following the award of FIT contract, the Government of Ontario delayed the determination of rules, standards and requirements for offshore wind proponents to obtain the approval, and eventually imposed a moratorium (temporary prohibition) on the development of offshore wind, grounded on the precautionary principle due to the need of further research. According to the investor, the moratorium frustrated its attempts to develop the project, in a manner incompatible with, among other things, the FET clause contained in the NAFTA.[183]

The tribunal identified the content of Art. 1105 with the MST, in line with the determination of the scope of FET protection argued by Canada (as well as the US and Mexico),[184] and in disregard once again of the investor's view that the standard was independent from customary international law.[185]

It then did not address the question of the scope of the standard in abstract terms, claiming that this endeavour could only be carried out referring to the specific circumstances of the case.[186] Doing so, however, entailed that the tribunal looked at whether the measures adopted by the government of Ontario were in breach of the investor's legitimate expectations and if they were discriminatory towards it, ultimately accepting a broader interpretation than that offered by the NAFTA States Parties.[187] The latter excluded discrimination on ground of nationality, already covered by Art. 1102, from the scope of the MST, admitting that 'Article 1105 might prohibit certain types of invidious discrimination, such as racial or religious discrimination', only.[188]

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[183] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (Windstream v. Canada), at paras 1-218.

[184] *Windstream Energy LLC v. Government of Canada, Government of Canada Counter-memorial* (Canada Counter-memorial), at para 389.

[185] Windstream v. Canada, *supra* note 183, at paras 355-356.

[186] *Ibid.*, at para 362.

[187] *Ibid.*, at para 363.

[188] Canada Counter-memorial, *supra* note 184 at para 442. See also *Windstream Energy LLC v. Government of Canada, Article 1128 Submission of Mexico* (Mexico Article 1128 Submission), at para 6.

Furthermore, in the States' view, investor's legitimate expectations did not constitute a standalone element of the standard[189] and could be taken into consideration when determining the egregiousness of the State conduct only when, among other things, 'based on a specific assurance or promise by the State made to induce the investment'.[190] Consequently, the States argued that the mere failure to respect an investor's expectations when making changes to the regulatory environment could not constitute, in and of itself, a breach of the MST.[191] Tribunals were thus to refrain from second-guessing government policy and decision-making,[192] and should accord a high level of deference to States governing affairs within their own borders.[193]

First, the tribunal looked at the government's behaviour that led to the moratorium, namely the progressive delay in the adoption of the necessary regulatory framework, while the investor was continuing to invest in the project. The tribunal found that the lack of scientific support 'necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring the protection of the environment and human health'[194] were not the sole reasons for the government's behaviour, as claimed by the latter: it found that an increasing political resistance to the development of offshore wind[195] and the government's concern for the impact of offshore wind on electricity costs in Ontario[196] played a role in the decision. It also found that the process lacked transparency, in that the government did not inform the investor of its evolving policy position.

This notwithstanding, the tribunal found the government's position to be 'at least in part driven by a genuine policy concern that there was not sufficient

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[189] Canada Counter-memorial, *supra* note 184, at para 406. See also *Windstream Energy LLC v. Government of Canada, Article 1128 Submission of the United States of America* (United States Article 1128 Submission), at para 16.

[190] Canada Counter-memorial, *supra* note 184, at para 410.

[191] *Ibid.*, at para 409. See also United States Article 1128 Submission, *supra* note 189, At para 17.

[192] Canada Counter-memorial, *supra* note 184, at para 381.

[193] *Ibid.*, at para 389. See also Mexico Article 1128 Submission, *supra* note 188, at para 7.

[194] Canada Counter-memorial, *supra* note 184, at para 397.

[195] Windstream v. Canada, *supra* note 183, at para 366.

[196] *Ibid.*, at para 377.

scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects'.[197] In doing so, it did not question the decision to impose a moratorium, respecting the government's determination.

The tribunal then focused on the government's failure to overcome the stalemate that its lack of action had created: the regulatory framework continued to envisage the development of offshore wind while the FIT contract could not be implemented because of the lack of additional and more detailed regulations, until the project had reached a point at which it was no longer financeable. In a similar fashion to the approach adopted by the tribunal in *GAMI v. Mexico*, the tribunal focused on whether the inaction was entirely dependent on the State and thus constituted an egregious conduct or it was caused by some 'contributory negligence' of the investor. Having found that the omission was entirely attributable to the government of Ontario contrary to its own legislation, that the investor was entirely prevented from overcoming the situation, and that the government had already envisaged the possibility of a legal action for such a failure to legislate, the tribunal found the State's behaviour to violate Art. 1105.[198]

In the *Windsream* case, the tribunal applied a deferential standard of review in the analysis of the government behaviour.[199] Though it found that scientific concerns where not the sole reason at the basis of the latter, and though it highlighted the lack of transparency of the process, it ultimately concluded that the scientific uncertainty, alongside at least a partially 'genuine policy concern' were sufficient to justify the State's behaviour. In doing so, the tribunal adopted a precautionary approach,[200] ultimately respecting the government's determinations. The broad interpretation given to the scope of the standard did not affect the analysis, where the tribunal required a high threshold for the violation of the MST, also in the case of

[197] *Ibid.*, at para 376.

[198] *Ibid.*, at paras 378-382.

[199] F. Baetens, *Renewable Energy Incentives: Reconciling Investment, EU State Aid and Climate Change Law*, 2 January 2020, Pluricourts Blog, available at https://www.jus.uio.no/pluricourts/english/blog/freya-baetens/renewable-energy-incentives.html (last visited 4 April 2021).

[200] Harrison, 'International Investment Law and the Regulation of the Seabed', in C. Banet (ed.), *The Law of the Seabed* (2020) 481, at 499 ff.

the behaviour kept after the moratorium, where the high threshold was ultimately met.

v. Mercer International Inc. v. Government of Canada (2018)

The last case of the present subsection sees Mercer International Inc. (the investor), an American enterprise operating in British Columbia through its Canadian affiliates. The investor owned and operated a pulp mill that was permitted to sell the energy it generated, while purchasing electricity at a favourable, embedded-cost rate from the government-controlled electricity generator BC Hydro, by virtue of a power-purchase agreement concluded in 1993. The regulatory framework changed in 2009, when the government of BC prevented self-generators from accessing electricity obtained by BC Hydro under the 1993 power purchase agreement (PPA) whilst selling self-generated electricity at market cost. According to the investor, Canada had failed, among other things, to provide the protection granted in Art. 1105.[201]

The interpretation that Canada gave to the FET clause was in line with that of the NAFTA Parties in all the proceedings seen above, namely the identification with the MST, in accordance with the FTC Note.[202] The standard required a high threshold in order to be breached, namely an act '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 reason as to fall below accepted international standards.'[203] It did not allow for NAFTA tribunals to second-guess government policy and decision-making therefore requiring a certain level of deference to the State's measures, exemplified through the famous formulation expressed by the *S.D. Myers* tribunal.[204]

Consequently, Canada rejected the claimant's assertion that the MST included the requirement of a stable regulatory framework, and that such element could

[201] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (Mercer v. Canada, Award), Part III, at paras 3.1-3.108.

[202] *Mercer International Inc. v. Government of Canada, Government of Canada, Counter Memorial*, 22 August 2014 (Canada Counter Memorial), at paras 454-455.

[203] *Ibid.*, at para 458. Citing Glamis Gold v. USA, Award, *supra* note 76, at para 627.

[204] Canada Counter Memorial, *supra* note 202, at para 457.

generate legitimate expectations covered by the standard. [205] The MST was also considered as not requiring a certain level of transparency in the State conduct,[206] nor to include the protection from discriminatory treatment already included in other NAFTA provisions.[207]

The tribunal devoted little time to the identification of the scope of the MST but it largely agreed with the State and the non-disputing Parties in requiring a high threshold. By quoting the tribunal in *Merrill & Ring v. Canada*, it stated that the MST precluded conducts that were 'unjust, arbitrary, unfair, discriminatory or violation of due process',[208] clarifying that the standard did not cover nationality-based discrimination, addressed under Artt.1102 and 1103.[209] It then did not address the violation of the investor's legitimate expectations, and claimed that the MST had not yet been shown to embrace a claim of transparency.[210]

The limited scope of the standard reflected in a limited analysis of the measures at hand in the dispute, since the tribunal refused to address most of the issues raised by the investor.

As to the first measure addressed by the tribunal, which allowed the investor to purchase some amounts on non-embedded electricity from BC Hydro when selling power, the tribunal only looked at whether the new regime prevented the investor from operating its investment.[211] It did not enquire into the reasons of the measure, nor into the process that led to its adoption. Since the investment was still operating (only at different conditions), the tribunal dismissed the claim.

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[205] *Ibid.*, at paras 472-475.

[206] *Ibid.*, at para 480.

[207] *Ibid.*, at para 478. This interpretation was confirmed by the other NAFTA Parties through their Art.1228 submissions. See *Mercer International Inc. v. Government of Canada, Submission of the United States of America*, 8 May 2015, at paras 17-20, 23, 27; *Mercer International Inc. v. Government of Canada, Submission of Mexico Pursuant [to] Article 1128 of NAFTA*, 8 May 2015, at paras 19-20.

[208] Mercer v. Canada, Award, *supra* note 201, at para 7.57. Quoting *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, at para 208.

[209] Mercer v. Canada, Award, *supra* note 201, at para 7.55.

[210] *Ibid.*, at para 7.77.

[211] *Ibid.*, at para 7.69.

The second measure prevented self-generators from accessing electricity obtained by BC Hydro under the 1993 PPA whilst selling self-generated electricity at market cost. Also in this case, the analysis was only narrowed down to the claim of arbitrariness, identified with the high threshold expressed in the *ELSI* case:[212] the tribunal only looked at whether the regulation prevented the investor from selling any electricity. Since the investor was only prevented from selling the electricity purchased at an embedded cost, it could still operate its investment and therefore the claim was dismissed.[213]

The *Mercer* case is another example of how the determination of the scope of review can affect the analysis of the measures. In the present case, the tribunal adopted a highly deferential standard in the first prong of the analysis, which limited the following analysis by a great extent. A highly deferential approach was then adopted when focusing on the measures, since the tribunal only focused on whether there was still an investment, not delving into any sort of determinations carried out by the State. The overall standard of review employed in the case was therefore highly deferential towards the State.

2.4. Preliminary assessment of the NAFTA framework

The analysis of NAFTA regulatory disputes allows to make some preliminary considerations.

The first consideration pertains to the relevance of the FTC Note, which has surely fettered the discretion of arbitral tribunals in the identification of the scope of protection offered by the FET clause in the treaty. As seen above, the interpretation of the standard of protection in some cases directly affected the overall standard of review employed by the tribunal. Consequently, after the FTC Note was released, arbitral tribunal did not go as far as the *S.D. Myers* or the *Pope & Talbot* tribunal in requiring additional elements to the MST and limited the analysis to stricter requirements. The immediate consequence of the FTC Note is that 'extreme' cases such as the *S.D. Myers* one have not happened again.

[212] *Ibid.*, at para 7.78.

[213] *Ibid.*, at para 7.81.

If the intervention of NAFTA Parties through the FTC Note has prevented tribunals from adopting extreme approaches, it has also shifted the debate from the link of the FET standard with the MST to the identification of the scope of the MST. In carrying out this task, tribunals were once again confronted with the identification of the scope of review of the norm and with the interpretation given by the State party to the dispute in the first place. If, from an overall perspective, interpretations where not as extreme as the pre-FTC Note ones, the debate still allowed tribunals to decide whether to pay deference to the State's interpretations.

The second consideration is that, notwithstanding the obvious peculiarities of each case, there seems to be a general trend showing a more deferential approach towards the host State's determinations in NAFTA arbitral jurisprudence. The two pre-FTC cases studied in Section 3.1.1. include the least-deferential award analysed to this point, namely *S.D. Myers v. Canada*, and a deferential approach in *Pope & Talbot*, still made less deferential by the broad interpretation given to the FET standard. The post-FTC Note cases addressed in section 3.1.2. include 4 cases out of 5 where tribunals have adopted a deferential approach in the analysis of the measures, namely *Methanex v. USA*, *GAMI v. Mexico*, *Glamis Gold v. USA*, and *Chemtura v. Canada*.

In two cases (*GAMI v. Mexico* and *Chemtura v. Canada*) the tribunal adopted a highly deferential standard of review. In two other cases, namely the *Methanex v. USA* and *Glamis Gold v. USA* case, the deferential standard of review was somehow mitigated by the little deferential interpretations of the standard of protection (within the boundaries set by the FTC Note) adopted by the tribunal, that entailed the extension of the analysis to elements to those indicated by the State. In one case (*Cargill v. Mexico*) the tribunal showed little deference in the analysis of the measures, although the overall standard of review was made more deferential by the deference displayed in the interpretation of the standard of protection, which ultimately led the tribunal to not analyse several elements of the standard indicated by the investor. Finally, the most-recent cases analysed in Section 3.1.3. show that, in four cases over five, tribunals have adopted highly deferential standards of review, where the deferential analysis of the State's measures was accompanied by deferential interpretations of the scope of the standard of review. This was the

approach kept by the arbitral tribunals in the cases *Mobil v. Canada*, *Mesa Power v. Canada*, *Windstream v. Canada*, and *Mercer v. Canada*. One exception to this is the little-deferential standard of review resorted to by the tribunal in *Bilcon v. Canada*, both in the analysis of the measures and the interpretation of the MST.

It is thus possible to say that, in the NAFTA framework, there seems to be an emerging trend towards a greater deference in the standard of review employed by arbitral tribunals in the analysis of the State's regulatory measures. The pre-FTC Note cases (Section 3.1.1.) set the lower end of deference. A more deferential standard of review can be seen in post-FTC cases (Section 3.1.2.), although the deference paid in the analysis of the measures was sometimes mitigated by little-deferential interpretations of the MST that negatively affected the overall standard of review. Conversely, the most-recent cases (Section 3.1.3.) show tribunals consistently resorting to a deferential standard of review, except for the *Bilcon* case.

To this end, one could argue that, without *S.D. Myers v. Canada* and *Bilcon v. Canada* (the less-deferential cases in the respective subsections), tribunals have always adopted a deferential standard of review. It seems however that such an observation misses some important elements of the analysis.

First, even without the above-mentioned cases, the standard of review employed in the cases grouped in Section 3.1.1. and 3.1.2. is lower than that employed by the most recent cases contained in Section 3.1.3., since deferential analysis of the measures in early cases have been affected by little-deferential interpretations of the standard, as seen above.

Second, in *Bilcon v. Canada* the standard of review clearly departs from the highly deferential standard employed in the other cases decided in the same period and can be considered as an exception. Conversely, *S.D. Myers v. Canada* reflects the broader tendency of pre-FTC Note cases to adopt broad interpretations, and therefore cannot be taken as an extreme case that needs to be excluded from the analysis.

Consequently, although arbitral jurisprudence is not entirely consistent and shows some exceptions (and it could not be otherwise given the nature and the inherent traits of investment arbitration), it seems correct to identify a trend towards

a greater deference in the standard of review employed by arbitral tribunals in the analysis of the State's regulatory measures.

3. Arbitral jurisprudence based on other treaties with qualified FET clauses

Outside the NAFTA context, arbitral jurisprudence concerning regulatory disputes that stem from qualified FET clauses encompasses only two cases, namely *TECO v. Guatemala* [214] and *Bear Creek Mining v. Peru*.[215] However, in the latter case, notwithstanding the lengthy discussion between the parties on the scope of protection offered by the MST,[216] enriched by the third-party submission by the Government of Canada,[217] the tribunal did not take any stance on the issue. It considered the claim to be absorbed in the indirect expropriation claim, to then conclude that 'there [was] no need to examine whether [the relevant legislative act] also constituted a breach of a duty to afford Claimant fair and equitable treatment'[218] since 'such a finding indeed would not change or add to those that follow[ed] from an unlawful indirect expropriation.'[219] Consequently, it will not be included in the present study.

Though the study of one single case will add little to the findings of the analysis of the NAFTA jurisprudence seen above, the remaining *TECO* award will still be indicative of the relevance played by NAFTA jurisprudence in the analysis of arbitral tribunals confronted with qualified FET formulations. The strong influence of NAFTA tribunals' reasonings, especially in guiding the interpretation of the scope of the standard, will then allow to insert the *TECO* award into the temporal categories depicted above and to determine whether it is in line with the ongoing tendency emerged in the NAFTA context in the same period.

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[214] TECO v. Guatemala, Award, *supra* note 7.

[215] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Bear Creek v. Peru).

[216] *Ibid.*, at paras. 480-532.

[217] *Bear Creek Mining Corporation v. Republic of Peru, Submission of Canada pursuant to Article 832 of the Canada-Peru Free Trade Agreement*, 9 June 2016.

[218] Bear Creek v. Peru, *supra* note 215, at para. 533.

[219] *Ibid.*

i. TECO Guatemala Holdings, LLC v. Republic of Guatemala (2013)

TECO Guatemala Holdings LLC (the investor), was a limited liability company established under the laws of the State of Delaware in the US, which owned a 30% share in the Guatemalan electricity company EEGSA.[220] In 2007, the National Commission of Electric Energy (CNEE), Guatemala's State electricity regulator in charge, among other things, of defining electricity distribution tariffs by virtue of the 1996 General Electricity Law (LGE), modified the terms of reference for the calculation of tariffs applicable to end consumers for final distribution for the period 2008-2013.[221] According to the investor, the changes (alongside with the whole process of their implementation) were in violation of the FET standard as provided for in Art. 10(5) of the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA). The article reads, in its relevant part, that

> '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 […]'.[222]

The tribunal agreed with the State in that FET under CAFTA did not require treatment in addition to or beyond what was required by the MST.[223] Guatemala

[220] TECO v. Guatemala, *supra* note 7, at paras. 1-7.

[221] *Ibid.*, at paras. 153 ff.

[222] Free Trade Agreement between Central America, the Dominican Republic and the United States of America (2004), 1 January 2009, Art.10(5). Emphasis added.

[223] TECO v. Guatemala, Award, *supra* note 7, at para. 448.

had claimed that the adoption of such a detailed formulation, in 2004, had taken place when the debate on the relationship between FET and MST was 'fully fledged' in the NAFTA context: by choosing the MST, the States Parties willingly wanted to 'ensure greater deference to their decisions and less interference on the part of international tribunals.'[224] The tribunal maintained that the MST protected investors from conducts that were in bad faith,[225] 'arbitrary, grossly unfair or idiosyncratic, […] discriminatory or [that] involve[d] a lack of due process leading to an outcome which offend[ed] judicial propriety.'[226] In doing so, it fully adhered to the identification of the scope of the standard as argued by the State,[227] which went on to specify that violations of the MST could be in breach of the standard only when constituting a 'deliberate violation of the regulatory authority's obligations or an insufficiency of Government action falling far below international standards',[228] given the ample margin of appreciation that the MST accorded to the State.[229]

Once again following the arguments of the State,[230] the tribunal dismissed the relevance of legitimate expectations as an element of the MST. In the tribunal's view, 'any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs.'[231] Consequently, the only relevant issue was whether the measures were arbitrary.[232]

Among the claims filed by the investor, of relevance for the present study is the claim that concerned the amendments to the Regulations of the LGE (RLGE) enacted in 2007 by the Ministry of Energy and Mines of Guatemala. While, under the

[224] *TECO Guatemala Holdings, LLC v. Republic of Guatemala, Guatemala's Rejoinder*, 24 September 2012 (TECO v. Guatemala, Rejoinder), at para. 82.

[225] TECO v. Guatemala, *supra* note 7, at para. 456.

[226] *Ibid.*, at para. 454.

[227] TECO v. Guatemala, Rejoinder, *supra* note 224, at para. 82.

[228] TECO v. Guatemala, Award, *supra* note 7, at para. 85.

[229] TECO v. Guatemala, Rejoinder, *supra* note 224, at para. 97.

[230] *Ibid.*, at para. 172.

[231] TECO v. Guatemala, *supra* note 7, at para. 621.

[232] *Ibid.*, at paras. 621-622. The same interpretation was argued by Guatemala, at para. 85.

previous regime, the tariffs for energy distribution were calculated on the basis of a study provided by the distributor, after the 2007 amendment the energy regulator was empowered with the decision on the applicable tariff, should the results of an ad-hoc commission not be followed by the distributor. The tribunal found the claim to be time-barred, although it went on to explain why it was also ill-grounded.

In the absence of any stabilization clause via which the State represented that the regulatory framework would remain unchanged, only changes to the latter that reflected bad faith or arbitrariness could entail the State's international responsibility.[233] However, the amendments to the RLGE did not give unfettered discretion to the regulator to apply its own independent study but did so only in limited circumstances, namely when the distributor entirely failed to submit its study, or when it failed to implement the corrections requested by the ad-hoc commission.[234] The new regime did not give the regulator the possibility of implementing its tariffs at will, but only when the distributor was at fault or the regulator in good faith disagreed with the ad-hoc commission.[235]

In this regard, the tribunal did 'not find it objectionable that, should the distributor fail to incorporate the corrections in such a situation, the regulator could decide to use its own independent study.'[236] Consequently, the regime changes were not considered in breach of the MST. Conversely, the subsequent behaviour of the regulatory agency vis-à-vis the investor led to a different outcome and was found by the tribunal to be in repudiation of the fundamental regulatory principles governing the tariff review process and therefore to be arbitrary and in breach of due process.[237]

Although the *TECO* tribunal ultimately found the State's behaviour to be in violation of the FET provision contained in Art. 10(5) of the CAFTA, the reasoning

[233] *Ibid.*, at para. 629.

[234] *Ibid.*, at paras. 631-632.

[235] *Ibid.*, at para. 633.

[236] *Ibid.*

[237] *Ibid.*, at para. 711. The award was then challenged before an annulment committee, although none of the grievances related to the regulatory issues seen above. See *TECO Guatemala Holdings, LLC v. Republic of Guatemala, Decision on Annulment*, ICSID Case No. ARB/10/23, 5 April 2016.

of the tribunal reflects a deferential standard of review in the analysis of the State's regulatory measures. The overall standard was heavily influenced by the determination of the scope of review, during which the tribunal strictly adhered to the interpretation offered by the State and limited the analysis to the sole enquiry into the alleged arbitrariness of the measure, thereby refusing to enquire into the investor's claim over the alleged violation of its legitimate expectations.

The State's behaviour was therefore judged against the high threshold required to determine the arbitrariness of a measure. In this case, the tribunal merely determined that, following the legislative changes, the relevant agency did not enjoy unfettered discretion, but provided a procedure that opened the floor to the agency's intervention should certain conditions occur. The tribunal did not enquire into the relationship between the measure and its stated purpose, as it was satisfied with the existence of a procedurally sound (meaning: not entirely discretionary) mechanism.

By reflecting a deferential standard of review, the 2013 *TECO* award is in line with the NAFTA cases concluded in the last decade analysed in Section 3.1.3. The highly-deferential standard of review employed by the tribunals seen above found adequate reflection in the *TECO* proceedings, which unfolded along similar lines, with a deferential identification of the scope of the FET standard that strongly influenced the ensuing analysis. The present case also highlights the primacy of the debate over the scope of NAFTA FET protection within the realm of unqualified FET clauses, given its pivotal role in guiding the parties' arguments and the tribunal's reasoning.

4. Conclusion: a detectable trend towards the recognition of a greater role for the State in arbitral jurisprudence based on qualified FET clauses?

At the end of the Chapter dedicated to arbitral jurisprudence based on qualified FET clauses, it is possible to highlight some findings.

In a preliminary fashion, it must be noted the relevance of NAFTA cases in determining the findings of the present section. The former represented 12 out of 13 cases and have therefore modelled the arbitral jurisprudence confronted with regulatory disputes based on qualified FET clauses. A confirmation of the primacy of NAFTA jurisprudence, if ever needed, can be found in the discussion emerged

in the *Teco v. Guatemala* case. The latter was entirely informed by NAFTA jurisprudence and adherent to the arguments emerged therein. Consequently, the findings of the present section cannot depart from those emerged from the analysis of NAFTA proceedings.

The first relevant finding reveals that the consideration of the State's regulatory authority in arbitral jurisprudence takes place irrespective of the specific organ or actor that exercises it, be it the Government or one of its ministers, the legislature, or administrative bodies. While the justifications for paying deference to the State's determinations vary according to the specific factual situation and range from democratic legitimacy to scientific expertise, there is no substantive difference in the approach adopted by arbitral tribunals based on the domestic actor involved in the arbitral proceeding. While this is arguably theoretically unsound,[238] with decisions taken by a democratically elected legislator ideally requiring a greater degree of deference than those of administrative agencies, it does not find reflection in the reasoning of arbitral tribunals, that have equally subjected the measures at hand in the relevant case to their scrutiny, employing different levels of deference on the basis of other factors than the organ of the State.

The second relevant finding allows to answer the research question indicated in Chapter 3, Paragraph 6., namely: is it possible to identify any consistent tendency or trend in investment arbitral jurisprudence? In the limited realm of arbitration arising out of qualified FET provisions, the analysis carried out above allows to answer in the positive, as it does in fact show the existence of a trend towards a greater deference in the standard of review employed by arbitral tribunals in the analysis of the host State's regulatory measures. Though the tendency is not entirely linear, the few cases that depart from the broader trend seem to represent bumps on the road and constant reminders of the ad-hoc nature of international arbitration, more than instances that undermine the overall conclusions. If this emerged clearly in the NAFTA framework, it was confirmed by the only relevant case released in the non-NAFTA realm.

[238] Schill, *supra* note 127, at 591.

Translating this into the analysis of State sovereignty, the trend towards a more deferential standard of review indicates that tribunals are recognizing an increasing space of manoeuvre to States in the adoption of regulatory measures or, in other words, a trend towards a greater recognition of the State's sovereign space in arbitral jurisprudence based on qualified FET provisions. This minor −but still extremely relevant− section of arbitral jurisprudence seems therefore to reflect and acknowledge the undergoing changes taking place in the investment regime seen in Chapter 2 above and to develop along similar lines. Whether such trend is confirmed by arbitral jurisprudence based on unqualified FTE provisions will be the object of the next Chapters. Additional considerations will therefore be postponed to the end of the analysis of arbitral jurisprudence, when the overall picture will emerge with greater clarity.

CHAPTER V

State sovereignty in international investment arbitral jurisprudence: the unqualified FET provision of the ECT

1. Arbitral jurisprudence in the ECT framework – 2. Miscellaneous cases – 2.1. Preliminary assessment of the miscellaneous cases– 3. Cases against Spain – 3.1. Awards reflecting a little-deferential standard of review – 3.2. Awards reflecting an overall deferential standard of review – 3.3. Awards reflecting a strongly deferential standard of review – 3.4. Preliminary assessment of the ECT cases against Spain– 4. Cases against Czech Republic – 41. Preliminary assessment of the ECT cases against Czech Republic – 5. Cases against Italy – 5.1 Awards reflecting a less-deferential standard of review – 5.2. Awards reflecting a more-deferential standard of review – 5.3. Preliminary assessment of the ECT cases against Italy – 6. A detectable trend in ECT-based jurisprudence?

1. Introduction: arbitral jurisprudence in the ECT framework

As already explained in Chapter 4, Paragraph 1., the vast majority of IIAs do not link the standard to any customary parameter and offer FET through what are defined as 'unqualified' FET clauses.[1] Provisions of this kind usually contain a simple indication that the States Parties 'ensure fair and equitable treatment to investments',[2] alone or in addition to other grounds of investment protection, leaving the determination of the exact treatment provided by the standard to arbitral tribunals.

Before extending the analysis to the broader sample of arbitral jurisprudence that stemmed from unqualified FET clauses, the present Chapter will address the jurisprudence generated by ECT. Although the latter falls within the category of

[1] See, e.g., how the term is used in UNCTAD, *Fair and Equitable Treatment - A Sequel*, UNCTAD/DIAE/IA/2011/5 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last visited 24 July 2018). According to the International Investment Agreement Navigator *International Investment Agreements Navigator*, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA (last visited 10 March 2021), 1986 out of 2577 IIAs currently contain an unqualified FET clause.

[2] Australia - Argentina BIT Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments (1995), 1 November 1997, Art.4(1).

IIAs containing unqualified FET clauses, the FET provision included in the ECT shows a peculiar and detailed wording that heavily influenced the parties' debate over the scope of the standard, ultimately justifying a separate analysis. This argument is further supporter by the fact that the ECT provides a common treaty basis for the study at focus in the present work. Consequently, the present Chapter will aim at answering the following research question: is it possible to identify any trend in the investment arbitral jurisprudence based on the ECT's FET provisions with regard to the respect that arbitral tribunals pay to State sovereignty?

The ECT was intended to promote long-term cooperation in the energy field,[3] and has been defined as 'the most important multilateral treaty in the field of foreign investment protection',[4] with more than 50 signatories between States and international organizations, among which the EU.[5] The treaty has served as legal basis for more than 130 investor-State proceedings,[6] which in more than 60 cases included alleged violations of the FET provision contained in its Art. 10(1).[7] Among these, 29 cases are related to regulatory disputes in the sense described above.[8]

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[3] For an overview of the aims of the ECT, see Gazzini, 'Energy Charter Treaty: Achievements, Challenges and Perspectives', in T. Gazzini and E. De Brabandere (eds.), *Foreign Investment in the Energy Sector* (2014) 105. For an overview of the origins and negotiating history of the treaty, see T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (2011), at 7 ff.

[4] Heiskanen, 'Arbitrary and Unreasonable Measures', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 87, at 89.

[5] See the official UN database: *The Energy Charter Treaty*, United Nations Treaty Collection, available at https://treaties.un.org/Pages/showDetails.aspx?objid=080000028009ac15&clang=_en.

[6] See the database in the official website of the ECT. *Investment Dispute Settlement Cases*, 25 March 2020, International Energy Charter, available at https://www.energychartertreaty.org/cases/list-of-cases/ (last visited 22 June 2020).

[7] Source: Investor-State Law Guide *Investor-State Law Guide*, available at https://www-investor-statelawguide-com. Since the present section will deal solely with the interpretation of Art.10(1) of the ECT, the reference to the treaty will be henceforth omitted when dealing with Art.10(1).

[8] Cases available in English over a total of 31 regulatory cases. Two cases are available in Spanish only, namely *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019. Their absence in the present analysis is not considered as affecting the results of the present Chapter.

Art. 10(1) is a long and complex provision that includes five different sentences. The Article reads

> '[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, *encourage and create stable, equitable, favourable and transparent conditions* for Investors of other Contracting Parties to make Investments in its Area. Such conditions *shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*. Such Investments shall also enjoy the most constant protection and security and *no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*. *In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations*. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'[9]

The text has given rise to several interpretative issues that are peculiar to the ECT and that are, to date, mostly left unresolved. The most relevant ones for the present analysis will be recalled below.

The first issue relates to whether the different elements contained in the provision amount to different standards of protection or conflate within the meaning of FET.[10] Commentators seem to agree that the choice of different sentences in the provision entails the existence of a plurality of independent elements.[11] Arbitral tribunals, on the other hand, have reached conflicting conclusions on the point. Some tribunals have agreed with the interpretation of scholars and found that the different sentences of Art. 10(1) provide independent standards of investor protection.[12] Others have considered all the sentences of Art. 10(1) as concurring to the determination of the FET standard instead. The tribunal in *Petrobart v. Kyrgyzstan*,

[9] The Energy Charter Treaty, 2080 UNTS 95, 16 April 1998, Art.10(1) (emphasis added).

[10] Mejía-Lemos, 'Article 10 - Promotion, Protection and Treatment of Investments', in R. Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (2018) 150, at 10.

[11] Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards', in G. Coop and Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty* (2008) 63, at 74; Roe and Happold, *supra* note 3, at 16; Mejía-Lemos, *supra* note 10, at 176.

[12] See, eg, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (Electrabel v. Hungary), at paras. 6.119, 7.79.

for instance, noted that '[Art. 10(1)] in its entirety is intended to ensure a fair and equitable treatment of investments.'[13] Other tribunals have pointed out the overlap between the sentences, like the tribunal in *AMTO v. Ukraine*, which stated that

> '[t]here is clearly overlapping within Article 10(1) […]. The result is that a claimant can plead that the same conduct breaches various obligations in Article 10(1) in circumstances where the content and relationship between these obligations is not clear.'[14]

Other tribunals again have avoided to take a stance: the tribunal in *Anatolie Stati v. Kazakhstan* analysed the non-impairment obligation and admitted that 'the protections granted in this regard and by the FET obligation overlap, though it may be arguable to which extent.'[15]

The second issue is the relevance and scope of the initial reference to the stability of the legal framework and its relationship with the second sentence of Art. 10(1), which *includes* FET in the previous obligation. In some cases, tribunals have carried out a rigorous reading of the treaty text and have attributed a broader scope to the stability provision as opposed to the FET standard, extending the former's reach to the pre-investment phase, while FET was granted only after the investment was made.[16] This view was not shared by other tribunals that have interpreted the FET clause as 'necessarily embrac[ing] an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments',[17] and therefore the stability requirement as an element of the FET standard.

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[13] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, at 76.

[14] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, at para. 74.

[15] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, at para. 1282. See also *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, at para. 248.

[16] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at para. 172.

[17] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID

The third issue is the relationship between FET and the prohibition of unreasonable or discriminatory conducts set out in the third sentence of Art. 10(1). In this case, even those scholars who support the independent nature of the different provisions admit that the non-impairment obligation 'may to some extent overlap with those that have been developed for FET'.[18] On their end, arbitral tribunals almost never delved into the relationship between the two and resorted to a practical approach instead. In the absence of a theoretical discussion on the topic, some arbitral awards have dealt with unreasonable or discriminatory conducts as part of the analysis of the FET standard[19] or have included them in the section of the award in which they decided upon alleged breaches of the FET.[20] Even those which consider them different standard, however, not infrequently consider the analysis in the FET section to have excluded the scope of the non-impairment obligation.[21]

The fourth issue is the relevance of the sentence that shields investors from treatment less favourable than that required by international law, *including treaty obligations*. Although the meaning of the sentence seems straightforward in describing the FET as an autonomous standard,[22] some tribunals have equated it with the protection offered by the MST under customary international law. As a matter of example, the tribunal in *Electrabel v. Hungary* considered the obligation contained in the fourth sentence of Art. 10(1) as expressing the 'minimum standards

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Case No. ARB/13/36, Award, 4 May 2017 (Eiser v. Spain), at para. 382: *Infrastructure Services Luxembourg S.à r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ICSID Case No. ARB/13/31 (Infrastructure Services v. Spain), at para. 532.

[18] Schreuer, *supra* note 11, at 76; Mejía-Lemos, *supra* note 10, at 193.

[19] See, e.g., *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdiction, liability and certain issues of quantum, 30 December 2019 (RWE v. Spain); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 (Stadtwerke v. Spain).

[20] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (SolEs v. Spain).

[21] See, e.g., *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (AES v. Hungary), at para. 9.3.37.

[22] Roe and Happold, *supra* note 3, at 111.

required by international law',[23] noting that 'the content of this standard is, at the present time, similar to the other standards expressly mentioned in [Art. 10(1)], which also exist as standards of protection in customary international law.'[24]

The peculiarities of Art. 10(1) find reflection on the level of investment protection identified by arbitral tribunals. Several grounds of protection that in other contexts do not find a textual hook, sparking a debate over their inclusion in the FET standard, are here explicitly indicated by the treaty in the same provision that grants FET to foreign investments. Consequently, much-debated issues in the NAFTA framework such as the stability of the legal framework, find in the ECT context little room for debate, although, as hinted above, the exact relevance of each sentence is far from being settled.

Due to the particular wording encountered in Art. 10(1), the first prong of the current analysis, namely the determination of the scope of the FET standard, will here fulfil a less-relevant role than in the NAFTA framework.

First, the article lists several connected elements that may or may not be addressed as part of the FET standard by tribunals but whose exact theoretical classification does not affect their liability threshold: whether the non-impairment standard is considered as part of the FET, for instance, does not bear consequences on the analysis carried out by the tribunal. The latter will still apply the same criterion for determining if a violation of the non-impairment provision has occurred. If in the case of qualified FET clauses the lack of legal basis entailed that, should such obligations not be identified as elements of the FET standard, they would be excluded from the protection of the treaty, the overarching text of Art. 10(1) renders such discussion moot, since the tribunal will still enquire into the specific obligation.

Theoretically, considering the various sentences of Art. 10(1) as a list of elements of the FET standard, as opposed to independent obligations, implicates that a violation of the specific obligation will not *per se* be enough to indicate a violation of the treaty, since it would still need to be balanced against the other elements of the standard. Furthermore, standalone obligations might have a different scope than

[23] Electrabel v. Hungary, *supra* note 12, at para. 7.159.

[24] *Ibid.*, at para. 7.158.

the FET. However, these issues have been rarely touched upon in practice, since the disputing parties have dedicated their efforts to debating the merits of the dispute instead of focusing on theoretical classifications, and this was reflected in tribunals' awards.

In addition, even tribunals that have addressed the issue and found some of the sentences of Art. 10(1) to be independent from FET have then recognized their overlapping nature. The tribunal in *Blusun v. Italy*, which considered the stability of the legal framework as an independent element, once it turned to the FET standard admitted that it was 'at the core of the obligation of stability under the first sentence'.[25]

Second, the lack of relevant documents often makes it impossible to reconstruct the debate as to the scope of the standard, since awards solely recall the State's arguments on the merits so to reject the investor's claims, leaving other arguments of the State (among which, possibly, those on the exact role of the different sentences of the article) aside.

For all these reasons, while it will be given account of the interpretation that tribunals give to the standard, acknowledging whether this is broad or strict, the stability of the legal framework and the non-impairment obligation will be equally included in the analysis even when not considered as part of the FET by the tribunal. The focus of the first prong of the analysis will lie instead on the threshold required for finding violations of the standard, with tribunals adhering to the threshold identified by the defending State considered as displaying a higher level of deference than those requiring a lower threshold.

Finally, some practical remarks. Starting from year 2015, all claims have been initiated in respect to legislative and regulatory changes enacted by three European Countries, namely Spain, Czech Republic, and Italy. Since all the cases against each of these particular Countries stemmed from the same regulatory measures respectively, the following analysis will not proceed in a purely chronological order as the sections above, but will group cases on the basis of the defendant State.

[25] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016 (Blusun v. Italy), at para. 363.

Each subsection will provide at the outset an overview of the legal framework and of the contested regulatory changes. First, the cases decided until 2015 against various respondent States will be looked at. Second, the cases stemming from the Spanish framework, rendered between 2015 and 2020. Third, the cases against Czech Republic, rendered between 2018 and 2019, and finally the cases against Italy, rendered between 2016 and 2020. Some final considerations will then follow before opening the stage to the analysis of arbitral jurisprudence stemming from BITs.

2. Miscellaneous cases

Since the cases against the three Countries listed above amount to the totality of awards released after 2015, the present subsection contains the 'earlier' ECT cases, decided between 2010 and 2015.

i. AES Summit Generation Limited and AES-Tisza Erömü Kft. v. The Republic of Hungary (2010)

AES Summit Generation Limited was a company incorporated under the law of the United Kingdom, which entered into a long-term power-purchase agreement (PPA) with Hungary for the production of energy through four power stations and for the construction of a new power plant.[26] Pursuant to a settlement agreement concluded in 2001, the existing pricing schedule was made subject to administrative pricing, identified by Decree.[27] After joining the EU in 2004, the regime of administrative pricing was terminated and generators were allowed to enter the free market,[28] sparking a heated debate over the excessive profits of energy generators and high fees imposed on consumers.[29] The debate led to the adoption by the Parliament of the 2006 Electricity Act and the 2007 Price Decree, that reintroduced a regime of administrative prices sold by generators to the State-owned electric provider.[30]

[26] AES v. Hungary, *supra* note 21, at para. 4.4.

[27] *Ibid.*, at para. 4.10-4.11.

[28] *Ibid.*, at para. 4.13.

[29] *Ibid.*, at para. 416.

[30] *Ibid.*, at paras. 4.17-4.20.

According to the investor, the reintroduction of administrative pricing was in violation of, among other things, the FET standard under the ECT.

The tribunal adopted a deferential approach in the determination of the scope of the standard. It accepted the concept of legitimate expectations supported by the State,[31] acknowledging that their protection required 'the existence of government representations and assurances'[32] and the reliance of the investor on such assurances to make its investment. The obligation to provide a stable legal framework was equally considered in the context of the investor's legitimate expectations and thus read as part of the FET standard.[33] Such obligation, in the tribunal's view, was

> 'not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a [S]tate has the sovereign right to exercise its powers which include legislative acts.'[34]

Due Process, transparency, and lack of arbitrariness were equally considered as elements of the FET standard,[35] while prohibition of impairment by unreasonable or discriminatory measures was then considered a separate ground of investor protection.[36]

In the analysis of the measures, the tribunal first turned to the existence of the expectation that regulated prices would not be introduced, limiting its enquiry to the time the investment was made, identified in the 2001 operation.[37] The tribunal looked at three communications between the investor and the Government, namely a governmental Memorandum, a letter from the Ministry of Economic Affairs, and the 2001 Settlement Agreement, and excluded that they could have given rise to the expectation that regulated prices would not be introduced. The first two communications were dismissed for not being relevant[38] and for temporal reasons

[31] *Ibid.*, at para. 9.3.17.

[32] *Ibid.*, at para. 9.2.5.

[33] *Ibid.*, at para. 9.3.27.

[34] *Ibid.*, at para. 9.3.29.

[35] *Ibid.*, at para. 9.3.36.

[36] *Ibid.*, at para. 10.1.1.

[37] *Ibid.*, at para. 9.3.16.

[38] *Ibid.*, at para. 9.3.19.

respectively,[39] while the latter could have given rise to such expectations if it had contained a stabilization clause, missing in the case at hand.[40] The tribunal then moved on to address the stability of the legal or regulatory framework, identified in the non-reintroduction of administrative pricing. Since it considered this element in connection with the protection of legitimate expectations, the tribunal similarly required a stability clause, but found none.[41]

In its analysis of the elements of the FET, the tribunal then looked into the arbitrariness of the measures.[42] This element was closely linked to the non-impairment obligation and its analysis was limited accordingly.[43] The degree of scrutiny was a low one, since it looked for a 'culpably unreasonable implementation process in relation to the Price Decrees.'[44] The tribunal did not question the objectives of the Hungarian Parliament to cap profits for energy generators,[45] and noticed that in the process that led to the adoption of the measures, comments on draft texts were solicited from power generators,[46] and one change at least was made following such comments,[47] thereby excluding the arbitrariness of the State's behaviour.[48] Also, the shortcomings found in the implementation of the Price Decrees still allowed the investor to participate to the process, leading the tribunal to exclude 'arbitrariness, a lack of transparency, or a lack of due process that amounts to unfair or inequitable treatment.'[49]

The reasonableness of the measures that reintroduced the administrative prices was then addressed on the basis of three justifications offered by the State.[50] The

[39] *Ibid.*, at para. 9.3.20.

[40] *Ibid.*, at para. 9.3.25.

[41] *Ibid.*, at paras. 9.3.27-9.3.35.

[42] *Ibid.*, at para. 9.3.40.

[43] *Ibid.*, at para. 9.3.37.

[44] *Ibid.*, at para. 9.3.42.

[45] *Ibid.*, at para. 9.3.48.

[46] *Ibid.*, at para. 9.3.49.

[47] *Ibid.*, at para. 9.3.45.

[48] *Ibid.*, at para. 9.3.55.

[49] *Ibid.*, at para. 9.3.69.

[50] *Ibid.*, at para. 10.3.10. As to the specific reasonableness test employed by the tribunal, see F.

first justification was the need to free up electricity for direct sale to the parallel free market. Here, the tribunal recognized that electricity producers had failed to agree over several years to any reductions in contracted PPA capacity, and found that 'a [S]tate could justify the breach of commercial commitments by relying on arguments that such breach was occasioned by an act of the [S]tate performed in its public character.'[51] However, in the tribunal's view, the correct solution would be that of terminating the contracts and face the contractual consequences of such termination and not to enact policies that would affect only certain contractual rights. Consequently, the measures were considered unreasonable as to the first justification provided by the State.[52]

The second justification was the pressure of the EC Commission's investigations and the foreseeable obligation to recover State aid that the Commission's decision would impose. The tribunal acknowledged that addressing the Commission's concerns would have been a rational policy. This notwithstanding, it questioned that this was the true purpose of the measure, concluding that the measure was not motivated by such pressure and that it was therefore unreasonable.[53] The third justification was the fact that the profits enjoyed under the PPAs, in the absence of either competition or regulation, exceeded reasonable rates of return for public utility sales. The tribunal carried out an enquiry to determine whether this was the genuine purpose of the measure, concluding in the positive,[54] and considered it a rational aim.[55] Since the State had attempted to renegotiate its relevant PPAs but had reached no agreement with the electricity producers, and in the absence of a specific commitment to the contrary, it reintroduced administrative pricing through the contested measures, in a manner considered 'reasonable, proportionate and consistent

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Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (2019), at 139.

[51] AES v. Hungary, *supra* note 21, at para. 10.3.13.

[52] *Ibid.*, at para. 10.3.14.

[53] *Ibid.*, at paras. 10.3.17-10.3.18.

[54] *Ibid.*, at para. 10.3.31.

[55] *Ibid.*, at para. 10.3.34. Using the analysis under the 'third justification' here analyzed as an example of deferential attitude of the tribunal, see C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015), at 131, 133.

with the public policy expressed by the parliament.'[56] Ultimately, the tribunal found the measures not to be in breach of Art. 10(1).[57]

Although the *AES v. Hungary* resulted in a finding of non-breach of Art. 10(1), the analysis saw the tribunal repeatedly questioning if the aims of the measures provided by the State were their real purpose, and determining whether the end means chosen to achieve such aims were correct, indicating the correct way in one of the occasions. Consequently, the tribunal employed an overall little-deferential standard of review, that was mitigated by the deferential approach kept in the first prong of the analysis.[58]

ii. AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (2013)

AES Corporation and TAU Power B.V. (collectively, the investors) were two companies incorporated under the laws of Deleware and the Netherlands respectively, that had acquired a number of heat and power plants in Kazakhstan and entered into their respective PPA agreements in 1997, following the privatization of several State-owned power generation companies as a result of a series of legal reforms undertook by Kazakhstan to attract investments in the energy sector.[59] According to the investor, several changes to the Kazakh competition law framework enacted between 2001 and 2008, and later between 2009 and 2012, negatively affected the investment in violation of Art. 10(1).

In its determination of the scope of the analysis, the tribunal stated that a duty of stabilization could arise as part of the FET standard in the sense that 'changes in law [were not to] be of such nature to compromise the basic transparency, stability or predictability of the existing legal framework'.[60] The protection of investor's legitimate expectations was an element of the standard that required

[56] AES v. Hungary, *supra* note 21, at para. 10.3.36.

[57] *Ibid.*, at para. 16.1.

[58] For an analysis of the reasonableness test employed by the tribunal, see V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018), at 171 ff.

[59] *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, at paras. 1-2, 19-26.

[60] *Ibid.*, at para. 258.

> 'the very clearest of commitments on the part of the State to refrain from adjusting that regulatory framework in some specified manner to give rise to any expectation that an investment would be insulated from the effects of normal legal and regulatory evolution'.[61]

Furthermore, though it admitted that the standard of prohibition of unreasonable and arbitrary impairment could, in abstract terms, be different from the FET standard, it considered such requirements to be elements of the latter.[62] Overall, the violation of the FET standard required a high threshold,[63] as also indicated by the State.[64]

The tribunal proceeded to divide the measures in two temporal blocks, analysed distinctly: first, the measures adopted between 2004 and 2008, when Kazakhstan enacted new laws and regulations in the field of competition law and, second, the measures enacted between 2005 and 2012, that reverted to a heavily regulated market model with capped tariffs imposed by the State for all electricity generators.

As to the first set of measures, the tribunal initially addressed the issue of stabilization. It found that the 1994 Kazakh Law on Foreign Investments, under which the investment was made, contained a stabilization clause that prevented from changes in the competition law 'which would have adversely affected [the investors'] position'.[65] First, the tribunal looked at the effects of the changes to the regulatory regime in their entirety to determine whether the investments had been adversely affected, and found that the 'fact that specific provisions within the general legal framework may have had adverse effects on [the investors'] operations and business cannot therefore be sufficient to conclude that [the investors'] position was adversely affected.'[66] Even if it were the case, the changes were not of an

[61] *Ibid.*, at para. 289.

[62] *Ibid.*, at para. 329.

[63] *Ibid.*, at para. 314.

[64] *Ibid.*, at para. 312.

[65] *Ibid.*, at para. 260.

[66] *Ibid.*, at para. 272.

'extraordinary nature',[67] and were not in breach of the requirement of stability under the FET standard.[68]

The second element analysed was that of legitimate expectations. Having already excluded the existence of expectations of the stability of the legal framework, the tribunal denied the existence of an expectation in that the investments would not be subject to legislation with adverse effects on their situation.[69] Having once again adopted a high threshold for the breach of the element, the tribunal did not considered breaches of one of the two agreements with the investor to be sufficient to violate the investor's expectations. In the words of the tribunal,

> 'a breach of contract does not *per se* trigger a breach of treaty protection […] a contractual right constitutes a 'legitimate expectation' protected by treaty only where there are factors other than the simple fact of the existence of the contract which justify giving the expectation of performance of the contract the status of a legitimate expectation protected by the treaty.'[70]

Additionally, the use of broad terms in the contract, such as 'market rates', 'competitive market' and 'blended tariffs' could not give rise to any specific expectation.[71]

Finally, the tribunal addressed the reasonableness and arbitrariness of the measures. It identified the scope of the measures in the State's effort to liberalize the electricity market in order to benefit the market, the market players, and the public at large. It considered the frequent changes to be reasonable in view of the evolution of the Kazakh economy, and found that the changes concerned specific elements and were grounded on the same general principles through time.[72] After clarifying that it was 'not [the tribunal's] role to re-assess whether the Kazakh

[67] *Ibid.*, at para. 277.

[68] *Ibid.*, at para. 279.

[69] *Ibid.*, at para. 288.

[70] *Ibid.*, at para. 291 (emphasis in the original).

[71] *Ibid.*, at para. 292.

[72] *Ibid.*, at para. 317.

courts and administrative bodies correctly implemented Kazakh competition law', it concluded that the changes were not arbitrary or unreasonable.[73]

The second set of measures imposed regulated tariffs and required investors to reinvest their entire net income in the production of energy. The tribunal identified the investors' legitimate expectations in 'the general principle that investors should be entitled to make a reasonable return on and of their investment'.[74] Here, the tribunal required the restrictions to be reasonable and proportionate: in doing that, it considered the requirement for power generators to reinvest *all* operating cash, preventing them from making any different use, to be in violation of the FET standard. Still, the measure was not considered unreasonable *per se*: in the tribunal's words,

> 'certain restrictions concerning the level of returns to be earned or to be repatriated [might] be justified in circumstances were investment in electricity generating infrastructure appear[ed] indispensable to prevent a collapse of the electricity distribution system […] the restrictions imposed by [the State] would only be justified if the threat of collapse was real and imminent and the measures necessary to prevent the collapse could not be implemented by means that involved a lesser intrusion upon the [investors]' rights'.[75]

The tribunal did not question the existence of a real and imminent risk of collapse in 2008-2009, but noticed that the State did not consider any less-intrusive measure before the adoption of the legislative changes.[76] In addition, even if the restrictions had been the only way to avoid a collapse, once it became apparent that the expected collapse was not going to happen, the principle of proportionality would have required Kazakhstan to adjust the restrictions accordingly.[77] Consequently, the tribunal found a violation of the investors' legitimate expectations that they would have the opportunity to make a reasonable return, and ultimately of the FET standard.[78]

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[73] *Ibid.*, at para. 329.

[74] *Ibid.*, at para. 400.

[75] *Ibid.*, at para. 406.

[76] *Ibid.*, at para. 407.

[77] *Ibid.*, at paras. 407-408.

[78] *Ibid.*, at paras. 411-412.

The present case shows the opposite scenario if compared to the award in *AES v. Hungary*, since here the tribunal found a violation of the FET standard while keeping an overall deferential approach. First, deference was exercised in the determination of the scope of the standard, which required a high threshold which was reflected in the analysis of the measures, for instance when considering contractual breaches as not enough to constitute a violation of FET.[79] The tribunal then did not question the State's determinations while addressing the reasonableness of the measures, although it second-guessed the State's choices the necessity and proportionality *stricto sensu* test in the proportionality analysis. This notwithstanding, the tribunal adopted an overall deferential standard of review.

iii. Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania (2015)

Mamidoil Jetoil Greek Petroleum Products Societe S.A. (the investor), a corporation organized and existing under the laws of Greece, settled on the construction and operation of an oil tank farm in in Albania, which led to a series of increasingly substantial investments in 1999 and 2000 and to a lease agreement with the State. In 2001, following a study endorsed by the World Bank and the European Commission, Albania changed its land use plan so that oil tanks, among which the one operated by the investor, would be moved to less-populated areas.[80] From year 2002 onwards, the State enacted a series of measures that brought its standards regarding security reserve of fuel in line with the ones prescribed by the EU, and taxed imported fuel.[81] According to the investor, the State's behaviour was in breach, among other things, of the FET standard provided in Art. 10(1).

[79] While not describing the interpretation in terms of deference, see, to this end, S. Faccio, *The Assessment of the FET Standard between Legitimate Expectations and Economic Impact in the Italian Solar Energy Investment Case Law*, 14 June 2020, QIL QDI, available at http://www.qil-qdi.org/the-assessment-of-the-fet-standard-between-legitimate-expectations-and-economic-impact-in-the-italian-solar-energy-investment-case-law/ (last visited 12 April 2021).

[80] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (Mamidoil v. Albania), at paras. 76, 92, 94-95.

[81] *Ibid.*, at paras. 116-118.

The tribunal considered the requirement of a stable and transparent legal framework to be an element of the FET standard and precisely of the investor's legitimate expectations.[82] The latter needed to be balanced against other legally relevant interests, such as 'the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests'.[83] Legitimate expectations did not require explicit representations by the State to be generated, since promises could be implicit.[84]

The tribunal started its analysis of the measures by determining whether the investor could legitimately expect the stability of the legal framework. It acknowledged that Albania was transitioning out of a communist regime where the rule of law had been jeopardized and environmental and social protection were irrelevant to the process of policy making.[85] If such a situation would have required a high level of due diligence by the investor, the latter did hold meetings with governmental officials, but obtained no 'specific commitment, no letter of intent, no agreed minutes, not even an internal memorandum or a letter reacting positively to the investment proposals'.[86] Since no clear and identifiable commitments were made, and since '[t]he measures pursued a legitimate objective of public policy […] in a transparent way, were proportionate and not arbitrary, and did not lead to unreasonable instability',[87] the element of stability had not been breached.[88]

The next part of the analysis moved to the existence of legitimate expectations as to the possibility for the investor to continue to operate the port connected to its oil tank farm for discharging oil tankers. In a similar fashion to the analysis of stability, the tribunal could not find any specific assurance given to the investor[89] that were 'identifiable under the circumstances in order to transform a subjective hope

[82] *Ibid.*, at para. 616.

[83] *Ibid.*, at para. 619.

[84] *Ibid.*, at paras. 691, 731.

[85] *Ibid.*, at para. 625.

[86] *Ibid.*. at para. 640.

[87] *Ibid.*, at para. 657.

[88] *Ibid.*, at para. 663. See also UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2015*, IIA Issue Notes, No.2 (2016), at 23.

[89] Mamidoil v. Albania, *supra* note 80, at para. 710.

into objective expectations.'[90] Moreover, it balanced the investor's alleged expectations with the right of the State to regulate in the public interest and concluded that, in the circumstances of the case, the State's right to conduct a public policy of consistent modernization prevailed.[91]

The last prong of the analysis focused on the reasonableness of several measures, all of which addressed briefly by the tribunal.[92] The imposition of import taxes based on fictitious amounts in bills of lading, and not on the quantities actually discharged, was considered common practice in domestic legislations. Furthermore '[i]f the State define[d] reasonableness of the tax law by the maximization of revenue, it [was] entitled to do so [and the tribunal had] no authority to replace the State's policy rationale by its own.'[93] With regard to the closing of the port where the investor's oil tank farm was built, the tribunal found that 'the State's conduct bore a reasonable relationship to some rational policy.'[94] Likewise, other measures such as changes in the requirements of the diesel quality, or the decision to distinguish temporarily between international traders and the local traders, were found to have public policy justifications and to be 'rational and reasonable',[95] and to not violate Art. 10(1).

In the *Mamidoil* award the tribunal employed an overall deferential standard of review. Although it was not possible to draw an exact evaluation of the first prong of the analysis, the tribunal required a high threshold for the violation of the elements of the standard. Deferential was then the analysis of the measures, where the tribunal paid respect to the State's determinations, without questioning the aims of the latter and considering the existence of a relationship between the measures and their stated aim as sufficient to fulfil the reasonableness test.

[90] *Ibid.*, at para. 731.

[91] *Ibid.*, at para. 734.

[92] Henckels, *supra* note 55, at 119.

[93] Mamidoil v. Albania, *supra* note 80, at para. 787.

[94] *Ibid.*, at para. 791.

[95] *Ibid.*, at para. 795. See also paras. 793-798.

2.1. Preliminary assessment of the miscellaneous cases

Although by no means enough to indicate any trend yet, the three awards released between 2010 and 2015 happened to move from a less-deferential approach to a deferential one in a temporal progression. The relevance of these awards will be, however, contextualized at the end of the following paragraphs, in the preliminary considerations carried out in Paragraph 6. below.

3. Cases against Spain

The first subsection dealing with proceedings against a single State focuses on Spain, which acted as respondent State in the higher number of investment cases so far (16 proceedings). With very few exceptions, the cases contained in the present subsection show ample similarities in some elements that are of relevance in present the analysis, namely the time the investment was made, the measures that allegedly violated the treatment provided for in the ECT, and the interpretation of the scope of Art. 10(1) by arbitral tribunals. For this reasons, the legislative framework and the first prong of the analysis, namely the identification of the scope of Art. 10(1), will be here summarized, and will be addressed under the analysis of a specific case only when differing from the reconstruction provided below.

Spain introduced a favourable framework for the production of renewable energy with Law 54/1997, which set up a special regime for renewable energy producers by granting them a premium above the wholesale market price. The most relevant act in this regard was Royal Decree (RD) 661/2007, which allowed producers to choose between selling the electricity to the system at a fixed FIT or selling the electricity on the wholesale market and receive a premium in addition to that. Art. 44(3) of RD 661/2007 provided that the State was allowed to revise the rate at which the FIT was granted, whilst mentioning that power plants already registered in a Pre-Allocation Registry (RAIPRE) would not be affected by the revisions. The regime was highly successful, although the aftermath of the economic and financial crisis of 2008 ultimately made it unsustainable for the State, leading Spain to amend it.

Starting from year 2010, several measures were enacted to reduce the incentives previously granted: among the many, RD 1565/2010 limited to 25 years the

possibility to obtain the regulated tariffs; Law 2/2011 limited the years for which the FIT could be received; Royal Decree Law (RDL) 1/2012 removed economic incentives for new power plants; Law 15/2012 established a 7% tax on energy production. Finally, in 2013 and 2014, Spain repealed the incentive regime altogether. RDL 9/2013 eliminated all FITs and abrogated RD 661/2007. Law 24/2013 eliminated the special treatment for renewable energy generators, depriving them of several non-economic advantages, while RDL 413/2014 and Ministerial Order IET/1045/2014 put a definitive end to the economic incentives provided in RD 661/2007.

In all the Spanish cases, a major issue in the identification of the scope of Art. 10(1) was the relationship between the obligation of stability and the protection of the investor's legitimate expectations. In most cases, the stability of the legal framework was considered as an element of the FET standard that could give rise to legitimate expectations only in the presence of a stabilization clause or of specific assurances given to the investor. [96] The tribunal in *Foresight v. Spain*, for instance, clarified that

> '[i]n the absence of a specific commitment to the investor by the host State, the investor cannot expect the legal or regulatory framework to be frozen. In such circumstances, a host State has space to reasonably modify the legal or regulatory framework without breaching an investor's legitimate expectations of stability.'[97]

[96] Eiser v. Spain, *supra* note 17, at para. 362, quoting *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, at para. 666. For the State's interpretation, see Eiser v. Spain, *supra* note 17, at para. 359; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (Masdar v. Spain), at paras. 486-487; Infrastructure Services v. Spain, *supra* note 17, at para. 446; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, at 9, at paras.584, 586; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 (9REN v. Spain), at para. 253.

[97] *Foresight Luxembourg Solar 1 S.à r.l. et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018 (Foresight v. Spain), at para. 356.

Other tribunals held that legitimate expectations could rise from specific commitments contained in the legislation itself.[98] The tribunal in *Stadtwerke v. Spain* required 'specific commitments contractually assumed by a State to freeze its legislation in favour of an investor'[99] but opened up to legitimate expectations arising out of the host State's legislation following a 'rigorous due diligence process carried out by the investor'.[100] For the tribunal in *BayWa r.e. v. Spain*, legitimate expectations needed clear representations to the investor that could be either explicit or implicit (thus contained in the legislation), as long as guarantees were specific.[101] Few tribunals adopted a broader interpretation of the requirement. The tribunal in *Novenergia v. Spain* did not consider specific assurances by the host State as indispensable for legitimate expectations to arise, while an expectation on the stability of the regulatory framework could arise from, or be strengthened by, State conducts or statements objectively capable of creating it.[102] Similarly, the tribunal in *Cube v. Spain* asserted that legal regimes in highly regulated industrial fields were 'plainly intended to create expectations upon which investors will rely; and to the extent that those expectations [were] objectively reasonable, they [gave] rise to legitimate expectations when investments [were] in fact made in reliance upon them.'[103] With few exceptions, the requirement of legitimate expectations was not given a different scope than that identified by the State, which demanded specific commitments for legitimate expectations to arise.[104]

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[98] 9REN v. Spain, *supra* note 96, at para. 292.

[99] RWE v. Spain, *supra* note 19, at para. 264.

[100] *Ibid.*

[101] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (BayWa r.e. v. Spain), at para. 459.

[102] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018 (Novenergia v. Spain), at paras. 651-653. Similarly, SolEs v. Spain, *supra* note 20, at para. 313.

[103] *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 (Cube v. Spain), at para. 388.

[104] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016 (Charanne v. Spain), at para. 357; Eiser v. Spain, *supra* note 17, at para. 359; Novenergia v.

In any case, tribunals often recognized that the investor's legitimate expectations required balancing with the exercise of regulatory powers by the State,[105] sometimes specifying that 'States [were] in charge of the general interest and, as such, [enjoyed] a margin of appreciation in the field of economic regulations'.[106] Some tribunals then identified in the proportionality test the criterion to determine whether regulatory measures could violate the investor's expectations, since their role was to balance 'the [investor]'s legitimate and reasonable expectations on the one hand and the [State]'s legitimate regulatory interests on the other.'[107]

Most tribunals then considered the other sentences of Art. 10(1), and the non-impairments standard in particular, as being part of the FET, often considering the reasonableness of the measures as a requirement in the finding of the investor's legitimate expectations[108] or admitting changes to the legal framework as long as 'reasonable' and not radically altering the investment 'in ways that deprive[d] investors who invested in reliance on those regimes of their investment's value.'[109]

Spain, *supra* note 102, at para. 593; Masdar v. Spain, *supra* note 96, at paras. 138-140; Infrastructure v. Spain, *supra* note 17, at para. 446; Foresight v. Spain, *supra* note 97, at para. 314; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 (RREEF v. Spain), at para. 349; Cube v. Spain, *supra* note 103, at para. 385; NextEra v. Spain, *supra* note 96, at para. 467; SolEs v. Spain, *supra* note 20, at para. 283; Stadtwerke v. Spain, *supra* note 19, at para. 233; RWE v. Spain, *supra* note 19, at para. 477; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 (Watkins v. Spain), at para. 398.

[105] Charanne v. Spain, *supra* note 104 at para. 349; Eiser v. Spain, *supra* note 17, at para. 362; Foresight v. Spain, *supra* note 97, at paras. 423-424; .

[106] RREEF v. Spain, *supra* note 104, at para. 262.

[107] Charanne v. Spain, *supra* note 104, at para. 517; SolEs v. Spain, *supra* note 20, at para. 318; BayWa r.e. v. Spain, *supra* note 101, at paras. 461-462; Stadtwerke v. Spain, *supra* note 19, at paras. 424-425; *The PV Investors v. Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020 (PV v. Spain), at para. 565.

[108] Charanne v. Spain, *supra* note 104, at para. 514; Masdar v. Spain, *supra* note 96, at para. 484; Foresight v. Spain, *supra* note 97, at para. 356; SolEs v. Spain, *supra* note 20, at paras. 314-315; RWE v. Spain, *supra* note 19, at para. 317.

[109] Eiser v. Spain, *supra* note 17, at para. 362; Novenergia v. Spain, *supra* note 102, at paras. 654-655; RREEF v. Spain, *supra* note 104, at para. 315. For an overview of the regulatory issues

Notwithstanding some differences that will be duly noted, the cases below offer a unitary ground which mostly corresponds to a deferential interpretation of the scope of review. Given the uniformity, the analysis of the Spanish cases will not delve into the different views on the elements of the standard and will focus on the different content of the investor's legitimate expectations instead: in this regard, Spain consistently argued that, in the lack of other specific commitments, the sole expectation that investors could enjoy was that of obtaining a reasonable return (or equivalent phrasings such as reasonable rate of return, or reasonable profitability) for their investments.[110] Deferential interpretations will therefore be considered those that adhere to this view, as opposed to those that grant a more demanding behaviour on the State.

Finally, in a handful of cases, the State resorted to a narrower interpretation of the scope of the standard and identified the protection offered by the FET with the MST under customary international law, with the consequence that the investor's maximum aspiration could be that of receiving only national treatment, should the latter be more favourable than the MST.[111] Here, the tribunal's consideration of the scope of the standard differed markedly from the view of the State, in that it adopted a broader notion. In the few cases where the State argued for such an interpretation, the level of deference in the scope-of-review phase was obviously lower and will be duly noted.

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emerging from the regulatory cases against Spain, see A. Noilhac, *Renewable Energy Investment Cases against Spain and the Quest for Regulatory Consistency*, 14 June 2020, QIL QDI, available at http://www.qil-qdi.org/renewable-energy-investment-cases-against-spain-and-the-quest-for-regulatory-consistency/ (last visited 12 April 2021).

[110] Eiser v. Spain, *supra* note 17, at para. 361; Novenergia v. Spain, *supra* note 102, at para. 382; Masdar v. Spain, *supra* note 96, at para. 139; Infrastructure v. Spain, *supra* note 17, at para. 454; Foresight v. Spain, *supra* note 97, at para. 319; RREEF v. Spain, *supra* note 104, at para. 353; Cube v. Spain, *supra* note 103, at para. 400; NextEra v. Spain, *supra* note 96, at para. 473; 9REN v. Spain, *supra* note 96, at para. 234; SolEs v. Spain, *supra* note 20, at para. 283; Stadtwerke v. Spain, *supra* note 19, at para. 243RWE v. Spain, *supra* note 19, at para. 481; Watkins v. Spain, *supra* note 104, at para. 414; PV v. Spain, *supra* note 107, at para. 374.

[111] Infrastructure v. Spain, *supra* note 17, at para. 443; RREEF v. Spain, *supra* note 104, at para. 530; Stadtwerke v. Spain, *supra* note 19, at paras. 231-232.

3.1. Awards reflecting a little-deferential standard of review

In the first group there are four awards in which tribunals employed a little-deferential standard of review through a piercing analysis of the measures adopted by the State. With the exception of *Watkins v. Spain* (2020), these cases are among the first ones to be decided by arbitral tribunals, since their respective awards were rendered in 2017 or 2018. In three of them, such analysis was coupled with a broad reading of the content of the investor's legitimate expectations.

The common denominator in the cases *Masdar v. Spain* (2018), *Infrastructure Services v. Spain* (2018) and *Watkins v. Spain* was the tribunals' consideration that specific commitments could result from general statements contained in general laws or regulations,[112] when the investor had exercised due diligence in the interpretation of existing laws.[113] Following this line of reasoning, the Spanish legal framework offered sufficient guarantees that any future changes to the FIT regime would not affect existing installations that had satisfied the registration requirements referred to therein,[114] giving rise to legitimate expectations that the legal framework would not be changed.[115]

Having found that specific assurances that the benefits would remain unaltered were in fact given to the investor, these tribunals required a low threshold for their violation. The tribunal in *Masdar* immediately ceased its enquiry and declared that the new regulations, by changing the legal framework, were adopted in breach of the investor's legitimate expectations.[116] The *Infrastructure Services* tribunal did not delve into the analysis of the measures and simply stated that the new measures

[112] Masdar v. Spain, *supra* note 96, at para. 490; Infrastructure v. Spain, *supra* note 17, at paras. 541-547; Watkins v. Spain, *supra* note 104, at para. 552.

[113] In Masdar, the argument was then surpassed by the existence of separate communications that took place between the investor and the Ministry of Industry, where the latter specified that the conditions of Royal Decree 661/2007 would be standing throughout the operating life of the investment. Although the tribunal here ultimately resorted to specific promises, it devoted a great part of its analysis explaining how the legal framework was sufficient to generate the latter once the registration was made. See Masdar v. Spain, *supra* note 96, at paras. 518-519.

[114] Infrastructure v. Spain, *supra* note 17, at para. 551.

[115] Masdar v. Spain, *supra* note 96, at paras. 497-503.

[116] *Ibid.*, at para. 533.

had eliminated the essential features of the regulatory framework.[117] The *Watkins* tribunal found RDL 9/2013 to be in breach of the investor's expectations for wiping out the RD 661/2007 economic regime in its entirety. In addition, the tribunal specified that also mere changes to the regime such as the introduction of a 7% levy by Law 15/2012 and the elimination of the premium granted under RD 661/2007 by RDL 2/2013 had violated the stability element of the standard.[118]

The latter tribunal then swiftly dismissed the reasonableness and proportionality of the measures, that were found as lacking rational justification. It did not accept the 'public policy' justification for their adoption, indicating that 'Spain attempt[ed] to justify its regulatory measures due to a tariff deficit but a tariff deficit [was] a result of Spain's own regulatory conduct and hence [could not] be attributed to the [investors].'[119] Even more concise was the determination of the lack of proportionality of the measures, that failed the suitability test because 'Spain's objective as stated, was to address the issue of tariff deficit yet it imposed retroactive changes to the [FIT], thereby destroying the RD 661/2007 economic regime and that, in the [t]ribunal's view, [was] not an appropriate solution to the problem.'[120] The necessity test was then not satisfied since 'there were less intrusive means available to achieve Spain's goal.'[121]

The *Infrastructure* Services tribunal, after having found a violation of the investor's legitimate expectations, went on by way of further explanation to dismiss the objection raised by Spain, according to which the sole expectation that the investor could enjoy was that of reasonable return. Here, the tribunal employed a little-deferential analysis, having found that the new rate for reasonable return was not based on an identifiable basis and was determined on what Spanish officials personally deemed to be reasonable.[122] In the tribunal's view, the parameters used

[117] Infrastructure v. Spain, *supra* note 17, at paras. 556-558, quoting Charanne v. Spain, *supra* note 104, at paras. 513-514, 517, 539.

[118] Watkins v. Spain, *supra* note 104, at paras. 534, 557.

[119] *Ibid.*, at para. 599.

[120] *Ibid.*, at para. 601.

[121] *Ibid.*, at para. 602.

[122] Infrastructure v. Spain, *supra* note 17, at para. 564.

to calculate the special payment were not based on scientific studies[123] and no identifiable set of criteria was provided to show how to revise the reasonable rate of return every three years.[124] Finally, it denied that the FIT program had had any significant role in causing the situation of economic difficulty that the State was encountering, concluding that the elimination of the RD 661/2007 regime was unjustified.[125]

An almost identical reasoning was applied by the tribunal in *Eiser v. Spain* (2017). Although the tribunal here admitted that the investors could legitimately expect a reasonable return of the investment, it questioned the criterion adopted by the State to reduce the investor's profit, stating that it was not based on objective criteria but instead on the decisions of the head of the solar department at the relevant administrative agency:[126] the reasons underpinning such decisions were consequently not based on scientific studies but on what, in the tribunal's view, emerged to be a non-thorough analysis of the tax framework that investors were subject to.[127] The tribunal then criticized the method employed by the State to calculate the pre-tax and post-tax return,[128] as well as the process that led to the adoption of the regulations, highlighting the reservations that other Spanish authorities had made to draft versions of the Decree,[129] ultimately finding the measures to be in violation of the FET.

In the cases seen in the present subsection, tribunals paid little deference to the State while carrying out the analysis of the measures. They heavily criticised most of the States' determinations and did not give the State any leeway for the actions taken. Furthermore, such analyses were heavily affected by demanding interpretations of both the circumstances that could give rise to investors' legitimate

[123] *Ibid.*, at para. 565.

[124] *Ibid.*, at para. 566.

[125] *Ibid.*, at paras. 569-572.

[126] Eiser v. Spain, *supra* note 17, at para. 404.

[127] *Ibid.*, at paras. 405-406.

[128] *Ibid.*, at para. 396.

[129] *Ibid.*, at para. 407.

expectations and the content of the latter, showing an overall little-deferential standard of review.

3.2. Awards reflecting an overall deferential standard of review

The second group corresponds to cases mainly released between 2018 and 2019, with the exception of the *Charanne v. Spain* (2016) award, which was the first regulatory case to be decided against Spain in the ECT framework. This group is made of six awards where tribunals, in contrast with the cases seen above, resorted to deferential approaches in the analysis of the measures, though the overall standard of review was lowered by little-deferential interpretations of the circumstances giving rise to the investor's legitimate expectations and of the content of the latter.

In some cases, tribunals considered the general legislation as assuring the stability of the legal framework. The tribunal in *Novenergia v. Spain* (2018) initially determined that Law 54/1997 and RD 661/2007 contained a number of relevant statements and assurances on the fact that the favourable framework would be durable.[130] In addition, various declarations by the government or its agencies confirmed that the returns of the investment would be high and the support scheme would be stable and predictable.[131] A similar approach was adopted by the *9REN v. Spain* (2019) tribunal, according to which 'it [was] not credible to conclude that the text of RD 661/2007 was intended to convey the message that even more sweeping revisions or wholesale repeal of benefits would apply to existing facilities'.[132] The content of the legitimate expectations was not that of receiving a reasonable rate of return as argued by the State, but that the investment would receive the precise tariffs established in RD 661/2007 and RD 1578/2008 respectively.[133] In *SolEs v. Spain* (2019), the tribunal considered the regulatory framework to adequately serve as the basis for the investor's expectations and consequently found that RD 661/2007 and RD 1578/2008 did indicate that '*the stability of a [FIT]* assigned to

[130] Novenergia v. Spain, *supra* note 102, at para. 666.

[131] *Ibid.*, at para. 668.

[132] 9REN v. Spain, *supra* note 96, at para. 267.

[133] *Ibid.*, at paras. 295-298, 303.

a particular plant' was a fundamental aspect of the design of the regulatory regime at the time the investment was made.[134]

For two of these cases, namely *RREEF v. Spain* (2018) and *SolEs*, the broad scope of the standard was then coupled with particularly narrow interpretations given by the State, that equated the FET standard with the MST under international law. According to Spain, the FET standard under the ECT was not meant to limit the regulatory power of the State in a different manner than that provided by the MST under international law,[135] and found a ceiling in the national treatment and non-discrimination of investors.[136] The latter could therefore not expect Art. 10(1) to embody any sort of insurance policy that prevented the State from taking regulatory measures in the public interest.[137] In the case of *RREEF*, the divergence with the State's view lowered the overall level of deference and ultimately led to the inclusion of the case in the present subsection, while the interpretation adopted by the tribunals would have otherwise been considered narrow. The tribunal identified the content of legitimate expectations with a reasonable return,[138] in turn considered a rate 'significantly above a mere absence of financial loss'.[139]

Other tribunals adopted different but equally broad interpretations of the content of the investor's expectations. The tribunal in *Charanne v. Spain* found that, regardless of any specific representations, investors enjoyed the 'legitimate expectation that […] the State [would] not act unreasonably, disproportionately or contrary to the public interest.'[140] In doing so, it distanced itself from the State's argument as to the inability of the legal framework to contain specific promises, that could consequently stem only from specific communication with the investor.[141] The *Foresight v. Spain* (2018) tribunal stated instead that the investors had the legitimate expectation that the legal and regulatory framework would not be

[134] SolEs v. Spain, *supra* note 20, at para. 423 (emphasis added).

[135] RREEF v. Spain, *supra* note 104, at para. 234.

[136] *Ibid.*, at paras. 233-234.

[137] *Ibid.*, at paras. 231, 235; see also SolEs v. Spain, *supra* note 20, at para. 332.

[138] RREEF v. Spain, *supra* note 104, at paras. 381-384.

[139] *Ibid.*, at para. 387.

[140] Charanne v. Spain, *supra* note 104, at para. 514.

[141] *Ibid.*, at paras. 355 ff.

fundamentally and abruptly altered.[142] Such expectations stemmed from the express language of RD 661/2007, which set out fixed FITs to be paid for entire operating life of a PV facility.[143]

As already anticipated, the cases contained in the present subsection show a deferential standard of review in the analysis of the measures.[144] In some cases, this reflected in a high threshold required for finding a violation of the investor's legitimate expectations. The tribunal in *Novenergia* required changes that entirely transformed the legal and business environment surrounding the investment;[145] the *Foresight* tribunal looked for changes that fundamentally and abruptly altered the regulatory framework;[146] for the *RREEF* tribunal, changes in the legal framework could amount to a violation of the investor's expectations when entailing 'a drastic and radical change' of the former;[147] the *9REN* tribunal stated that such threshold was met by measures that set up a legal framework 'fundamentally different from the [one] that Spain promised and that induced the Claimant to invest';[148] the *SolEs* tribunal looked at whether the measure affected the core features of the investor's expectations.[149] The consequence of such a high threshold was that the tribunals consistently ruled that the regulatory changes enacted until 2013, namely RD 1565/2010, RDL 14/2010, and RD 2/2013, did not meet the requirement.[150] Different conclusions were reached for regulatory measures starting with RDL 9/2013,

[142] Foresight v. Spain, *supra* note 97, at para. 377.

[143] *Ibid.*, at para. 378.

[144] As to Novaenergia v. Spain, 9REN v. Spain, and Charanne v. Spain, see, to this end, F. Baetens, *Renewable Energy Incentives: Reconciling Investment, EU State Aid and Climate Change Law*, 2 January 2020, Pluricourts Blog, available at https://www.jus.uio.no/pluricourts/english/blog/freya-baetens/renewable-energy-incentives.html (last visited 4 April 2021).

[145] Novenergia v. Spain, *supra* note 102.

[146] Foresight v. Spain, *supra* note 97, at para. 388.

[147] RREEF v. Spain, *supra* note 104, at para. 379.

[148] 9REN v. Spain, *supra* note 96, at para. 302.

[149] SolEs v. Spain, *supra* note 20, at paras. 446-448, 450.

[150] Novenergia v. Spain, *supra* note 102, at para. 689; Foresight v. Spain, *supra* note 97, at para. 388SolEs v. Spain, *supra* note 20, at paras. 446-448, 450.

including RDL 413/2014 and Ministerial Order IET/1045/2014, that met the threshold and violated the FET obligation contained in the treaty.[151]

Other tribunals engaged in a scrutiny over the reasonableness of the measures. In *Charanne v. Spain*, while addressing the regulatory changes that limited the years for which the FIT could be received, the tribunal stated that the investor could not reasonably expect that the FIT program would last for more than 30 years,[152] considered as the normal lifespan of power plants. While looking at the limitation of the yearly eligible hours that could enjoy the FIT it then accepted the justification advanced by the State without delving into it and concluding that the measure was 'not disproportionate'.[153] The tribunal then identified the 'economic rationality' of the limitations, linking the measures to their stated objective and concluding that 'although these measures may harm economic interests of generators, they have been adopted on the basis of objective criteria and cannot be considered irrational'.[154] Furthermore, the tribunal quickly dismissed the proportionality test by considering such criterion satisfied 'as long as the changes [were] not capricious or unnecessary and [did] not amount to suddenly and unpredictably eliminat[ion of] the essential characteristics of the existing regulatory framework'.[155] Although framed in terms of proportionality, the test carried out by the tribunal here resembled much more the traits of a test of arbitrariness, thereby requiring a high threshold for its violation.

A proper proportionality test was carried out by the tribunals in *RREEF* and *9REN*. The first tribunal adopted a deferential approach: in the three-pronged test based on the legitimacy of the purpose, necessity, and suitability of the measure,[156] it did not question the State's determinations of the first two requirements, finding a violation solely on the proportionality *stricto sensu*. Furthermore, it recalled that

[151] Novenergia v. Spain, *supra* note 102, at para. 697; Foresight v. Spain, *supra* note 97, at paras. 396-398; 9REN v. Spain, *supra* note 96, at para. 309; SolEs v. Spain, *supra* note 20, at paras. 462-463.

[152] Charanne v. Spain, *supra* note 104 at para. 529.

[153] *Ibid.*, at para. 532.

[154] *Ibid.*, at para. 534.

[155] *Ibid.*, at para. 517.

[156] RREEF v. Spain, *supra* note 104, at para. 464.

the analysis would be informed by the recognition of a margin of appreciation by the State in conducting its policies, meaning that 'the [t]ribunal [would] abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation'.[157] As to the element of proportionality *stricto sensu*, it conducted the analysis *in concreto*, establishing what was the reasonable return that the investor could expect and what were the damages that the investor had incurred because of the measures. The tribunal considered the pre and post-measures expected rates of return, the incidence of taxes, the parameters resorted to for the calculation, the cost of money in the different stages of the investment and concluded that 'the reasonable return [was not to] be below 6.86% post-tax',[158] while being in fact lower. Failing to grant the promised reasonable return, the measures were disproportionate and ultimately in breach of the investor's legitimate expectations.[159]

A similarly deferential –yet much-shorter– reasoning was the one employed by the tribunal in *9REN*, which recalled the aim of the 2013-2014 changes (to avoid the insolvency of the Spanish electricity system and to keep prices low for most-vulnerable consumers) and defined the latter as 'proportionate to achievement of the objective',[160] specifying that the fact the investment disagreed with parts of the methodology '[did] not rob Spain of its regulatory authority.'[161]

In the cases seen in the present subsection, tribunals have resorted to deferential analyses of the measures enacted by the State, either by requiring a high threshold in order to find a violation of legitimate expectations or by paying respect to the State's determinations that led to the adoption of the relevant measures. The overall standard of review employed by tribunals in this subsection was therefore higher than that seen in the previous one, although it was lowered by broad interpretations of the circumstances that could give rise to the investors' legitimate expectations, that consequently led the tribunals to carry out extensive analyses of the latter.

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[157] *Ibid.*, at para. 468.

[158] *Ibid.*, at para. 589.

[159] *Ibid.*, at para. 589.

[160] 9REN v. Spain, *supra* note 96, at para. 323.

[161] *Ibid.*, at para. 321.

3.3. Awards reflecting a highly deferential standard of review

Finally, the third group includes six arbitral awards rendered between 2019 and 2020. The awards listed in this subsection reflect a highly deferential standard of review, since the deferential analysis of the measures was coupled with a deferential reading of the requirement of the investor's legitimate expectations.

The different approach towards a limitation of the investor's expectations can already be seen in the *NextEra v. Spain* (2019) tribunal, which considered the Spanish regulatory framework in force prior to the 2013-2014 changes as not enough, in and of itself, to give rise to expectations that the conditions of the investment would not change.[162] In the tribunal's words, '[t]he framework was based on legislation and legislation can be changed.'[163] Other tribunals focused on the specific provision that, according to investors, contained a stabilization clause. The tribunal in *BayWa r.e. v. Spain* (2019) maintained that Art. 44(3) of RD 661/2007 did not promise the immutability of the FIT regime, nor that the subsidies would never be reduced or capped.[164] Similarly, the tribunal in *Stadtwerke v. Spain* (2019) considered that, in the absence of a specific contract such as a PPA, a reasonable investor could not expect that RD 661/2007 would stabilize the energy regime;[165] the tribunal in *RWE v. Spain* (2019) acknowledged that Art. 44(3) of RD 661/2007, along with the other provisions of the decree, was contained in a regulation of general application and was thus susceptible to change.[166] As such, it could not be considered as a specific commitment made to the investors to the effect that the remunerations established by RD 661/2007 would remain substantially unchanged.[167] Similarly, the tribunal in *PV v. Spain* (2020) did not find Art. 44(3) of RD 661/2007 to contain any stabilization commitment, and specified that the system was subject to continuous changes since its inception and was constantly evolving.[168]

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[162] NextEra v. Spain, *supra* note 96, at paras. 583-586.

[163] *Ibid.*, at para. 584.

[164] BayWa r.e. v. Spain, *supra* note 101, at paras. 471-472.

[165] Stadtwerke v. Spain, *supra* note 19, at para. 277.

[166] RWE v. Spain, *supra* note 19, at para. 538.

[167] *Ibid.*, at para. 542.

[168] PV v. Spain, *supra* note 107, at para. 602.

In addition, other elements that tribunals listed in the previous sections had considered as indicating explicit promises, or as being irrelevant, were here considered differently. Unlike the previous cases, registration with RAIPRE was deemed a mere administrative requirement that investors needed to fulfil in order to sell energy, as such unfit to confer a vested right to certain remuneration.[169] Furthermore, the rulings of the Spanish Supreme Court that had confirmed the legitimacy of the changes were given due consideration, leading the tribunals to conclude that no investor acting in due diligence would have expected that no regulatory changes to RD 661/2007 affecting their investment would ever occur.[170] Consequently, with the exceptions of the *NextEra*[171] and the *Cube v. Spain* (2019)[172] awards, investors enjoyed no legitimate expectations that the special regime would remain substantially unchanged[173] or, as found by the tribunals in *BayWa r.e.* and *Stadtwerke*,[174] the only expectation that the legal framework could generate was that of achieving a reasonable return for their investments.

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[169] NextEra v. Spain, *supra* note 96, at para. 585; Stadtwerke v. Spain, *supra* note 19, at paras. 297-306; RWE v. Spain, *supra* note 19, at para. 544.

[170] Stadtwerke v. Spain, *supra* note 19, at para. 282; PV v. Spain, *supra* note 107, at paras. 612-613.

[171] In the NextEra case, after finding that legitimate expectations could not arise from the regulatory framework, the tribunal found that Spanish officials had made specific statements in writing to the investor. Spanish assurances did not include outright commitments by Spain; however, the tribunal considered that the use of terms such as 'guaranteeing' and 'preserv[ing] legal security' from a Spanish minister in written correspondence could 'reasonably be taken as statements that the Spanish government had no intention of making significant changes to the investment regime set out in RD 661/2007 and that this could be relied on by an investor.' More precisely, the assurances were not about a reasonable return, but about regulatory certainty and stability. The extensive consultations with the solar energy sector that followed RD 1614/2010 reinforced the expectation that there would be no radical changes made to the economic regime based on RD 661/2007. See NextEra v. Spain, *supra* note 96, at paras. 585-594 .

[172] While the tribunal found that the regulatory framework could only give rise to the expectation of a reasonable return of the investment, the peculiar circumstances of the investment led the tribunal to conclude, for that particular set of operations, that the investor had the expectation of the stability of the regime. See Cube v. Spain, *supra* note 103, at para. 442.

[173] RWE v. Spain, *supra* note 19, at para. 549.

[174] BayWa r.e. v. Spain, *supra* note 101, at para. 473; Stadtwerke v. Spain, *supra* note 19, at para. 275. See also Cube v. Spain, *supra* note 103, at paras. 273, 276.

The tribunals that had found the existence of investor's legitimate expectations then required a high threshold for the violation of the latter. The *NextEra* tribunal looked for regulatory changes that fundamentally and radically changed the existing regime, while the tribunal in *Cube* required a dramatic change from the previous regime: in both cases, this precluded the measures enacted until 2013 to violate the FET, while measures adopted in 2013 and 2014 were found to meet the threshold.[175]

Other tribunals carried out a reasonableness test of the measures instead. The tribunal in *Stadtwerke* described the reasonableness as requiring two elements, namely 'the existence of a rational policy; and the reasonableness of the act of the [S]tate in relation to the policy.'[176] The change in the remuneration system enacted by the measures at scrutiny was considered rational, since it was 'reasonably correlated' to the public policy objective of limiting excess remuneration and 'clearly address[ing]' a matter of public interest.[177] As to the second element of the test,

> '[t]he Spanish Government chose a policy solution that sought to protect the interests of the consumers while requiring producers to bear additional costs of maintaining the electrical system of which they were also beneficiaries. While that solution may have been objectionable to producers, one cannot say that it was unreasonable. It is also the case that the reforms bore a reasonable relationship to the objective of reducing the tariff deficit.'[178]

Having found the reasonableness of the measures, the tribunal considered the investors' claim on proportionality to be exhausted by the previous analysis. This notwithstanding, it went on to determine whether the impact on the claimant's investment was proportional. The reasonable rate of return was identified in around 7% post-tax,[179] whereas the investor's current rate of return was identified in 8.12%.[180] Consequently, the measures did not have a 'significant negative effect on

[175] Cube v. Spain, *supra* note 103, at para. 442; NextEra v. Spain, *supra* note 96, at para. 598.

[176] Stadtwerke v. Spain, *supra* note 19, at para. 318, quoting AES v. Hungary, *supra* note 21, at paras. 10.3.7-10.3.9. This criterion was followed in Electrabel v. Hungary, *supra* note 12, at para. 179, and Charanne v. Spain, *supra* note 104, at paras. 513-514.

[177] Stadtwerke v. Spain, *supra* note 19, at para. 319.

[178] *Ibid.*, at para. 321.

[179] *Ibid.*, at para. 337.

[180] *Ibid.*, at para. 353.

the […] investment.'[181] According to the tribunal, Spain adopted the measures to protect vitally important aims to its public welfare such as the solvency and stability of the public electricity system, and, as a consequence, investors 'were required to forego a modest amount of revenue for the sake of preserving the electricity system. Thus, the aim, the method and the effect of the State measures were reasonable.'[182]

The tribunal in the *PV* case addressed two different claims, the first one on the alleged violation of the legitimate expectations that investors would enjoy the RD 661/2007 tariff for the lifetime of their plants, the second one on the legitimate expectation of a reasonable return. While addressing the first one, the tribunal carried out a reasonableness test. If the aim of the measures was identified in the need to tackle the financial crisis that hit Spain in 2009 and in the following years, Spain decided to face the crisis by not imposing burdens to a single category, namely producers or consumers, choosing a middle course instead. It did increase the price for consumers as well as reduced the producers' rate of return while still guaranteeing a reasonable profit.[183] Consequently, '[t]here was thus an appropriate correlation between the policy objectives pursued by Spain and the [d]isputed [m]easures that diminished the amount required for subsidies in the renewable energy sector.'[184] Having passed the rationality test, the measures were considered 'not unreasonable, arbitrary, and disproportionate.'[185] In the analysis of the investors' second claim, the tribunal determined whether the measures had violated the investors' legitimate expectations of a reasonable return. In order to reach a conclusion on the issue, the tribunal carried out a proportionality test, without questioning the legality, suitability, and necessity stages. As to the proportionality *stricto sensu*, it calculated the return under the regime in force at the time the investment was made, that it found to be in the range of 7%,[186] and, after a lengthy analysis of the correct method

[181] *Ibid.*, at para. 354.

[182] *Ibid.*

[183] PV v. Spain, *supra* note 107, at paras. 627-628.

[184] *Ibid.*, at para. 628.

[185] *Ibid.*, at para. 630.

[186] *Ibid.*, at para. 709.

to apply,[187] the ensuing damages per every investor under the new regime.[188] The investors which suffered a rate of return below the threshold of 7% due to the measures were found to be treated 'unreasonably and disproportionately', the measures being in breach of the FET obligation.[189]

Other tribunals again just carried out a proportionality test, similarly keeping a deferential approach. The *BayWa r.e.* tribunal did not delve into the suitability and necessity of the measures under the proportionality test: in its words, its role was not 'to second guess reasonable measures taken to address the deficit (including measures affecting existing plants), to propose alternative policies that could have been adopted, or to weigh up for itself the competing demands of generators and consumers.'[190] To this end, it did not question the parameters adopted by the legislator: it briefly mentioned the limit of 25 years[191] and the adoption of standard facilities as being 'not unreasonable',[192] without delving into the analysis of any of the two. The retroactivity of the measures was then addressed: here, the tribunal found that clawing back remuneration to which the investor had a right at the time the payment was made was in breach of the element of stability of the legal framework and therefore in violation of the FET.[193] Still, the tribunal was to test the *overall* proportionality of the measures, meaning whether the impact on the reasonable return was disproportionate.[194] The tribunal found that, although by fixing the reasonable return to a lower parameter than the one identifiable through the previous measures, the investment was still profitable and the measures were proportional.[195]

Finally, the tribunal in *RWE* did look at whether the measures were suitable and necessary to the objective to be achieved. Although it carried out a more piercing analysis than the tribunals seen above, it still employed a deferential standard of

[187] *Ibid.*, at paras. 670-804.

[188] *Ibid.*, at para. 846.

[189] *Ibid.*, at para. 847.

[190] BayWa r.e. v. Spain, *supra* note 101, at para. 480.

[191] *Ibid.*, at para. 484.

[192] *Ibid.*, at para. 485.

[193] *Ibid.*, at paras. 495-496.

[194] *Ibid.*, at para. 497.

[195] *Ibid.*, at paras. 504, 509.

review. Since the measures were directly aimed at reducing the deficit and given the fact that the deficit dropped rapidly as a result of their implementation, they were considered suitable.[196] When addressing the necessity of the measures, the tribunal granted some margin of appreciation on the State as to which measures 'would successfully address the complex and acute problem of the [t]ariff [d]eficit and the unsustainable electricity sector debt', thereby considering the requirement as met.[197] As to the proportionality *stricto sensu*, the tribunal first addressed the claimant's contention that the tariff deficit could have been dealt with by being imposed on consumers.[198] Here, the tribunal did 'not accept that the failure to pass the full cost of the electricity system on to consumers […] was disproportionate (or unreasonable)'.[199] It then noted that the measures maintained the essential elements of the previous support system, including access and dispatch priority and a subsidy element in addition to market price,[200] and looked at the economic impact of the measures on the investment. Here, the tribunal considered the return rate identified by the State as a reasonable and proportionate threshold for the calculation, and found that, if for some investments the reduction of profits was minimal, others were 'estimated to achieve significantly lower returns',[201] therefore bearing an excessive and disproportionate burden.[202] In conclusion, it found that there had been a breach of the FET standard under Art. 10(1).[203]

The approach adopted by the tribunals in the present subsection reflected a deferential standard of review. As to the first prong of the analysis, narrow interpretations of the circumstances generating investors' legitimate expectations led the majority of tribunals to deny their existence. In the other cases, and in general during the second prong of the analysis, the tribunals did not carry out a piercing scrutiny over the State's determinations: most tribunals considered the reasonableness test

[196] RWE v. Spain, *supra* note 19, at para. 560.

[197] *Ibid.*, at para. 567.

[198] *Ibid.*, at para. 575.

[199] *Ibid.*, at para. 576.

[200] *Ibid.*, at paras. 577-578.

[201] *Ibid.*, at para. 587.

[202] *Ibid.*, at para. 589.

[203] *Ibid.*, at para. 600.

to be fulfilled once the measure was rational, thereby limiting the test to the first of the two requirements. Those which required a proportionality test did not challenge the necessity and suitability of the measures, paying respect to the State's decisions in this regard.

3.4. Preliminary assessment of the ECT cases against Spain

The Spanish cases already offer some indications on the approach that arbitral tribunals have kept towards States' sovereign measures. The different subsections roughly correspond to different temporal slots: three out of four cases listed in the first subsection (showing the least-deferential standard of review) were released between 2017 and 2018. Cases reflecting an overall deferential standard of review, though lowered by broad interpretations of the scope of protection, were mostly released between 2018 and 2019.[204] Finally, highly deferential cases were all released in 2019 and 2020. The fact that the little-deferential *Watkins* award was released in 2020 seems to constitute an exception to the otherwise identifiable trend towards the employment of a more-deferential standard of review by tribunals in the Spanish framework.

4. Cases against Czech Republic

A much-smaller sample is provided for by the proceedings filed against Czech Republic, which resulted in five awards issued between 2018 and 2019. Four of them were heard in parallel and discussed together before the same tribunal, leading to four separate awards almost identical in structure and text between each other, exception made for few instances that necessitated a separate analysis.[205]

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[204] With the exception of the 2016 award in Charanne v. Spain, *supra* note 104.

[205] Namely *WA Investments Europa Nova Ltd. v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019 (WA Investments v. Czech Republic); *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019 (Voltaic v. Czech Republic); *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019 (I.C.W. v. Czech Republic); *Photovoltaic Knopf Betriebs GMBH v. Czech Republic* (Photovoltaic v. Czech Republic). For this reason, the first case of the four according to their registry number, namely WA Investments v. Czech Republic, will be quoted in the text. References to the other cases in the text will be generally omitted, since they contain identical wording. Where the texts differ, it will be duly indicated.

The investments in Czech Republic were carried out upon a background of investment liberalization and promotion in the production of energy from renewable sources that started with Act No. 586/1992 on Income Tax, which exempted renewable energy producers from corporate income tax for a number of years and lowered taxes for certain components of photovoltaic installations. Further incentives for renewable energy producers were enacted in 2005 with the Act on Promotion, which established, among other things, a preferential treatment for renewable energy producers in the distribution or transmission of electricity, and 15-year FITs that would then be subject to a depreciation period under the so-called 5% rule (the new price set by the relevant administrative agency in any given year was not allowed to be decreased by more than 5% of the value of the FIT in the previous year), with further amendments made in 2007 and 2009. Given the success of such reforms, Czech Republic quickly met its stated objectives in renewable energy production and soon found itself in a situation of so-called 'solar boom', where the FIT programme had gone beyond the limit of economic sustainability for the State with fallbacks on consumers, that were called to pay higher prices for electricity.

The State reacted with various amendments to the existing legislation starting with Act No. 330/2010, which abolished incentives for photovoltaic plants with installed output exceeding a specific threshold. Act No. 346/2010 repealed the depreciation period, while Act No. 402/2010 introduced a levy for producers of solar energy (solar levy). Finally, the 2005 Act on Promotion was replaced by Act No. 165/2012, which terminated all existing contracts between renewable energy producers and the grid operators that provided for the payment of FITs or bonuses as of 31 December 2012.

i. Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic (2018)

In the earlier case *Antaris v. Czech Republic*, the tribunal adopted a broader notion of legitimate expectations than that fostered by the State.[206] More precisely, it did not limit legitimate expectations to those arising from a stabilization clause, either contractual or contained in a legislative act through 'a clear language of

[206] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018 (Antaris v. Czech Republic), at para. 365.

prohibiting legislative or regulatory change'.[207] Instead, the tribunal accepted that 'promises or representations to investors [might] be inferred from domestic legislation in the context of its background, including official statements. It [was] not essential that the official statements ha[d] legal force.'[208] Following its broad interpretation, the tribunal considered the presence of words such as 'stable' or 'guarantee' in Czech legislative acts (as well as in reports from the Ministry and from the Czech energy agency) to be promises of stability, thereby capable of generating investor's legitimate expectations.[209]

The broad scope of review reflected in a piercing analysis of the contested measures. At first, the expectations arising from the legal framework were identified in the stability of the framework set up by the Act on Promotion for investments commenced until the end of 2010.[210] Upon this expectation, the tribunal addressed Act No. 402/2010, which changed the favourable legal framework by introducing the solar levy in October 2010. As such, the measures affected the investment, which was carried out, for the most part, in the last three months of 2010. The tribunal dedicated much attention to the path that led to the adoption of the contested measures,[211] surveying numerous statements and interviews by members of the Parliament[212] and by members of the Executive to determine whether the legislative changes were anticipated or were due to a swift change of policy. Given that Czech officials had repeatedly warned about future changes to the regime and that the new measures were enacted in proximity to 2011, the tribunal considered the changes as not being retroactive, in line with the conclusions of the Czech Constitutional Court and of the European Commission's Decision on State aid.[213] Ultimately, the tribunal denied that the legitimate expectations as to the stability of the legal framework were breached.[214]

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[207] *Ibid.*, at para. 319.

[208] *Ibid.*, at para. 366.

[209] *Ibid.*

[210] *Ibid.*, at para. 400.

[211] *Ibid.*, at para. 410.

[212] *Ibid.*, at paras. 413-420.

[213] *Ibid.*, at para. 430.

[214] *Ibid.*, at para. 437.

The tribunal then moved on to assess the reasonableness of the measures.[215] While it left open that there could have been better solutions to reach the State's objective to tackle the excessive FIT, the tribunal clarified that

> 'for purposes of the reasonableness analysis, it [did] not matter whether a tribunal believe[d] that a particular course of action [was] 'good' or 'bad,' that a different solution might have been 'better,' or that a State could have done 'more,' or that other States took different measures',[216]

thereby finding the measures to be reasonable. Little room was finally conceded to considerations over the arbitrariness and proportionality of the contested measures. Given that there was an appropriate correlation between the State's objectives and the measures adopted, the latter were then considered to be rational and not arbitrary.[217] On the other hand, the changes applied only to most recent power plants, namely those that were heavily subsidized since they had been able to benefit from the decline in power generating costs, and were consequently deemed to be proportionate.[218]

ii. WA Investments Europa Nova Ltd. v. Czech Republic and other cases (2019)

A different approach was adopted in *WA Investments v. Czech Republic* and the other three cases. Here, the tribunal construed the stability of the legal framework as an independent obligation, as well as part of the protection of the investor's legitimate expectations. [219] This interpretation was, however, not opposed to by the State.[220] In both cases, the tribunal adopted a deferential approach in the

[215] For an analysis of the reasonableness test employed by the tribunal, see Ortino, *supra* note 50, at 142.

[216] Antaris v. Czech Republic, *supra* note 206, at para. 443.

[217] *Ibid.*, at para. 446.

[218] *Ibid.*, at para. 444.

[219] WA Investments v. Czech Republic, *supra* note 205, at paras. 569-570; Voltaic v. Czech Republic, *supra* note 205, at paras. 486-487; I.C.W. v. Czech Republic, *supra* note 205, at paras. 528-529; Photovoltaic v. Czech Republic, *supra* note 205, at paras. 482-483.

[220] WA Investments v. Czech Republic, *supra* note 205, at paras. 476 ff; Voltaic v. Czech Republic, *supra* note 205, at paras. 387 ff; I.C.W. v. Czech Republic, *supra* note 205, at paras. 376 ff; Photovoltaic v. Czech Republic, *supra* note 205, at paras. 434 ff.

determination of the scope of the standard. The obligation of stability required commitments expressly undertaken though legislation or contract, or individually made to the investor,[221] as argued by the State.[222] Once again in line with the State's view,[223] legitimate expectations required specific assurances as to regulatory stability, as well as a reasonable reliance by the investor and 'bearing in mind that *de minimis* violations [did] not meet the necessary threshold for treaty violations.'[224]

The tribunal then moved to the analysis of the contested measures, which introduced the solar levy, removed the Income Tax Exemption and abolished the Shortened Depreciation Period.[225] As to the obligation of stability, the inclusion of terms such as 'stable' or 'maintain' in the Act on Promotion and in a Ministerial report, in the absence of outright stabilization commitments, was not sufficient to ground the obligation.[226] For this simple reason,

> 'the changes introduced by the [State] to the [i]ncentive [r]egime were part of the exercise of the [State]'s sovereign right to regulate tariffs – in particular in the context of the solar boom and its substantial adverse consequences'. [227]

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[221] WA Investments v. Czech Republic, *supra* note 205, at para. 569; Voltaic v. Czech Republic, *supra* note 205, at para.486; I.C.W. v. Czech Republic, *supra* note 205, at para. 482; Photovoltaic v. Czech Republic, *supra* note 205, at para. 528.

[222] WA Investments v. Czech Republic, *supra* note 205, at para. 479; Voltaic v. Czech Republic, *supra* note 205, at para. 390; I.C.W. v. Czech Republic, *supra* note 205, at para. 379; Photovoltaic v. Czech Republic, *supra* note 205, at para. 437.

[223] WA Investments v. Czech Republic, *supra* note 205, at para. 505; Voltaic v. Czech Republic, *supra* note 205, at para. 416; I.C.W. v. Czech Republic, *supra* note 205, at para. 405; Photovoltaic v. Czech Republic, *supra* note 205, at para. 463.

[224] WA Investments v. Czech Republic, *supra* note 205, at para. 583; Voltaic v. Czech Republic, *supra* note 205, at para. 500; I.C.W. v. Czech Republic, *supra* note 205, at para. 496; Photovoltaic v. Czech Republic, *supra* note 205, at para. 542.

[225] Respectively, Act No. 330/2010, Act No. 346/2010, and Act No. 402/2010.

[226] WA Investments v. Czech Republic, *supra* note 205, at para. 573; Voltaic v. Czech Republic, *supra* note 205, at para. 490; I.C.W. v. Czech Republic, *supra* note 205, at para. 532; Photovoltaic v. Czech Republic, *supra* note 205, at para. 486.

[227] WA Investments v. Czech Republic, *supra* note 205, at para. 576; Voltaic v. Czech Republic, *supra* note 205, at para. 493; I.C.W. v. Czech Republic, *supra* note 205, at para. 535; Photovoltaic v. Czech Republic, *supra* note 205, at para. 489.

When confronted with the existence of investor's legitimate expectations, given that it had already found no commitments to stabilization in the State's regulatory framework, the tribunal swiftly dismissed that mere references to stability contained in agency reports could generate legitimate expectations to this end.[228] Consequently, 'in the absence of an express stabilization commitment, changes to address the solar boom were within the Respondent's regulatory power.'[229] Since the first requirement had not been fulfilled, the rest of the analysis over the existence of investor's legitimate expectations took a clear direction towards their non-existence in the case at hand.

This part of the analysis differed slightly in the four cases: in *WA Investments v. Czech Republic* the tribunal found that the investor had relied simply on a feasibility study by a private firm;[230] in *Voltaic v. Czech Republic* and *I.C.W. v. Czech Republic*, it saw no evidence that could ground the investor's claim;[231] in *Photovoltaic v. Czech Republic*, it found that the only expectation that the investor could enjoy was that of generating stable revenues and was well fulfilled even under the new regime.[232] Contrary to the approach held by tribunals in the cases against Spain addressed in Paragraph 3.3.1. above, here the tribunal considered the compatibility with the European legislation as a precondition for legitimate expectations to arise.[233] Consequently, since the regime of incentives had been considered as

[228] WA Investments v. Czech Republic, *supra* note 205, at para. 585; Voltaic v. Czech Republic, *supra* note 205, at para. 502; I.C.W. v. Czech Republic, *supra* note 205, at para. 544; Photovoltaic v. Czech Republic, *supra* note 205, at para. 498.

[229] WA Investments v. Czech Republic, *supra* note 205, at para. 586; Voltaic v. Czech Republic, *supra* note 205, at para. 503; I.C.W. v. Czech Republic, *supra* note 205, at para. 499; Photovoltaic v. Czech Republic, *supra* note 205, at para. 545.

[230] WA Investments v. Czech Republic, *supra* note 205, at para. 598; Voltaic v. Czech Republic, *supra* note 205, at para. 515; I.C.W. v. Czech Republic, *supra* note 205, at para. 555; Photovoltaic v. Czech Republic, *supra* note 205, at para. 511.

[231] Voltaic v. Czech Republic, *supra* note 205, at paras. 506-510; I.C.W. v. Czech Republic, *supra* note 205, at paras. 548-551.

[232] Photovoltaic v. Czech Republic, *supra* note 205, at paras. 502-507.

[233] WA Investments v. Czech Republic, *supra* note 205, at para. 612; Voltaic v. Czech Republic, *supra* note 205, at para. 525; I.C.W. v. Czech Republic, *supra* note 205, at para. 565; Photovoltaic v. Czech Republic, *supra* note 205, at para. 521.

amounting to State aid by the EU Commission, they could not serve as a basis for any investor's legitimate expectations.[234]

Finally, the tribunals adopted a deferential standard of review also when addressing the reasonableness of the measures. It looked at 'whether the challenged measures were promulgated in pursuit of a rational policy and were implemented in a reasonable manner',[235] and identified rationality with the existence of 'an appropriate correlation between the [S]tate's public policy objective and the measure adopted to achieve it'.[236] The tribunal considered 'plausible' the State's allegation that the measures were enacted to safeguard the State's budget during the economic crisis and to lower the excessive burden caused by energy costs on consumers by sharing it with electricity producers.[237] As such, it did not delve into the analysis any further: the State's justification was considered a public interest matter that laid the basis for their adoption, thereby fulfilling the requirement of reasonableness.[238]

4.1. Preliminary assessment of the ECT cases against Czech Republic

The tribunals in the Czech cases displayed different levels of deference in the determination of the scope of review. The tribunal in *Antaris* deemed the existing legal framework sufficient to generate legitimate expectations as to the stability of the legal framework, thereby adopting a broad interpretation of the requirement.

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[234] WA Investments v. Czech Republic, *supra* note 205, at para. 613; Voltaic v. Czech Republic, *supra* note 205, at para. 526; I.C.W. v. Czech Republic, *supra* note 205, at para. 566; Photovoltaic v. Czech Republic, *supra* note 205, at para. 522.

[235] WA Investments v. Czech Republic, *supra* note 205, at para. 683; Voltaic v. Czech Republic, *supra* note 205, at para. 601; I.C.W. v. Czech Republic, *supra* note 205, at para. 636; Photovoltaic v. Czech Republic, *supra* note 205, at para. 596.

[236] WA Investments v. Czech Republic, *supra* note 205, at para. 684; Voltaic v. Czech Republic, *supra* note 205, at para. 602; I.C.W. v. Czech Republic, *supra* note 205, at para. 210; Photovoltaic v. Czech Republic, *supra* note 205, at para. 597.

[237] WA Investments v. Czech Republic, *supra* note 205, at para. 685; Voltaic v. Czech Republic, *supra* note 205, at para. 603; I.C.W. v. Czech Republic, *supra* note 205, at para. 638; Photovoltaic v. Czech Republic, *supra* note 205, at para. 598.

[238] WA Investments v. Czech Republic, *supra* note 205, at para. 686; Voltaic v. Czech Republic, *supra* note 205, at para. 604; I.C.W. v. Czech Republic, *supra* note 205, at para. 639; Photovoltaic v. Czech Republic, *supra* note 205, at para. 599.

This reflected in a piercing enquiry to determine whether the measures were, in fact, retroactive, in breach of the investor's expectations. At the same time, the tribunal's analysis reflected deference at the intensity-of-review phase when focusing on the reasonableness, lack of arbitrariness, and proportionality of the measures.

Conversely, in the other four cases the tribunal identified a much-higher threshold for legitimate expectations to arise, swiftly rejecting the investor's claim. In this case, the identification of a standalone obligation of stability did not affect the deference in the scope-of-review analysis, as it was not opposed by the State. Similarly to the *Antaris* tribunal, when dealing with the reasonableness of the measures, the *WA Investments* one showed a deferential approach.

Consequently, the earlier *Antaris* case reflected an overall-deferential approach (deferential intensity of review, lowered by a little-deferential scope of review), while the tribunal in the later cases employed a highly deferential standard of review. Once again, this narrow sample seems to follow the tendency emerged in the previous paragraphs.

5. Cases against Italy

Finally, five cases filed against Italy found an outcome in awards rendered between 2016 and 2020. They all stemmed from the same regulatory measures that provided incentives to investment in the Italian renewable energy sector, following the adoption of Directive 2001/77/EC, which in turn promoted the production of electricity from renewable energy sources.

The renewable energy framework found its genesis in Legislative Decree 387/2003, through which Italy granted solar energy producers incentives based on FITs, through a system in which the cost of incentives was not borne by the State but was shifted on consumers. Such system was first implemented in 2005 with the so-called First Energy Account, and subsequently amended by the Second, Third, Fourth, and Fifth Energy Accounts, once each Account's targets were achieved. Under this system, every investor would receive confirmation of its right to a specific FIT through a letter from the National Energy Agency. The letter would anticipate the conclusion of an agreement with the Agency, according to which the FIT would usually remain unchanged for a twenty-year period.

Changes to the above-mentioned framework were implemented starting from year 2011, when Legislative Decree 28/2011 established that the FITs adopted under the Third Energy Account would last less than originally established, in addition to other limitations. Law Decrees No. 145/2013 and No. 91/2014 then limited the possibility of certain photovoltaic facilities to benefit from the minimum guaranteed price and granted lower tariffs to such facilities.

The tribunals in the Italian cases showed similar approaches in the interpretation of the scope of the investor's legitimate expectations. In *Greentech* the tribunal required specific assurances for legitimate expectations to arise, which could also be contained in the State's general legislation;[239] similarly, the tribunal in *Blusun v. Italy* (2016) stated that no obligation to keep the system unchanged was imposed on the State in the absence of specific commitments, which could be made in form of law, but needed to be clearly expressed;[240] the tribunal in *CEF Energia* came to similar conclusions, adding that legitimate expectations could also arise from implicit representations that were made by or were attributable to the State in order to induce the investment.[241]

The tribunals in *Blusun* and *CEF Energia*, alongside with the ones in *Belenergia v. Italy* (2019) and *Sun Reserve v. Italy*, then restated the State's right to regulate: in *Blusun* it needed to be proportionate to the aim of the amendments and with 'due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime';[242] in *CEF Energia*, it was not affected by the investor's legitimate expectations 'in the light of the high measure of deference which international law generally extend[ed] to the right of national authorities to regulate matters within their own borders'.[243] In *Belenergia* and *Sun Reserve*, legitimate expectations were limited by the State's regulatory

[239] *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018 (Greentech v. Italy), at para. 453.

[240] Blusun v. Italy, *supra* note 25, at para. 371.

[241] Greentech v. Italy, *supra* note 239, at para. 462.

[242] Blusun v. Italy, *supra* note 25.

[243] *CEF Energia BV v. Italian Republic*, SCC Case No. 158/2015, Award, 16 January 2019 (CEF Energia v. Italy), at para. 185.

autonomy, since a 'legitimate regulatory activity in the public interest does not amount to an FET breach even if it adversely affects investments.'[244]

Although for different reasons, the interpretation given by all tribunals differed, to some extent, from that of the State. The *Greentech* tribunal explicitly dismissed the State's argument as to the need for an explicit provision that would 'freeze [the State's] own normative activity'[245] to generate investor's expectations. In *Blusun*, the stability of the legal framework was considered as an independent obligation concurring to the determination of the FET standard and not as a preambular or hortatory texts, as argued by the State.[246] In *Belenergia* and *Sun Reserve*, the tribunals considered the FET standard under the ECT to be additive to customary international law,[247] adopting a broader view than that argued by the State, which saw the FET provision as reflecting the MST under customary international law.[248]

Where the awards of the present section showed different approaches was in the qualification of the elements that could constitute specific representations, specifically the agreements with National Energy Agency. The State argued that such

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[244] *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, at para. 572; *Sun Reserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Award, 25 March 2020, at para. 628.

[245] Greentech v. Italy, *supra* note 239, at para. 426.

[246] Blusun v. Italy, *supra* note 25, at para. 315.

[247] Belenergia v. Italy, *supra* note 244, at paras. 568-569; SunReserve v. Italy, *supra* note 244, at paras. 669-674.

[248] Belenergia v. Italy, *supra* note 244, at paras. 498, 566. It must be noted, however, that such disagreements seemed more a matter of form than one of substance, since they did not translate into a more thorough analysis carried out by the tribunals. On the contrary, State and tribunals agreed on all the components of the FET standard, the violation of which required a high threshold. In the words of the tribunal in Sun Reserve, which disagreed with the State in not finding a link with the MST, '[n]ot every shortcoming in a State's action will justify a claim for breach of the FET standard. To constitute a breach of the FET standard, it must be shown that the host State's conduct was manifestly or grossly unfair or un-reasonable, was arbitrary or discriminatory, constituted a denial of justice in national proceedings in the host State, or that the host State engaged in a wilful neglect of duty or a wilful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards. As articulated by the tribunals in AES v. Hungary, the conduct must be such as to shock judicial propriety.' See Sun Reserve v. Italy, *supra* note 244, at paras. 625-626.

agreements were merely accessory contracts that simply transposed legal provisions, and that could not be considered as specific assurances given to the investor.[249] Deferential interpretations will therefore be considered those that adhere to this view.

5.1. Awards reflecting a less-deferential standard of review

Two awards out of five, namely *Greentech v. Italy* (2018) and the *CEF Energia v. Italy* (2019), markedly distanced themselves from the interpretation given by the State to the agreements with the National Energy Agency that granted the FITs for 20 years and displayed an overall less-deferential standard of review as opposed to that employed by the tribunals in the next subsection.

Both tribunals found that through '[the energy account] decrees, statements and conduct of Italian officials, and [a]greements'[250] with the National Energy Agency, the State had offered specific assurances that the tariffs would remain fixed for two decades.[251] In *CEF Energia*, this led the tribunal to conclude that two of the investor's projects pre-dated the tariff-recognition letters and the ensuing agreements, therefore not crystallizing the protection of the claimant.[252] Conversely, the third project post-dated the tariff-recognition letter and the agreement with National Energy Agency that granted the FIT for 20 years. Since the agreement was considered to be a private law contract that indicated the incentives and its exact duration,[253] '[the investor]'s expectation as of that date was not simply […] relying on a general, *erga omnes*, promise found in law to putative photovoltaic producers.'[254] The investor was then considered to have acted in due diligence and therefore to enjoy

[249] Greentech v. Italy, *supra* note 239, at para. 442; CEF Energia v. Italy, *supra* note 243, at para. 250; Belenergia v. Italy, *supra* note 244, at para. 505; Sun Reserve v. Italy, *supra* note 244 at para. 638.

[250] Greentech v. Italy, *supra* note 239, at para. 453.

[251] *Ibid.*, at para. 451; CEF Energia v. Italy, *supra* note 243, at para. 188.

[252] CEF Energia v. Italy, *supra* note 243, at para. 188.

[253] *Ibid.*, at para. 222.

[254] *Ibid.*

legitimate expectations 'to receive incentives, in constant currency for a twenty-year period.'[255]

In *Greentech,* such interpretation was followed by a little-deferential analysis of the measures. The tribunal balanced the State's regulatory right with the investors' expectations. It rejected the State's justification that the reduction of tariffs answered the need to lower electricity costs to 'consumers, including households',[256] because electricity costs to consumers had decreased only 2-4% as a result of the regulation, and the decree was directed not only to households but also to administrations and factories.[257] Although it acknowledged that Italy was facing a situation of economic difficulty, 'none of the circumstances evidenced in this case reach[ed] the level of force majeure.'[258] The measure thus found no reasonable justification and consequently undermined the investors' legitimate expectations under the FET standard. Having found a violation of the investor's legitimate expectations, the tribunal did not see the need to continue with the analysis of the other elements of the FET standard, which were addressed only by way of further argumentation.[259]

The broad interpretation also affected the standard of review employed by the tribunal in *CEF Energia*. Here, the tribunal identified the reasons for the adoption of the measures in the reduction of the 'the burden of electricity bill to the consumers, especially small and medium enterprises, in order to stimulate economic growth and competitiveness.'[260] It argued that the measures would be reasonable in the circumstances of the case and that the interest of the State could prevail over the investor's legitimate expectations, also in light of the deference that was to be paid to the State.[261] However, it distinguished legitimate expectations arising from general legislation from those arising from a specific private law contract, as the case at

[255] *Ibid.*, at para. 234.

[256] Greentech v. Italy, *supra* note 239, at para. 454.

[257] *Ibid.*

[258] *Ibid.*, at para. 451.

[259] *Ibid.*, at para. 456.

[260] CEF Energia v. Italy, *supra* note 243, at para. 239.

[261] *Ibid.*. On the reasonable reliance of investor's expectations in the case at hand, see Faccio, *supra* note 79, at 15 ff.

hand, which contained undertakings made to the investor for the specific investment on the provision of a constant currency tariff for 20 years.[262] Changing such conditions was, in the tribunal's view, a breach of Art. 10(1).[263]

The two cases addressed above represent the least deferential cases in the Italian framework. The *Greentech* tribunal employed the lowest standard of review of all the Italian cases, pairing a broad interpretation of the investor's legitimate expectations with non-deferential analysis which required the reasons of the State to arise to the level of *force majeure* to be taken into account. Certainly higher was, on the contrary, the standard of review emerging from the later *CEF Energia* award, since the analysis paid respect to the State's determinations, but was affected by the little-deferential reading of the scope of the investor's expectations.

5.2. Awards reflecting a more-deferential standard of review

The remaining awards showed a narrower understanding of the requirement of the investor's legitimate expectations and reflected an overall deferential standard of review.

In the *Belenergia* case, the tribunal gave the agreements with the National Energy Agency a different qualification from the tribunals seen above. Such agreements were considered to pertain to the Italian regulatory framework, since they were administrative acts and could not 'have contained specific commitments addressed specifically to [the investor].'[264] Along the same lines, the agreements replicated the terms of the Energy Account Decrees and were not personally addressed to the investor.[265] At the same time, the legal and regulatory framework in place at the time the investment was made could not have created legitimate expectations in relation to the FITs and minimum prices.[266]

Particularly high was then the threshold required in the *Sun Reserve* case. Faced with the analysis of the measures, the tribunal looked at whether the investors enjoyed any legitimate expectations. For eight out of nine investor's projects, at the

[262] CEF Energia v. Italy, *supra* note 243, at para. 242.

[263] *Ibid.*, at para. 246.

[264] Belenergia v. Italy, *supra* note 244, at para. 579.

[265] *Ibid.*, at para. 580.

[266] *Ibid.*, at para. 583.

time of the making of the investment, the tariff-recognition letters and the ensuing agreements with the Italian Energy Authority had not been issued yet;[267] in the absence of such specific assurances, the general legal framework could not give rise to legitimate expectations.[268] Equally unfit to generate investors' expectations were the various public statements made by Italian government officials and Italian Ministerial and other authorities, since they merely reiterated the regime that existed by virtue of the regulatory framework without containing any promise.[269] Even the expectation of a fair remuneration for the average conventional life of photovoltaic plants (20 years) did not satisfy the threshold of objective certainty and was thus a purely subjective belief, unfit to generate expectations.[270]

Similar conclusions were then reached for the remaining project, which post-dated the tariff confirmation letter and the contract awarding the incentive.[271] Differently from the approach of the tribunal in *CEF Energia*, the tribunal considered such instruments as 'as accessories to public acts, […] distinct from instruments that could create binding contractual obligations.'[272] Consequently, also in this case, the only legitimate expectation was that of receiving a fair remuneration for the average conventional life of photovoltaic plants (20 years),[273] although this time it satisfied the threshold of objective knowledge and certainty.[274]

A highly-deferential test was then employed when addressing the reasonableness of the measures. The *Belenergia* tribunal found that the old regime had been

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[267] Sun Reserve v. Italy, *supra* note 244, at para. 778.

[268] Several reasons were given in this regard: the Energy Account Decrees did not provide for the photovoltaic producers any entitlement to incentive tariffs in the absence of the tariff confirmation letters and the agreements with the Energy Authority; the Energy Decrees were secondary acts in the Italian legal framework and were subject to changes upon recommendations by the EU or the determinations of the Italian State budget; Legislative Decree No. 387/2003 did not mention any 20 year period during which incentive schemes, such as tariffs were to remain constant, solely referring to the fair remuneration of the investment costs instead. See *Ibid.*, at paras. 790, 800-801.

[269] *Ibid.*, at paras. 816-817.

[270] *Ibid.*, at para. 836.

[271] Sun Reserve v. Italy *Ibid.*, at paras. 786, 820.

[272] *Ibid.*, at para. 822.

[273] *Ibid.*, at para. 830.

[274] *Ibid.*, at para. 840.

adopted on the basis of a calculation that underestimated solar irradiation and consequently overestimated the subsidies enshrined in the FITs.[275] Consequently, the rationale at the basis of the measures was to correct such imbalance, through a reduction that mirrored the initial overestimation.[276] In any case, 'other reasons for feed-in tariffs' reduction such as underestimated production predictions, lower [power plants] technology costs and burdens on Italian tax payers and electricity consumers suffice for the Tribunal to consider the [measure] as reasonable, justifiable and proportionate.'[277]

The *Sun Reserve* tribunal enquired into the reasonableness of three measures: as to the Fifth Energy Account enacted in 2015, its policy objective was 'to promote greater accountability with respect to the imbalances created in the grid as a result of nonprogrammable sources of energy'.[278] Given the rationality of the aim, and the fact that the imposition of the costs '[did] not appear to be unrelated to the objectives behind the imposition',[279] the measure was deemed reasonable. The second measure concerned the reduction of minimum guaranteed prices through resolution of the Italian Electrical Energy Authority: since its objective was the economic survival of smaller power plants, and since it was related to the policy that the State aimed to achieve, it was considered reasonable.[280] The third measure was Law Decree No. 91/2014, which the tribunal had already found to be aimed at offsetting the increase in electricity costs the end consumers were called to pay, thereby finding a rational aim; since the measure was then related to this policy objective, it was considered to be reasonable.[281]

A different, though still highly deferential reasoning, was then employed by the tribunal in *Blusun*.[282] First, the tribunal briefly looked at the existing legislation and, having found no specific commitments to grant subsidies such as FITs, or to

[275] Belenergia v. Italy, *supra* note 244, at para. 602.

[276] *Ibid.*, at para. 604.

[277] *Ibid.*, at para. 605.

[278] Sun Reserve v. Italy, *supra* note 244, at para. 952.

[279] *Ibid.*

[280] *Ibid.*, at para. 953.

[281] *Ibid.*, at para. 951.

[282] Baetens, *supra* note 144.

maintain them unchanged once granted, simply dismissed the claim on legitimate expectations.[283] Once it moved to the stability of the measures, among the various arguments in the investor's claim, the tribunal was faced with the compatibility with the treaty of two regulatory measures.[284] The tribunal required a high threshold for the violation of Art. 10(1) and found that the reduction in FITs was 'quite substantial, but […] not in itself crippling or disabling'.[285] It finally subjected the measures to a proportionality test, finding that they were a response to a genuine fiscal need and, without subjecting them to any assessment as to their suitability or necessity, it considered them proportional since the reduction of incentives was less than the reduction in the cost of photovoltaic technology,[286] When analysing the cumulative effect of the measures, be they regulatory or not, the tribunal concluded that, in view of the high threshold required by the FET, the claim was not materially stronger than those addressing the measures separately.[287]

The cases in this section reflect a deferential standard of review. The narrow reading of the investors' legitimate expectation led the tribunal in *Blusun* to simply dismiss the respective claim, and the other tribunals to require high thresholds that were ultimately not met.[288] Deferential were then the analyses of the measures, as the tribunals did not second-guess the State's determinations, and considered the reasonableness test as fulfilled where the measures were related to the stated aim, under a less-demanding rationality test.[289] Overall, they showed an opposite approach from the awards of the previous section and in particular from the *Greentech* award.

5.3. Preliminary assessment of the ECT cases against Italy

The Italian cases offer a more fragmented picture than the cases against other Countries seen above. Overall, they show one little-deferential case (*CEF Energia*

[283] Blusun v. Italy, *supra* note 25, at paras. 371-374.

[284] *Ibid.*, at paras. 332-337.

[285] *Ibid.*, at para. 342.

[286] *Ibid.*, at para. 342.

[287] *Ibid.*, at para. 364.

[288] See, to this end, Faccio, *supra* note 79, at 11 ff.

[289] See Ortino, *supra* note 50, at 150 ff.

v. Italy) from 2018 and a case where the tribunal employed an overall deferential analysis of the measures, although lowered by the little-deferential scope of review (*Greentech v. Italy*), rendered in 2019. The last two cases, which found an outcome in 2019 and 2020 respectively, and the *Blusun v. Italy* case from 2016 showed deferential standards of review instead. Although they do not offer a clear picture like the Spanish context, the latest awards reflect a deferential standard of review as opposed to the previous ones, with the exception of the 'early' *Blusun* tribunal. Consequently, they still seem to suggest a similar, although less evident, tendency to the cases seen in the other contexts.

It must then be recalled that the approaches seen above take place upon the background of the tribunals' broader interpretations of the scope of the standard as opposed to those argued by the State, thereby making the overall standard of review less-deferential in absolute terms. However, while this might hold true for the *Greentech* and *Blusun* awards, where the different interpretation led the tribunal to carry out broader analyses than those suggested by the State, in *Belenergia* and *Sun Reserve* the disagreement over the identification of FET with the MST under international law appeared more formal than substantial, with tribunals still requiring a really high threshold to find violations of the FET. Consequently, in these two cases, the deferential standard of review does not seem affected.

6. Conclusion: A detectable trend in ECT-based jurisprudence?

At the end of the section dealing with the ECT cases, it is now possible to highlight some findings.

The first relevant finding regards the timeframe in which regulatory cases have been decided in the ECT framework. The awards under scrutiny in the present Chapter have been rendered in the past 10 years, thereby covering a much-narrower lifespan than cases seen in the NAFTA framework. While the *S.D Myers* award was rendered in the year 2000, the earlier case surveyed in the present section, namely *AES v. Hungary*, dates 2010. However, the timespan is actually much narrower, since 26 over 29 cases have been decided between 2016 and 2020. A shorter timespan makes the formation of a coherent body of arbitral jurisprudence more difficult, since proceedings overlap (regardless of the exact date in which the award is rendered) and tribunals may not be informed by the terms of previous awards. As

a matter of example, the last NAFTA tribunal deciding on the *Mercer v. Canada* case could benefit, from the moment the notice of arbitration was filed, from more than 12 years of NAFTA arbitral jurisprudence on FET. Consequently, one must be cautious when identifying possible trends.

Some considerations, however, are relevant in this regard. First, although ten years might not seem as a relevant timespan, for the fast-moving investment arbitral jurisprudence it is a substantial amount of time. Highly-debated issues such as those addressed in investment arbitration receive widespread attention from all the relevant stakeholders and from international scholars, and influence existing proceedings. Second, many of the cases seen above were filed against the same State. Although States can obviously change their litigation strategies, what emerged from the analysis of the cases above is that they often keep a consistent line of argumentation, allowing the different approaches of tribunals to be tested upon a similar background. Third, even if the timespan is narrowed, the sample of cases is broad. The ECT offers the highest number of cases stemming from the same treaty provision, and consequently allows to reflect on possible changes that are found in arbitral jurisprudence.

The second relevant finding pertains to the substantive level of protection offered by the ECT. As pointed out in the introduction, Art. 10(1) is an elaborate provision which contains several grounds of investor protection. Although their relationship is debated, the textual basis is undeniable and leads to a high level of protection in absolute terms. Not only the protection of investors' legitimate expectations is here simply not an issue (as opposed to the NAFTA framework), but the same goes for the stability of the legal and regulatory framework, whether it is considered as an objective element or as part of the investor's expectations. Even in the presence of such a high protection, tribunals do adopt different approaches and employ different levels of deference in their analysis of the compatibility of State measures with the treaty text: in absolute terms, however, this materializes in standards of review that oscillate within a narrower range than in other contexts.

The third relevant finding regards the identification of any trends in the approach adopted by arbitral tribunals. From the arbitral jurisprudence scrutinized above, it emerges that a tendency to apply an increasingly deferential standard of

review can be seen in all the different contexts when examined independently. The broadest sample, namely the Spanish framework, offers the clearest picture in this regard, but similar conclusions can be drawn, to some extent, for the other contexts. If this is a strong argument towards the identification of a trend towards a greater deference in the standard of review employed by arbitral tribunals in the ECT framework, one must look at the overall picture before reaching such conclusion. This effort reveals more problematic, given the differences emerged in the different contexts: as a matter of example, the Spanish and Czech cases generally offered a deferential interpretation of the scope of review, upon which the differences between awards have been tested; the analysis of the Italian cases, on the other hand, generally adopted as a starting point a less-deferential scope of review.

While it might be difficult (if not impossible) to trace the exact standard of review employed by tribunals in a temporal sequence, it is possible to notice some tendencies upon the total sample of 29 cases. A little-deferential standard of review was employed in 7 cases, most of which concluded between 2017 and 2019;[290] an overall deferential standard of review, although lowered to some extent by narrow interpretations of the scope of the standard, characterized 10 awards, 9 of which rendered between 2016 and 2019;[291] a deferential standard of review was disclosed in 12 awards, 10 released in 2019 and the last two in 2020.[292] While the first two

[290] 5 out of 7 cases were concluded between 2017 and 2019, namely Eiser v. Spain, *supra* note 17 (2017); Masdar v. Spain, *supra* note 96 (2018); Infrastructure v. Spain, *supra* note 17 (2018); Greentech v. Italy, *supra* note 239 (2018); CEF v. Italy, *supra* note 243 (2019). The remaining cases were AES v. Hungary, *supra* note 21 (2010) and Watkins v. Spain, *supra* note 104 (2020).

[291] The 9 cases rendered between 2016 and 2019 were: Charanne v. Spain, *supra* note 104 (2016); Blusun v. Italy, *supra* note 25 (2016); Novenergia v. Spain, *supra* note 102 (2018); Antaris v. Czech Republic, *supra* note 206 (2018); Foresight v. Spain, *supra* note 97, at 9 (2018); RREEF v. Spain, *supra* note 104 (2018); 9REN v. Spain, *supra* note 96 (2019); SolEs v. Spain, *supra* note 20 (2019). The other case was AES v. Kazakhastan, *supra* note 59 (2013).

[292] The 10 awards rendered in 2019 were: Cube v. Spain, *supra* note 103; Nextera v. Spain, *supra* note 96; WA Investments v. Czech Republic, *supra* note 205; Voltaic v. Czech Republic, *supra* note 205; I.C.W. v. Czech Republic, *supra* note 205; BayWa r.e. v. Spain, *supra* note 101; Stadtwerke v Spain, *supra* note 19; RWE v. Spain, *supra* note 19; Photovoltaic v. Czech Republic, *supra* note 205. Belenergia v. Italy, *supra* note 244. The awards rendered in 2020 were PV v. Spain, *supra* note 107, and Sun Reserve v. Italy, *supra* note 244.

groups present substantial temporal overlaps, it can be immediately seen that strongly deferential awards, while constituting a relevant portion of the overall sample, appear only since year 2019 and never before. If one focuses on the last two years (2019-2020), the picture is even clearer: out of 16 awards rendered, 2 show a little-deferential standard of review, 2 an overall deferential one, and 14 a strongly deferential one. Consequently, although when looking at the totality of the ECT sample the tendency is less straightforward than in the single contexts seen above, also in this case it is possible to detect a tendency towards a greater deference in the standard of review employed by arbitral tribunals in the analysis of the State's regulatory measures.

It is now possible to turn to the research question is here presented at the beginning of the present Chapter, namely: is it possible to identify any trend in the investment arbitral jurisprudence based on the ECT's FET provisions with regard to the respect that arbitral tribunals pay to State sovereignty? The study of the arbitral jurisprudence emerged in the ECT framework seems to suggest an answer in the positive, as an ongoing tendency towards a greater recognition of the State's regulatory authority seems to be emerging. This tendency confirms, with the peculiarities seen above, the trend noticed in the previous Chapter, adding another piece to the identification of a trend in investment arbitral jurisprudence. Still, the results reached so far need to be confronted with those that will emerge from the next Chapter on arbitral jurisprudence based on BITs.

CHAPTER VI

State sovereignty in international investment arbitral jurisprudence: other 'unqualified' FET provisions

1. Introduction – 2. The Argentine cases – 2.1. A unitary study: the underlying common framework – 2.2. Awards reflecting a little-deferential standard of review– 2.2.1. Preliminary considerations – 2.3. Awards reflecting some degree of deference – 2.3.1. Preliminary considerations – 2.4. Awards reflecting a deferential standard of review – 2.4.1. Preliminary considerations – 2.5. Preliminary assessment of the Argentine cases – 3. Arbitral jurisprudence based on other BITs – 3.1. Awards reflecting a little-deferential standard of review – 3.2. Awards reflecting an overall deferential standard of review –3.3. Awards reflecting a highly deferential standard of review –3.4. Preliminary assessment of arbitral jurisprudence based on the remaining BITs – 4. A detectable trend towards the recognition of a greater role for the State in arbitral jurisprudence based on unqualified FET clauses?

1. Introduction

The final Chapter will address the strain of arbitral jurisprudence that originated from the more diverse and miscellaneous panorama of BITs that contain unqualified FET clauses. As such, it will be dedicated to answering the following research question: is it possible to identify any trend in the analysis of unqualified FET provisions with regard to the respect that arbitral tribunals pay to State sovereignty?

On a preliminary note, it is important here to recall one issue that seems to find increasing acceptance in recent investment arbitration and that has been already appreciated in ECT jurisprudence, namely that unqualified FET clauses require a lower liability threshold than qualified ones.[1] The issue is, as many others, not settled: if some commentators see this as the obvious consequence of provisions that do not fetter the protection of the standard to the one offered by customary international law or the MST,[2] others question this view, also in the light of the evolving

[1] UNCTAD, *Fair and Equitable Treatment - A Sequel*, UNCTAD/DIAE/IA/2011/5 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last visited 24 July 2018), at p. 60.

[2] Schreurer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *Journal of World Investment & Trade* (2005) 357.

content of customary international law and of the 'emerging trend of convergence'[3] in the identification of the elements of the standard.[4]

Generally speaking, recent tribunals that were confronted with the interpretation of unqualified FET clauses have been reluctant to delve into the relationship between the FET standard and customary international law and have adopted an operational approach instead, focusing on the specific elements of the standard. Still, from the survey of arbitral jurisprudence carried out in the current Chapter, it emerges that some elements the existence of which was much-debated in the context of qualified FET clauses, such as the protection of the investor's legitimate expectations, are consistently deemed as concurring to the protection offered by the FET standard.

Although investment protection provided by unqualified FET clauses can be considered, in absolute terms, generally higher than that provided by qualified FET clauses, it remains silent on the deference paid by arbitral tribunals to the State's determinations and to the ensuing recognition of a sovereign space of manoeuvre to the latter. What follows is that a higher protection of investments does not entail *per se* a more deferential approach of arbitral tribunals towards State sovereign measures, but it solely constitutes a different starting point upon which the different approaches of arbitral tribunals, if existing, are to be tested.

On a practical note, the present Chapter will show fewer elements of uniformity than the ECT framework, both in the factual situations that led to investment disputes and in the underlying treaty texts, and will require the analysis to proceed with greater caution. Still, several common traits can be found in the numerous cases filed against Argentina as a result of the measures enacted by the State to face the economic crisis that hit the Country between 2001 and 2003. The similarities among the so-called 'Argentine cases' make it possible to consider them as a unitary body of jurisprudence and to analyse them accordingly. Consequently, the present

[3] UNCTAD, *supra* note 1, at p. 59.

[4] M. Paparinskis, *Fair and Equitable Treatment*, 2016, Encyclopedia of International Economic Law, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713914; Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010).

analysis will be divided into two sections: the first one will deal with the Argentine cases, while the second (and last) one will open the floor to the remaining BITs. Accordingly, Paragraphs 2. and 3. of the present Chapter will be guided by a relevant sub-question. As to the Argentine cases, the research question will be: is it possible to identify any trend in the analysis of the FET standard carried out in the Argentine cases with regard to the respect that arbitral tribunals pay to State sovereignty?

2. The Argentine cases

The Argentine cases originate from the same historic context, namely the major economic crisis that began to unfold in Argentina by the end of the 1990s, culminating some 20 years of political and economic instability of the Country.[5] At the time, many of the State's public services had been privatized and were being managed by the private sector. The privatization started with the 1989 Reform Law and was supported by the enactment of several favourable measures for private investors, among which Law No. 23.928/1991 (the Convertibility Law) and Decree No. 2128/91, which ordered the implementation of a fixed exchange rate of the State currency that pegged the Argentine peso to the US dollar.[6]

The most-relevant State-owned entities were then made available to private participation and acquisition: in the gas sector, the national natural-gas transport and distribution monopoly was privatized through Law No. 24.076/1992 (Gas Law) and Decree No. 1738/92 (Gas Decree), which laid down the basic rules of the system and which divided the State-owned entity into transportation companies and distribution companies, opened to investors by means of a public tender offer. In the water sector, the Argentine government issued Decree 999/92 (Water Decree) to establish a regulatory framework for the privatization of the State-owned entity and to provide for the rights and obligations of the future concessionaires, for the

[5] For an overview of the Argentine economic crisis and its background, see, among the many, C. Daseking et al., *Lessons from the Crisis in Argentina* (2005), at 36 ff; Di Rosa, 'The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues', 36 *The University of Miami Inter-American Law Review* (2004) 41, at 44 ff.

[6] The specific instruments enacted in this framework to govern the privatization of the main industries will be recalled in the analysis of the cases.

related regulatory bodies, and for the users of the service. In the electricity sector, Decree 634/91 and Law 24.065/91 (Electricity Law) grouped the three State-owned companies into a single operator to then privatize it. Private investors were granted licenses or concession contracts that specified certain important provisions governing the financial aspects of their concessions, including investment commitments, tariffs, and standards of efficiency to be achieved by the concessionaire.

The economic turmoil worsened to a point of no return in late 2001, when the State declared default and several Presidents succeeded one another in office within a matter of days. In the wake of such developments, the transitional authorities introduced several emergency measures that affected individuals and businesses at all levels, such as the drastic limitation on the right to withdraw deposits from bank accounts through the so-called 'Corralito' (Decree No. 1570/2001) in an attempt to preserve the stability of the banking system. On 6 January 2002, the Emergency Law (Law No. 25.561/2002) declared a public emergency that would last until 10 December 2003, introducing sweeping reforms: it abolished the foreign exchange system set up by the Convertibility Law and the pegging of the peso to the US dollar, with the ensuing devaluation of the peso and the introduction of different exchange rates for different transactions; it adopted measures in modification of public-service contracts, establishing that tariffs and prices for public services were to be calculated in pesos, instead of US dollars; it abolished all contract clauses calling for tariff adjustments in US dollars or other foreign currencies; it eliminated all indexing mechanisms. On 12 February 2002, Argentina announced the renegotiation of all public service contracts and later prohibited all regulatory agencies to affect the tariffs of any entities subject to their regulatory supervision until the end of the renegotiation period.

After a new Government replaced the transitional authorities in May 2003, a period of legal stability began. The Government extended the renegotiation process through Law No. 25.790/2003, during which it did not offer to restore the legal guarantees that were eliminated by the Emergency Law, or to compensate investors for any losses incurred.

In the wake of the Argentine crisis, Argentina was at the receiving end of an impressive number of arbitral proceedings initiated against it. In the years between

2001 and 2012, investors filed around 50 claims for breaches of the relevant BITs against the State, which accounted for around one-quarter of the ICSID workload at the time.[7] Among them, 25 cases can be qualified as regulatory disputes concerning alleged breaches of the FET standard by the Argentine State. Although many proceedings have been discontinued or are still pending at the time the present work is being written, 17 regulatory disputes have reached a conclusion and can thus be analysed in the context of the present enquiry.

2.1. A unitary study: the underlying common framework

In addition to the shared background, the Argentine cases have other elements in common that allow to study them as a unitary body: they were based on BITs that, although not identical, contained similar FET provisions; the differences in treaty texts have not influenced Argentina's interpretation of the relevant FET provisions, that has remained practically unchanged throughout all the proceedings; arbitral tribunals have heavily resorted to precedents in the specific Argentine context to support their reasoning.

The first element that connects the Argentine cases is their common treaty framework, composed of BITs concluded by Argentina with the US, the UK, Chile, Germany, Italy, Spain, and France respectively. All the treaties at hand contain unqualified FET clauses that read '[i]nvestment shall at all times be accorded fair and

[7] F. Lavopa, *Crisis, Emergency Measures and Failure of the ISDS System: The Case of Argentina*, 12 August 2015, Inter Press Service, available at http://www.ipsnews.net/2015/08/opinion-crisis-emergency-measures-and-failure-of-the-isds-system-the-case-of-argentina/ (last visited 3 September 2020).

equitable treatment […]'[8] or equivalent phrasing.[9] While most of the treaties do not add any elements to this clause and can be considered equivalent, the Argentina-France BIT and the Argentina-US BIT contain further elements in their FET provision that could disturb a unitary analysis of the Argentine cases.

A potentially problematic trait in this regard is the reference to the 'principles of international law' contained in the Argentina-France BIT. The treaty provides, at Art. 3, that '[c]hacune des Parties contractantes s'engage à assurer […] un traitement juste et équitable, *conformément aux principes du droit international*, aux investissements effectués par des investisseurs de l'autre Partie […]'.[10] The text might even cast doubt over the placement of arbitral cases based on the BIT[11] in the

[8] Argentina-US BIT Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991), 20 October 1994, Art.2(2)(a): 'Investment shall at all times be accorded fair and equitable treatment […]'; Argentina-UK BIT Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and the Protection of Investments (1990), 19 February 1993, Art.2(2): 'Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment […]'; Accordo Tra La Repubblica Argentina e La Repubblica Italiana Sulla Promozione e Protezione Degli Investimenti (1991), 14 October 1993 (Argentina-Italy BIT), Art. 2(2): 'Ciascuna Parte Contraente assicurerà sempre un trattamento giusto ed equo agli investimenti di investitori dell'altra'.

[9] Acuerdo Para La Promocion y La Proteccion Reciproca de Inversiones Entre El Reino de Espana y La Republica Argentina (1991), 28 September 1992 (Argentina-Spain BIT), Art.4(1): 'Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte'; Accord Entre Le Gouvernement de La République Française et Le Gouvernement de La République Argentine Sur l'encouragement et La Protection Réciproques Des Investissements (1991), 3 March 1993 (Argentina-France BIT), Art.3: 'Chacune des Parties contractantes s'engage à assurer […] un traitement juste et équitable […]; Tratado Entre La Republica Federal de Alemania y La Republica Argentina Sobre Promoción y Protección Reciproca de Inversiones (1991), 11 August 1993 (Argentina-Germany BIT), Art.2(1): 'En todo caso tratará las inversiones justa y equitativamente[…]'; Tratado Entre La Republica Argentina y La Republica de Chile Sobre Promocion y Proteccion Reciproca de Inversiones (1991), 1 January 1995 (Argentina-Chile BIT), Art.2(1): 'En todo caso tratará las inversiones justa y equitativamente […]'.

[10] Argentina-France BIT, *supra* note 9, Art.3.

[11] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case n. ARB/03/19, Decision on liability, 30 July 2010 (Suez v. Argentina); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on liability, 27 December

present section on unqualified FET clauses, suggesting their inclusion in the previous one on qualified FET clauses instead, or in a separate section altogether. The current placing is justified by the fact that all tribunals confronted with the specific treaty have steadily rejected the interpretation offered by the State that linked the reference to 'principles of international law' to the MST under customary international law,[12] arguing that the latter was

> 'so well-known and so well established in international law that one can assume that if France and Argentina had intended to limit the content of [FET] to the [MST] they would have used that formulation specifically. In fact, they did not.'[13]

Moreover, once the scope of the principles of international law was untied from that of the MST, tribunals have proceeded to identify the standard in exactly the same way as those confronted with scanter texts. They extended the analysis to the content of international law in general, including international treaties as well as international and domestic jurisprudence and came to similar conclusions to those reached by the other tribunals.[14] Consequently, given the irrelevance *in practice* of the inclusion of 'principles of international law' in the FET clause and the fact that tribunals did not interpret Art. 3 of the Argentina-France BIT differently from other tribunals confronted with unqualified clauses, proceedings against Argentina based on the treaty at hand are considered to fit well in the present section on unqualified FET clauses. For the same reasons, since the treaty has not been considered as offering a different level of protection if compared to the other treaties invoked in the Argentine framework, it may well be analysed alongside them.

2010 (Total v. Argentina); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (EDF v. Argentina).

[12] Suez v. Argentina, *supra* note 11, at para. 183; Total v. Argentina, *supra* note 11, at para. 125; EDF v. Argentina, *supra* note 11, at para. 343.

[13] Suez v. Argentina, *supra* note 11, at para. 184. For equivalent considerations, see Total v. Argentina, *supra* note 11, at para. 125; EDF v. Argentina, *supra* note 11, at para. 1001.

[14] Suez v. Argentina, *supra* note 11, at para. 185; Total v. Argentina, *supra* note 11, at para. 126; EDF v. Argentina, *supra* note 11, at para. 1001.

Another potentially problematic element is the treaty preamble of the 1991 Argentina-US BIT. The preamble specifically mentions the stability of the legal framework as one of the objectives of the treaty by providing that 'fair and equitable treatment of investment is desirable in order to maintain *a stable framework for investment* and maximum effective use of economic resources […]'.[15] The role of treaty preambles in the interpretation of the treaty text is well-known and is enunciated in Art. 31(2) of the VCLT, which lists the treaty preamble among the elements that contribute to the determination of the treaty context.[16] However, it is equally well-known that the informative role of preambles in treaty interpretation does not guarantee the identical interpretation of the treaty text by arbitral tribunals.

This will become evident during the analysis of the cases based on the Argentina-US BIT below, that will show how interpretations of FET, even if informed by the treaty preamble, have ranged from findings of an obligation of stability as an element of the standard to the outright exclusion of the latter.[17] As a matter of example, while the tribunal in *LG&E v. Argentina* concluded that the 'stability of the legal and business framework is an essential element of [FET]',[18] the tribunal in *Continental Casualty v. Argentina* stated that, although stability was indicated in

[15] Argentina-US BIT, *supra* note 8, Preamble (emphasis added).

[16] Vienna Convention on the Law of Treaties, 1155 UNTS 33, 27 January 1980, Art.31(1).

[17] As to the first approach, see: *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (CMS v. Argentina), at paras. 274-276; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (LG&E v. Argentina), at para. 124; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (Enron v. Argentina), at paras. 259-260; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (Sempra v. Argentina), at para. 300. As to the second approach, see: *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (Continental Casualty v. Argentina), at para. 258; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (El Paso v. Argentina), at paras. 350-352; 366-371; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (Mobil v. Argentina), at para. 930.

[18] LG&E v. Argentina, *supra* note 17, at para. 124.

the treaty preamble, it was 'not a legal obligation in itself for the Contracting Parties, nor [could] it be properly defined as an object of the [t]reaty'.[19] The element of stability has then been included in the protection offered by the FET standard by tribunals confronted with treaties other than the Argentina-US BIT that did not contain the same preambular reference,[20] which was as such not crucial in one way or the other.

Furthermore, the wording of the Argentina-US BIT did not influence the interpretation of the standard given by the State: Argentina has consistently denied that the reference to legal stability in the treaty preamble might entail an obligation to the stability of the legal framework as an element of the FET standard,[21] and has argued accordingly even when the treaty preamble did not so provide.[22] Consequently, the different wording of the treaty preamble does not seem to have affected the level of deference paid by arbitral tribunals to the interpretation of the FET standard offered by the State and can be included in a unitary analysis of the Argentine cases. Still, it will be duly noted when such wording is discussed during arbitral proceedings.

In addition to the common background and the similar treaty framework, the Argentine cases find another element of uniformity in the approach kept by the State throughout the proceedings where, notwithstanding the differences depicted above, the interpretation given to the FET standard has remained highly consistent. Argentina has always identified the standard with the treatment provided for by the MST under customary international law, thereby requiring a high threshold for its

[19] Continental Casualty v. Argentina, *supra* note 17, at para. 258.

[20] See, among others, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Final Award, 24 December 2007 (BG v. Argentina), at para. 306; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008 (Metalpar v. Argentina), at para. 184; Suez v. Argentina, *supra* note 11, at para. 230.

[21] See, e.g., CMS v. Argentina, *supra* note 17, at para. 272; LG&E v. Argentina, *supra* note 17, at para. 113: Enron v. Argentina, *supra* note 17, at para. 254; Sempra v. Argentina, *supra* note 17, at para. 292.

[22] See, e.g., BG v. Argentina, *supra* note 20, at paras. 286-287; Continental Casualty v. Argentina, *supra* note 17, at para. 253; Total v. Argentina, *supra* note 11, at para. 116.

violation.[23] On various occasions, the State has resorted to the debate emerged in the NAFTA context to identify the scope of the MST.[24] Some differences between the cases can be found in the identification of the specific elements of the standard, also considering the not-always-thorough reconstruction of the arguments of the parties given by arbitral tribunals. However, the threshold remained high: in some cases the State has required the interpretation adopted by the *Waste Management II* tribunal, which identified infringements of FET whenever the State conduct was

> 'arbitrary, grossly unfair, unjust or idiosyncratic, […] discriminatory and expos[ing] the claimant to sectional or racial prejudice, or involv[ing] a lack of due process leading to an outcome which offend[ed] 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.'[25]

Similarly demanding −although less-detailed− interpretations have been suggested in other proceedings. In *LG&E*, Argentina required that 'an investor ha[d] been treated in such an unjust or arbitrary manner that the treatment [rose] to the

[23] CMS v. Argentina, *supra* note 17, at para. 271; LG&E v. Argentina, *supra* note 17, at para. 113; Enron v. Argentina, *supra* note 17, at para. 253; Sempra v. Argentina, *supra* note 17, at para. 292; BG v. Argentina, *supra* note 20, at para. 284; Metalpar v. Argentina, *supra* note 20, at para. 117; Continental Casualty v. Argentina, *supra* note 17, at para. 248; *National Grid plc v. The Argentine Republic*, UNCITRAL Award, 3 November 2008 (National Grid v. Argentina), at para. 161; Suez v. Argentina, *supra* note 11, at para. 183; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL Decision on Liability, 30 July 2010 (AWG v. Argentina), at para. 183; Total v. Argentina, *supra* note 11, at para. 125; El Paso v. Argentina, *supra* note 17, at para. 329; EDF v. Argentina, *supra* note 11, at para. 343; Mobil v Argentina, *supra* note 17, at para. 900; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, 8 December 2016 (Urbaser v. Argentina), at para. 581.

[24] On some occasions, the State identified the MST with the high benchmark embodied by the 1927 Neer standard. See EDF v. Argentina, *supra* note 11, at paras. 344-345; Urbaser v. Argentina, *supra* note 23, at para. 581. In Enron v. Argentina, *supra* note 17, at para. 253, the State recalled the interpretation given by the NAFTA Parties with the 2001 FTC Note. In Continental Casualty v. Argentina, *supra* note 17, it pointed at the NAFTA jurisprudence on the interpretation of the standard.

[25] Waste Management II v. Mexico *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at para 98, quoted in Continental Casualty v. Argentina, *supra* note 17, at para. 253; Total v. Argentina, *supra* note 11, at para. 110.

level […] unacceptable from the international perspective'[26] for a violation of the FET to be identified. State conducts that were grossly unfair or arbitrary, gross denial of justice or manifest arbitrariness falling below acceptable international standards were then called for in *Mobil* and *Urbaser*.[27] On other occasions, the State has also listed bad faith among the requirements to identify a breach of the standard,[28] quoting the definition provided by the tribunal in *Genin v. Estonia*.[29] Similarly, in the course of the *Enron* and *Sempra* proceedings, Argentina argued that the standard offered protection from conducts that evidenced 'inconsistency in State action, radical and arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor's business.'[30]

A fundamental element of FET that lied at the heart of all the Argentine cases was then the protection of the investor's legitimate expectations. In line with the high threshold required by the MST, on numerous occasions the State has claimed that the protection of legitimate expectations was excluded from the content of the standard.[31] As a secondary argument, investors could enjoy legitimate expectations only when specific representations or clear commitments were given to the investor,[32] although expectations could not include an absolute obligation to maintain a stable and foreseeable framework.[33]

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[26] LG&E v. Argentina, *supra* note 17, at para. 113, quoting S.D: Myers v. Canada *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Partial Award, 13 November 2000, at para. 263.

[27] Mobil v. Argentina, *supra* note 17, at para. 900; Urbaser v. Argentina, *supra* note 23, at para. 582.

[28] CMS v. Argentina, *supra* note 17, at para. 270.

[29] See Metalpar v. Argentina, *supra* note 20, at para. 118, and National Grid v. Argentina, *supra* note 23, at para. 161, quoting *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 25 June 2001, at para. 367.

[30] Enron v. Argentina, *supra* note 17, at para. 254; Sempra v. Argentina, *supra* note 17, at para. 293.

[31] Enron v. Argentina, *supra* note 17, at para. 255; Sempra v. Argentina, *supra* note 17, at para. 294; Metalpar v. Argentina, *supra* note 20, at para. 117; Continental v. Argentina, *supra* note 17, at para. 253; EDF v. Argentina, *supra* note 11, at para. 359; Urbaser v. Argentina, *supra* note 23, at para. 588.

[32] National Grid v. Argentina, *supra* note 23, at para. 166; AWG v. Argentina, *supra* note 23, at para. 203; EDF v. Argentina, *supra* note 11, at para. 360; Urbaser v. Argentina, *supra* note 23, at para. 595.

[33] Continental v. Argentina, *supra* note 17, at para. 253; National Grid v. Argentina, *supra* note 23,

Given the fact that the Argentine cases show a shared factual background, similar treaty texts the differences of which have not been considered relevant by arbitral tribunals, and a consistent interpretation by the State, they can be considered as a single body of jurisprudence that originates from a common treaty framework and that allows to compare the different approaches (if present) adopted by arbitral tribunals.

In this regard, it then must be noted that, in response to the highly consistent interpretation of the scope of the FET standard given by Argentina, tribunals, with the sole exceptions of the *El Paso* and *Mobil* ones,[34] have consistently rejected both the identification of FET with the MST under customary international law[35] and the argument according to which investor's legitimate expectations were excluded from the protection offered by the standard.[36] Given the fact that such little-deferential

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at para. 163; Suez v. Argentina, *supra* note 11, at para. 117; Mobil v. Argentina, *supra* note 17, at paras. 902-904; Urbaser v. Argentina, *supra* note 23, at para. 590.

[34] In El Paso v. Argentina, although the tribunal considered the debate over FET being equivalent to the MST as futile, it agreed with the State's approach, in that 'the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard.' El Paso v. Argentina, *supra* note 17, at para. 336; in Mobil v. Argentina, according to the tribunal, the 'position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the [MST]'. Mobil v. Argentina, *supra* note 17, at para. 911.

[35] Enron v. Argentina, *supra* note 17, at para. 258; Sempra v. Argentina, *supra* note 17, at para. 302; National Grid v. Argentina, *supra* note 23, at para. 179; Suez v. Argentina, *supra* note 11, at para. 183; AWG v. Argentina, *supra* note 23, at paras. 184-185; Total v. Argentina, *supra* note 11, at para. 110; EDF v. Argentina, *supra* note 11, at para. 1001. In the remaining cases, tribunals did not consider the dispute over the identification of FET with the MST as being relevant, although they always discussed the investor's expectations or the obligation of stability of the legal framework on the merits.

[36] Enron v. Argentina, *supra* note 17, at paras. 262-263; Sempra v. Argentina, *supra* note 17, at paras. 110-113; BG v. Argentina, *supra* note 20, at para. 294; Metalpar v. Argentina, *supra* note 20, at para. 103; Continental Casualty v. Argentina, *supra* note 17, at para. 261; National Grid v. Argentina, *supra* note 23, at para. 173; Suez v. Argentina, *supra* note 11, at para. 203; AWGv. Argentina, *supra* note 23, at para. 230; Total v. Argentina, *supra* note 11, at para. 119; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 (Impregilo v. Argentina), at

approach in the identification of the elements of the FET standard is a common feature to all the proceedings addressed here, it is little indicative of the potential changes in the tribunals' attitude. The present enquiry will thus not delve into the general debate over the FET standard and will focus instead on the content of the specific element discussed in each dispute, be it the investor's legitimate expectation or the stability of the legal framework: deferential interpretations by tribunals will therefore be considered those that adhere to the position of the State, as opposed to those that require a more demanding behaviour from the latter. In the rare cases where the tribunal agreed with the identification of the scope of the standard as argued by the State, this will be duly noted.

Finally, one more clarification is in order. The enquiry will not delve into the protection from arbitrary measures and discriminatory treatment, that have been included among the elements of the FET standard by proceedings addressed in other sections of the present work. While in the treaties at hand these grounds of investor protection were generally included in separate provisions, arbitral tribunals have either refused to adjudicate on the respective claims, considering them as already exhausted by the analysis of FET,[37] or have rejected them in substance, thereby not offering any additional element to the study of possible changes in the tribunals' approach. In the latter case, once arbitrariness was identified with the definition given by the ICJ in the *ELSI* case, namely 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety',[38] the tribunals have always found that 'the charges imposed by Argentina to [the investors]'

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para. 292; El Paso v. Argentina, *supra* note 17, at para. 339; EDF v. Argentina, *supra* note 11, at para. 1005; Mobil v. Argentina, *supra* note 17, at para. 927; Urbaser v. Argentina, *supra* note 23, at para. 615.

[37] Arbitral tribunals that resorted to this approach while addressing the arbitrariness of State measures were Impregilo v. Argentina, *supra* note 36, at para. 333; EDF v. Argentina, *supra* note 11, at para. 1107; Hochtief v. Argentina *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, at para. 291. For tribunals that included the discrimination claim in the analysis of the FET, see Total v. Argentina, *supra* note 11, at para. 163; Impregilo v. Argentina, *supra* note 36, at para. 333; Hochtief v. Argentina, *supra* note, at para. 291.

[38] ICJ, *Case concerning Elettronica Sicula S.P.A. (Elsi) (United States of America v. Italy)*, General List No. 76, 20 July 1989, at para. 76.

investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law',[39] or equivalent wording.[40] With the exception of the tribunal in *Total v. Argentina* then,[41] no tribunal have then found the State's actions to be discriminatory.[42] For these reasons, the present analysis will not include the enquiry into the arbitrariness or discrimination of the measures.

The only exceptions in this regard are the Argentina-UK BIT, which refers to 'unreasonable or discriminatory measures'[43] and the Argentina-Spain BIT, which speaks of 'unjustified or discriminatory measures'.[44] Since the reasonableness of the State's actions laid obviously at the heart of the analysis of the FET standard in the other tribunals' reasoning, the cases based on the Argentina-UK BIT that dealt with the specific provision, namely *BG v. Argentina*, *Suez v. Argentina* and *National Grid v. Argentina*, might add some relevant elements to the study of the deference reflected in the tribunals' reasoning and will therefore include the specific provision in their analysis. Conversely, the only tribunal confronted with a claim based on Art. 3(1) of the Argentina-Spain, namely the *Urbaser* tribunal, considered the wording 'unjustified measures' to be entirely encompassed by the FET analysis, and will therefore not be here recalled.[45]

2.2. Awards reflecting a little-deferential standard of review

The first group of awards, which roughly corresponds to the earlier Argentine cases, reflects an overall little-deferential standard of review in the reasoning of arbitral tribunals. As will be seen below, the standard of review is here heavily influenced by the first prong of analysis, namely the identification of the scope of the

[39] LG&E v. Argentina, *supra* note 17, at para. 162.

[40] CMS v. Argentina, *supra* note 17, at para. 292; Enron v. Argentina, *supra* note 17, at para. 281; Sempra v. Argentina, *supra* note 17, at para. 318; Metalpar v. Argentina, *supra* note 20, at para. 187; Mobil v. Argentina, *supra* note 17, at para. 878.

[41] Total v. Argentina, *supra* note 11, at para. 163.

[42] CMS v. Argentina, *supra* note 17, at para. 293; Enron v. Argentina, *supra* note 17, at para. 282; Sempra v. Argentina, *supra* note 17, at para. 319; Metalpar v. Argentina, *supra* note 20, at para. 188; Mobil v. Argentina, *supra* note 17, at para. 893; Urbaser v. Argentina, *supra* note 23, at para. 1100.

[43] Argentina-UK BIT, *supra* note 8, Art.2(2).

[44] Argentina-Spain BIT, *supra* note 9, Art.3(1).

[45] Urbaser v. Argentina, *supra* note 23, at para. 1103.

FET standard. In almost all cases grouped in the present subsection, tribunals have given broad interpretations of the latter and, with the sole exception of the *EDF v. Argentina* case, have identified the stability of the legal framework as an element of the FET. All tribunals have then given little consideration to the situation of economic crisis that the State was facing, carrying out a little-deferential analysis of the emergency measures enacted by the State and consistently considering the State responsible for violations of the FET obligation.

i. Early cases stemming from the Argentina-US BIT

The earlier Argentine cases, namely *CMS v. Argentina* (2005), *LG&E v. Argentina* (2006), *Enron v. Argentina* (2007), *Sempra v. Argentina* (2007), were filed on the basis of the Argentina-US BIT against State measures that affected the gas sector. They were highly similar in their content and argued in almost identical terms, and will be analysed collectively.

Based on the specific wording of the preamble of the Argentina-US BIT, the tribunals identified the stability and predictability of the legal framework among the elements of the FET standard.[46] The legal framework contained several commitments towards the investors: the Gas Law granted the right to fair and reasonable tariffs through provisions of a general nature;[47] the Gas Decree bestowed upon investors specific rights that were also replicated in the licenses, namely the calculation of tariffs in dollars, their conversion into pesos at the time of billing,[48] and the tariff adjustment in accordance with US Producer Price Index (PPI).[49] In addition, the licenses guaranteed that the tariff structure would not be frozen or subject to

[46] CMS v. Argentina, *supra* note 17, at paras. 274-276; LG&E v. Argentina, *supra* note 17, at para. 124; Enron v. Argentina, *supra* note 17, at paras. 259-260; Sempra v. Argentina, *supra* note 17, at para. 300.

[47] CMS v. Argentina, *supra* note 17, at para. 133; LG&E v. Argentina, *supra* note 17, at para. 119; Enron v. Argentina, *supra* note 17, at para. 127; Sempra v. Argentina, *supra* note 17, at para. 168.

[48] CMS v. Argentina, *supra* note 17, at para. 133; Enron v. Argentina, *supra* note 17, at para. 133.

[49] CMS v. Argentina, *supra* note 17, at paras. 139-144; LG&E v. Argentina, *supra* note 17, at para. 119; Enron v. Argentina, *supra* note 17, at para. 101; Sempra v. Argentina, *supra* note 17, at para. 110.

further regulation or price control.[50] In doing so, the tribunal embraced a much-wider interpretation of the FET standard than that offered by the State, which argued that the regulatory framework offered no guarantees, including the alleged guarantee to dollar-denominated tariffs,[51] and that the sole expectation arising from the Gas Law was that investors would be granted a fair and reasonable tariff.[52]

All tribunals clarified that the obligation of stability did not entail the freezing of the legal system, given the sovereign space enjoyed by the State to face the economic crisis: the *CMS* tribunal stated that 'it [was] not the tribunal's task to pass judgment on the economic policies adopted by Argentina and hence it [was] not for it to determine whether the devaluation was the right or the wrong measure to take in the circumstances';[53] the *LG&E* tribunal 'recognize[d] the economic hardships that occurred during this period';[54] the *Enron* and *Sempra* tribunals recognized that Argentina had 'the sovereign authority to change its mind later, as in fact it did'.[55]

However, little room was given to the role of State authority in practice, with tribunals second-guessing the State's choices when deciding over alleged breaches of the investors' rights. In particular, the tribunals looked at the Emergency Law and related measures adopted by Argentina between 2000 and 2002. After acknowledging the dire situation that Argentina was undergoing and the need for the State to take action, the *CMS* tribunal indicated that the State could still have chosen alternative ways to face the emergency without abandoning the legal guarantees offered to investors. More precisely, 'the necessary adjustments could be accommodated within the structure of the guarantees offered to the [investor]. This

[50] CMS v. Argentina, *supra* note 17, at para. 145; LG&E v. Argentina, *supra* note 17, at para. 119.

[51] CMS v. Argentina, *supra* note 17, at para. 131; BG v. Argentina, *supra* note 20, at para. 286.

[52] CMS v. Argentina, *supra* note 17, at para. 129; Enron v. Argentina, *supra* note 17, at para. 110; Sempra v. Argentina, *supra* note 17, at paras. 107, 123. For a comment on the broad interpretation of the FET standard given by arbitral tribunals in the cases under scrutiny, see UNCTAD, *supra* note 1, at 31 and related footnotes. For a critical voice over the broad notion of FET employed by the CMS tribunal, see Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment": General International Law on Foreign Investment?', 46 *Archiv Des Völkerrechts* (2008) 74.

[53] CMS v. Argentina, *supra* note 17, at para. 159.

[54] LG&E v. Argentina, *supra* note 17, at para. 139.

[55] Enron v. Argentina, *supra* note 17, at para. 104; Sempra v. Argentina, *supra* note 17, at para. 114.

approach, in turn, would have made any unilateral determination by the [State] unnecessary.'[56] The *Enron* and *Sempra* tribunals similarly criticized the Government's actions while pointing out that a sound way of dealing with the crisis was aptly provided by the legislation and the respective licenses. In both cases, when dealing with the suspension of the PPI adjustment under the Emergency Law (and earlier measures)[57] and with the calculation of tariffs in US dollars,[58] the tribunals indicated the specific alternatives that the State might have chosen to achieve the same result, such as adjustment mechanisms, tariff reviews on periodic basis, and even the possibility of an extraordinary review.[59]

Following the fact that the legal system and the licenses granted the investors *rights*, the tribunals decided upon the disputes adopting a quasi-contractual approach: given that the measures had changed the rights originally granted to investors, they were found to have 'entirely transform[ed] and altered the legal and business environment under which the investment was decided and made',[60] 'completely dismantle[d] the very legal framework constructed to attract investors',[61] or 'substantially' and 'beyond any doubt' changed the legal and business framework.[62] The obligation of stability was therefore interpreted strictly: changing the obligations identified in the scope of the protection entailed that the State measures violated the stability of the legal framework and therefore the FET obligation contained in the BIT.[63]

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[56] CMS v. Argentina, *supra* note 17, at para. 238.

[57] Enron v. Argentina, *supra* note 17, at para. 104; Sempra v. Argentina, *supra* note 17, at para. 114.

[58] Enron v. Argentina, *supra* note 17, at para. 143; Sempra v. Argentina, *supra* note 17, at para. 168.

[59] Enron v. Argentina, *supra* note 17, at para. 104; Sempra v. Argentina, *supra* note 17, at para. 114.

[60] CMS v. Argentina, *supra* note 17, at para. 275 (emphasis added).

[61] LG&E v. Argentina, *supra* note 17, at para. 139 (emphasis added).

[62] Enron v. Argentina, *supra* note 17, at para. 264; Sempra v. Argentina, *supra* note 17, at para. 303 (emphasis added).

[63] CMS v. Argentina, *supra* note 17, at paras. 277-278; LG&E v. Argentina, *supra* note 17, at para. 133; Enron v. Argentina, *supra* note 17, at para. 266; Sempra v. Argentina, *supra* note 17, at para. 303. This interpretation has been defined an 'absolute stability' approach by some commentators. See, e.g., T. Cottier and I. Espa, *International trade in sustainable electricity: regulatory challenges in international economic law* (2017), at 445.

ii. BG Group Plc. v. The Republic of Argentina (2007)

Another case that originated from the effects of the emergency measures on the gas framework, this time based on the Argentina-UK BIT, was *BG v. Argentina*, where the tribunal framed the same factual situation seen above in slightly different terms, though it still resorted to a non-deferential approach towards the State's determinations.

While the State argued that the BIT contained no stabilization clause and that the regulatory framework offered no guarantees, including the alleged guarantee to dollar denominated tariffs,[64] the tribunal identified stability and predictability as inherent principles of the FET standard.[65] The legal framework then contained specific commitments directed to the investor: the Gas Law granted just and reasonable tariffs;[66] the Gas Decree established that the US dollar would be the currency in which tariffs would be calculated and provided for tariff adjustment every 5 years.[67] These commitments were then confirmed by an Information Memorandum and, more importantly, by the license released to the investor.[68]

Furthermore, the statements of the President of the Republic made during the presentation of the BIT to the Parliament, where he specifically mentioned stability and confidence as the aims of the treaty, could well be the basis for investor's legitimate expectations to this end.[69]

Even though the tribunal framed the investor's position as that of enjoying *expectations* and not rights as the cases seen above, it did not depart from the reasoning of the previous tribunals. It did not seem to give much consideration to the State's sovereign role and it reduced its reasoning to the bare minimum:

> 'Argentina's derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it

[64] BG v. Argentina, *supra* note 20, at para. 286.

[65] *Ibid.*, at para. 307.

[66] *Ibid.*, at para. 162.

[67] *Ibid.*, at paras. 166-169.

[68] *Ibid.*, at paras. 171-173.

[69] *Ibid.*, at para. 300.

decided to make the investment. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of [FET]'.[70]

Consequently, the departure from the guarantees contained in the legislation and license constituted a breach of the obligation of stability of the legal framework that had 'entirely altered the legal and business environment'.[71]

This reasoning was then replicated in the analysis of Art. 2(2) of the Argentina-UK BIT, which protected investors from unreasonable measures. Reasonableness was required to 'be measured against the expectations of the parties'[72] that had already been identified in the FET analysis. Although it was not for the tribunal 'to pass judgment on the reasonableness or effectiveness of such measures as a matter of political economy',[73] the simple fact that the State had changed the commitments made to the investor was considered unreasonable and therefore in violation of Art. 2(2) of the BIT.[74]

iii. Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (2010) and AWG Group Ltd. v. The Argentine Republic (2010)

A similarly little-deferential standard of review, this time enriched by a more articulated reasoning in the second prong of the analysis, could be found in two cases discussed in the water sector and heard in parallel before the same tribunal, namely *Suez v. Argentina* and *AWG v. Argentina*.

Here, the State argued for the inability of the general regulatory framework to offer guarantees to investors, envisaging such possibility only in the presence of a stricter relationship between the parties, such as one of contractual nature.[75] Furthermore, even the contractual relationship needed to be specific: since the investors in *Suez* and *AWG* were shareholder of the once-public company and the concession

[70] *Ibid.*, at para. 307.

[71] *Ibid.*, at para. 307. For an analysis of the tribunal's approach in finding a breach of the investor's expectations, see G. Bücheler, *Proportionality in Investor-State Arbitration* (2015), at 188–189.

[72] BG v. Argentina, *supra* note 20, at para. 342.

[73] *Ibid.*, at para. 344.

[74] *Ibid.*, at para. 346.

[75] Suez v. Argentina, *supra* note 11, at para. 203; AWG v. Argentina, *supra* note 23, at para. 203.

contract was concluded with the latter, no representations or commitments were given to the investors and it was 'wholly unreasonable for the [investor] to expect that the [State] would endorse a massive tariff increase given the severity of the crisis.'[76]

Once again, the tribunal firmly disagreed with the scope of review identified by the State: firstly, it found that '[t]he stability of the legal and business environment [were] directly linked to the investor's justified expectations.'[77] It then went on to conclude that legitimate expectations did in fact arise from both the concession contract and the legal framework in that Argentina would respect the concession contract throughout its thirty-year life.[78]

In a similar fashion to the cases seen above, the tribunal was mindful that the State enjoyed right to regulate. However, such right was to be exercised 'within the rules of the detailed legal framework that Argentina had established for the [c]oncession'[79] and did not translate, in practical terms, into a deferential analysis. Two sets of measures were then subject to the scrutiny of the tribunal.

First, the Emergency Law was examined. The tribunal did not question the purpose of the piece of legislation, although it second-guessed the choice carried out by the State, going to great lengths to explain the various alternatives that the State might have employed to act in compliance with the BITs. In the words of the tribunal,

> 'if Argentina's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved [the investor], at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. […] If Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework […]

[76] Suez v. Argentina, *supra* note 11, at para. 203; AWG v. Argentina, *supra* note 23, at para. 203.

[77] Suez v. Argentina, *supra* note 11, at para. 230; AWG v. Argentina, *supra* note 23, at para. 230. Quoting *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, at para. 340.

[78] Suez v. Argentina, *supra* note 11, at para. 231; AWG v. Argentina, *supra* note 23, at para. 231.

[79] Suez v. Argentina, *supra* note 11, at para. 237; AWG v. Argentina, *supra* note 23, at para. 237.

Argentina might have taken measures to assure that its own governmental organizations paid their legitimate debts to [the investor].'[80]

Having found that the measures did not respect the legal framework existing at the time the investment was made, the State's actions constituted an abuse of regulatory discretion and were in violation of the FET provisions contained in the relevant treaties.[81]

The second set of measures concerned the renegotiation process provided by the emergency legislation. Among the many measures adopted were Resolution No. 38/02, which prohibited all regulatory agencies from affecting tariffs directly or indirectly until the end of the renegotiation period; Decree 311/03, by which Argentina changed the rules of the renegotiation process; Law No. 25.790, which provided that the decisions adopted by the Government while renegotiating public contracts were 'not limited or conditioned' by the provisions of their regulatory frameworks.[82] In this case, the tribunal did not accept the stated aim of the measures, namely the renegotiation of the concessions: under such a label, in the tribunal's view, the State was aiming at imposing unilateral changes to the concession contracts. For this reason, it found the State's behaviour to be in breach of the FET treatment of the investor.[83]

iv. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (2012)

Finally, the *EDF v Argentina* proceeding did not touch upon the issue of the stability of the legal framework, while identifying a broad content for the investor's legitimate expectations.

The latter found their genesis in road shows carried out by the Government of Argentina during the privatization of the Country's energy infrastructures and in Memoranda circulated in the same context. According to the tribunal, the

[80] Suez v. Argentina, *supra* note 11, at para. 235; AWG v. Argentina, *supra* note 23, at para. 235.

[81] Suez v. Argentina, *supra* note 11, at para. 237; AWG v. Argentina, *supra* note 23, at para. 237.

[82] Suez v. Argentina, *supra* note 11, at para. 241; AWG v. Argentina, *supra* note 23, at para. 241.

[83] Suez v. Argentina, *supra* note 11, at paras. 242-243; AWG v. Argentina, *supra* note 23, at paras. 242-243.

Government had promised investors a reasonable return as well as a series of protections contained in the Provincial Electricity Law and incorporated by reference in the concession agreement.[84] These guarantees included a fixed-exchange regime, the pegging of tariffs to US dollars, the US PPI adjustment, and concessions with a duration of thirty years.[85] In doing so, the tribunal identified a much-broader content than the one determined by the State, according to which the concession contract solely granted the principle of fair and reasonable tariffs[86] and the link of the agreement to the Convertibility Law. Consequently, in the State's view, 'only a change in the exchange rate parity under the Convertibility Law [should] be taken into account and not the total repeal of the Convertibility Law so as to implement a completely different monetary system',[87] as in fact happened.

Also in this case, the tribunal first focused on the emergency legislation, to then turn to the consistency of Argentina's pre-emergency measures with the BIT at a later stage.

Having identified the investor's legitimate expectations with the contractual undertakings embodied in the concession contract, the tribunal solely looked at the adherence of the State measures to the conditions laid down in the contract. The Emergency Law and related measures were therefore considered in violation of the FET since

> '[t]he due diligence obligations of a concession bidder provide no basis for the Tribunal to ignore Argentina's duties under its investment treaty with France. The failure of the Province to raise tariffs in a timely manner, so as to restore balance when rates were set in [US] dollars, constituted unfair and inequitable treatment in and of itself.'[88]

An equally-strict parameter was then employed in the analysis of the numerous pre-emergency measures that dealt with the modifications of the tariff regime under the concession agreement made by the relevant regulatory agency. Also in this case, the determination over violations of FET was linked to the adherence to the

[84] EDF v. Argentina, *supra* note 11, at para. 74.

[85] *Ibid.*, at paras. 367-368.

[86] *Ibid.*, at para. 304.

[87] *Ibid.*, at para. 300.

[88] *Ibid.*, at para. 1009.

contractual undertakings: given that the modifications affected such relationship, several measures were found to be in breach of the FET standard.[89] Two different measures were here investigated into with equally little-deferential analyses. Firstly, the tribunal focused on Resolution No. 8/98, which imposed a different tariff structure than that set up by the concession agreement. It looked at the stated aims of the measures[90] and maintained that the State could have behaved differently to reach the aim.[91] Secondly, while addressing the modification of the tariff regime of the concession agreement, the tribunal disagreed with the stated aims of the measures and considered them to violate the FET provided under the BIT.[92]

2.2.1. Preliminary considerations

The cases seen in the present subsection are yet another example of how the overall standard of review employed by tribunals is influenced by the determination of the scope of review in the first place. Little-deferential interpretations of the FET standard have, with the sole exception of the *EDF* case, led to the inclusion of the stability of the legal framework among the elements of the standard, that has then served as legal basis for findings of FET violations. General legislation or contracts were then considered as having generated numerous and wide-ranging commitments towards the investors.

Tribunals have then employed little-deferential analyses of the emergency legislation adopted by the State. On numerous occasions, the stability of the legal framework was interpreted strictly, through a quasi-contractual approach.[93] Accordingly, the simple fact that a modification of the conditions laid out in the respective concession contracts had taken place was a sufficient reason for finding a violation of the FET standard. Other times, tribunals have put more effort into the analysis of the measures, thereby abandoning the almost-contractual approach. However, even in these cases, they have heavily second-guessed either the stated

[89] *Ibid.*, at paras. 1036, 1040.

[90] *Ibid.*, at para. 1033.

[91] *Ibid.*, at para. 1034.

[92] *Ibid.*, at para. 1050.

[93] As to the early cases stemming from the Argentina-US BIT, see, in this regard, C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015), at 72.

aims of the specific acts or the actual choice of measures carried out by the State, often explaining what the State could have done so not to violate the BIT. Ultimately, the proceedings grouped above reflected the least-deferential standard of review that will be seen in the present Chapter, as they coupled non-deferential scope-of-review analyses with non-deferential intensity-of-review analyses.

2.3. Awards reflecting some degree of deference

Other arbitral awards, while still reflecting an overall little-deferential standard of review, have shown some degree of deference in the reasoning of the tribunal. In the case *National Grid v. Argentina*, this can be seen in the standard of review expressed during the analysis of the emergency measures enacted by the State, that were given a different consideration than that given in the previous cases. In three other cases, namely *Continental Casualty v. Argentina*, *El Paso v. Argentina*, and *Mobil v. Argentina*, tribunals have identified a narrower scope of review, which excluded the stability of the legal framework from the elements of the FET standard, to then carry out little-deferential analyses during the second prong of the enquiry.

i. National Grid plc v. The Argentine Republic (2008)

The tribunal in the *National Grid* case determined that investor's legitimate expectations could well arise from the statements made by the President of the Republic during the presentation of the BIT to the Argentine Congress for ratification, when he spoke about maintaining the treatment of investors 'unaltered' and of establishing a climate of 'stability and confidence'.[94] In addition, both the regulatory framework and the concession contract guaranteed that the tariffs would be calculated in dollars even if the electricity bills were denominated in pesos, and that the risk of future devaluations of the Argentine peso would be carried by the State.[95] This interpretation differed starkly from the one upheld by the State, which argued that legitimate expectations required specific declarations or clear commitments adopted towards the specific investor, absent in the case at hand.[96]

[94] National Grid v. Argentina, *supra* note 23, at para. 176.

[95] *Ibid.*, at paras. 109; 117-124.

[96] *Ibid.*, at para. 166.

The *National Grid* tribunal was the first to give some actual recognition to the economic crisis that the State was facing, separating the Emergency Law from the measures enacted at a later time. As to the Emergency Law, notwithstanding the scarce argumentation, the tribunal recognized some leeway to the State over the choice of measures that were necessary to face the crisis, by stating that '[w]hat would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis'.[97] As a consequence, it found the Emergency Law as not breaching the FET standard.

Equal recognition to the emergency situation was given by the tribunal when deciding upon the violation of Art. 2(2) of the Argentina-UK BIT, which protected from unreasonable measures. In this case, the tribunal identified the meaning of reasonableness with the protection from arbitrariness,[98] requiring the same high threshold for its violation. The measures 'were taken by the [State] in the context of an unfolding crisis. They may have contradicted commitments made to the [investor] but each one of them provided the reasons why it was taken.'[99] Consequently, the Emergency Law was considered reasonable under Art. 2(2).

A different conclusion was reached for the regulations adopted after the Emergency Law, which required companies such as the investor to renounce to the legal remedies they might have resorted to as a condition to re-negotiate their concession contract.[100] Such measures were found to have fundamentally changed the existing legal framework and consequently the conditions granted to the investor and to violate the stability of the legal framework and therefore the FET standard.[101]

ii. Continental Casualty Company v. The Argentine Republic (2008)

[97] *Ibid.*, at para. 180.

[98] *Ibid.*, at para. 197.

[99] *Ibid.*, at para. 198.

[100] *Ibid.*, at para. 180.

[101] *Ibid.*, at para. 179. On the little-deferential approach adopted by the National Grid tribunal, see G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013), at 64.

In the case *Continental Casualty v. Argentina* that arose out of an investment in the insurance sector, the tribunal gave a narrow reading of the scope of the FET protection provided by the Argentina-US BIT.

In contrast with the awards addressed in the previous subsection based on the same treaty, it dismissed the investor's argument over the stability of the legal framework on the basis that stability, although explicitly mentioned in the treaty preamble, was 'not a legal obligation in itself for the Contracting Parties, nor [could] it be properly defined as an object of the [t]reaty'.[102] Legitimate expectations then required specific undertakings by the State that were in turn relied upon by the investor.[103] Following this line of reasoning, the legal framework underpinning the insurance sector did not reach the necessary level of specificity required for legitimate expectations to arise, since the measures were 'general pronouncements […] predominantly of a legislative type'[104] and they 'were applicable or addressed […] to the generality of Argentina's public'.[105] Consequently, general legislative statements could only engender reduced expectations.[106] Furthermore, political declarations by various authorities were not enough to give rise to the legitimate expectation that the convertibility regime set up by the Convertibility Law would remain in place and never be abandoned by the State.[107] Finally, the Intangibility Law was enacted in times of crisis and should have been received with reduced trust by the investor.[108]

The tribunal found that the investor enjoyed expectations that arose not from the general legislative framework but from a series of Government-guaranteed loans contracts, treasury Bills, and term deposits offered by Argentina to bondholders (included the investor) as part of the restructuring of its sovereign debt.[109] Still, the unilateral modification of contractual undertakings by the government did not

[102] Continental Casualty v. Argentina, *supra* note 17, at para. 258.

[103] *Ibid.*, at para. 261.

[104] *Ibid.*, at para. 259.

[105] *Ibid.*

[106] *Ibid.*, at para. 261.

[107] *Ibid.*, at para. 262.

[108] *Ibid.*, at para. 262.

[109] *Ibid.*, at para. 135.

automatically entail a breach of the investor's expectations, and required additional scrutiny from the tribunal.[110]

The narrow scope of review was followed by a peculiar reasoning in the analysis of the measures, which was entirely levelled out to the findings of the necessity claim. Without delving into the extensive discussion over necessity clauses in investment treaties,[111] it is clear that an investigation based on the ground of necessity under international law moves along different lines and resorts to different criteria than those employed for the FET standard. For a start, the search for alternative measures hypothetically applicable by the State is mandated by the first requirement of Art. 25 of the ILC Articles on State Responsibility,[112] making the search for 'other (otherwise lawful) means available, even if they may be more costly or less convenient'[113] an integral part of its analysis. Consequently, even though the tribunal ultimately found that the legislative measures adopted to face the crisis were not in violation of the necessity clause and therefore of the FET standard, and even in the presence of the usual disclaimer that 'it [was] not [the tribunal's] mandate to pass judgment upon Argentina's economic policy during 2001-2002, nor to censure

[110] *Ibid.*, at para. 261.

[111] The issue has been predominant in the context of investment arbitration against Argentina. See, among the many, Reinisch, 'Necessity in Investment Arbitration', 41 *Netherlands Yearbook of International Law* (2010) 137; Ismailov, 'Necessity Revisited: Interpreting the Non-Precluded Measures Clause of the U.S.-Argentina BIT under Systemic Integration Approach', 13 *Transnational Dispute Management (TDM)* (2016) 1; Kent and Harrington, 'The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine Cases', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011) 246. Specifically on the necessity defense in Continental Casualty v. Argentina, see Alvarez and Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2010-2011* (2012) 315.

[112] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, A/56/10 (2001), Yearbook of the International Law Commission, 2001 Vol.II, Art.25(1): '[n]ecessity may not be invoked by a State as a ground for precluding the wrong-fulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril […]'.

[113] *Ibid.*, at 83, at para. 15.

Argentina's sovereign choices as an independent [S]tate',[114] the very nature of the necessity analysis led the tribunal to second-guess many of the State's determinations and to carry out an ultimately little-deferential analysis.

When focusing on the imposition of the bank freeze, the tribunal looked at whether the negotiations and consultations with the IMF might have been effective alternatives in light of the circumstances, concluding that there was no evidence that 'further negotiations between federal authorities and [international] institutions' could have led Argentina to obtain additional international support.[115] The bank freeze was thus considered adequate and effective in respect of its legitimate aim to prevent a further fall in bank deposits that would have brought about the banks' bankruptcy, as well as the exhaustion of the Country's reserves.[116] With respect to the devaluation of the peso, the tribunal delved into the analysis of the alternative solutions suggested by the investor, such as the voluntary debt exchange or the full dollarization of the Argentine economy, and concluded that 'neither solution [could] be considered as an alternative to devaluation that could have been reasonably pursued by Argentina with any probable chances of success.'[117] The pesification of the US dollar-denominated contracts and deposits led the tribunal to look at whether Argentina could have let the peso devalue or terminate the convertibility regime, whilst leaving unaffected the denomination in dollar of the financial instruments issued within the internal market.[118] It ultimately found that the de-dollarization was inevitable in the situation that Argentina was facing at the time.[119] In respect of the suspension of payments, default and rescheduling of the governmental financial instruments, the tribunal looked at the reasons for their adoption, their specific traits and mechanisms, and compared such treatment with that of other financial instruments. It then concluded that they were appropriate and reasonable

[114] Continental Casualty v. Argentina, *supra* note 17, at para. 199.

[115] *Ibid.*, at para. 204.

[116] *Ibid.*, at para. 205.

[117] *Ibid.*, at para. 210.

[118] *Ibid.*, at para. 211.

[119] *Ibid.*, at para. 214.

means to cope with the need to urgently stabilize the financial markets and the banks, reinstating progressively the rights of depositors.[120]

The necessity analysis was then extended to the State behaviour in the aftermath of the economic emergency, namely the restructuring of treasury bills. In this case, Argentina could not avail itself of necessity defence under customary international law for the simple fact that the solutions envisaged by the State were offered, 'when Argentina's financial conditions were evolving towards normality'.[121] For this very reason, the tribunal concluded that the measures at hand violated the FET.[122]

Without addressing the deference (or lack thereof) in the emergency analysis, the fact that the tribunal equated the necessity and the FET analysis and thus subjected both standards to the same requirements rendered its reasoning little-deferential. If looking for viable alternatives was the only method to determine if a measure was necessary, transposing the latter into the analysis of FET entailed heavily second-guessing the State's determinations an ultimately recognizing little room for manoeuvre to the latter.[123]

iii. El Paso Energy International Company v. The Argentine Republic (2011)

The tribunal in *El Paso v. Argentina* seemingly showed a more-deferential approach in the determination of the scope of review, agreeing with the State in linking the FET to the MST under customary international law.[124] Unlike the State, the tribunal considered the legitimate and reasonable expectations to be an element of

[120] *Ibid.*, at paras. 215-219.

[121] *Ibid.*, at para. 222.

[122] *Ibid.*, at para. 265.

[123] *Ibid.*, at para. 264. For an analysis that considers the award as an example of deference, although limited to the statements made by the tribunal, see Van Harten, *supra* note 101, at 63 ff; but see, contra, Henckels, *supra* note 93, at 184.

[124] El Paso v. Argentina, *supra* note 17, at para. 336. On the more-deferential approach adopted by the El Paso tribunal as opposed to the early Argentine cases, see Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', 4 *Journal of International Dispute Settlement* (2013) 197, at 209.

the MST, which derived from the obligation of good faith.[125] Legitimate expectations required

> 'specific commitments directly made to the investor – for example in a contract or in a letter of intent, or even through a specific promise in a person-to-person business meeting – and not simply general statements in treaties or legislation which, because of their nature of general regulations, can evolve.'[126]

Commitments could be considered specific if their precise object was to give a real guarantee of stability to the investor.[127] As such, general texts were excluded, since they could not guarantee that they would not be modified in due course,[128] and could solely give rise to reduced expectations instead. On the contrary, contractual undertakings could create proper legitimate expectations.[129] Consequently, the statements made by the President of the Republic as the Country's highest authority in that the enactment of the Electricity Law '[gave] the required legal certainty to the process of transformation of the electricity sector, thus preventing the ancient lack of stability of the rules of the game',[130] were not specific commitments towards investors.[131] Similarly, the indications contained in Argentina's legislation, such as the preamble of Decree No. 1589/1989, which stated that the Decree had been enacted 'to set clear and definitive rules that guarantee the legal stability',[132] could not generate investor's expectations. The legitimate expectations of any investor had then to include the real possibility of reasonable changes and amendments in the legal framework made by the competent authorities within the limits of the powers conferred on them by the law.[133]

Such a situation characterized the energy sector, where there was no contractual relationship between the State and the investor and there was no special

[125] El Paso v. Argentina, *supra* note 17, at para. 339.

[126] *Ibid.*, at para. 376.

[127] *Ibid.*, at para. 377.

[128] *Ibid.*, at para. 377.

[129] *Ibid.*, at para. 378.

[130] *Ibid.*, at para. 393.

[131] *Ibid.*, at paras. 394-394.

[132] *Ibid.*, at para. 393.

[133] *Ibid.*, at para. 400.

commitment on which the investor could reasonably rely. The legitimate expectations of any investor entering the electric power generation market of Argentina had therefore to include the possibility of changes in the procedures regulating the electricity market.[134] Among the several claims that embraced State actions touching upon several sectors of the economy,[135] the tribunal focused on the changes that the emergency measures imposed to the electricity market where, it noticed, the regulatory framework solely provided the parameters to establish the price of energy products without fixing the latter, therefore leaving a margin of appreciation to the administrator.[136] Consequently, the tribunal paid respect to the determinations carried out by the State and did not embark into the calculation of the hypothetically correct and fair amount of prices, as required by the investor, finding that the FET had not been violated.[137]

A different situation was identified in the cumulative effect of the measures adopted by the State. According to the tribunal, the Government of Argentina had given specific assurances through seminars and other promotional meetings in the US, Europe and South-East Asia.[138] On those occasions, it had promised that all the main parameters would either be in dollars or linked to the dollar; that the price of electricity tariffs would be connected with the US PPI and adjusted bi-annually; and that the capacity payments would be in dollars.[139] Irrespective of the very strict parameters it had previously required for legitimate expectations to arise, the tribunal found that other expectations could rise from the 'overall setting of the legal

[134] *Ibid.*, at para. 404.

[135] In the gas sector, the tribunal did not examine the possible violations of the FET standard: the measures that led to the restrictions on crude oil export were not addressed since their effects were in place for less than 60 days and solely constituted a short-term restriction, insufficient as such to determine a violation of the FET. See *Ibid.*, at para. 437. The claim over the enactment of export withholding taxes was then dismissed for lack of jurisdiction. See *Ibid.*, at para. 448. Similarly, the issue of pesification was not addressed since the investor did not prove to have been damaged by the measures. See *Ibid.*, at para. 458.

[136] El Paso v. Argentina, *supra* note 17, at para. 419.

[137] *Ibid.*, at paras. 421-422.

[138] *Ibid.*, at para. 83.

[139] *Ibid.*, at para. 510.

framework',[140] according to which the investor could reasonably expect that a devaluation of the peso would not substantially alter the dollar value of tariffs.[141] The tribunal considered the cumulative effect of the measures to be a total alteration of the entire legal setup for foreign investments in disregard of the guarantees given to the investor.[142] More precisely, while all measures, seen in isolation, were considered as reasonable measures to cope with a difficult economic situation,[143] their cumulative effect led to a different outcome, namely the violation of the FET.[144]

iv. Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (3013)

A similar interpretation of the FET standard was then given by the tribunal in *Mobil v. Argentina*, which equated the protection offered by the FET with that of the MST under customary international law.[145] While disagreeing with the State in finding that the protection of the investor's legitimate expectations on the stability of the legal framework be an element of the MST,[146] legitimate expectations could not originate from general statements in treaties or legislation, which could evolve because of their nature of general regulations.[147] Still,

> 'a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.'[148]

In line with this approach, the declarations made by the President of the Republic over the stability of the legal framework were solely 'political statement[s] to

[140] *Ibid.*, at para. 510.

[141] *Ibid.*, at para. 513.

[142] *Ibid.*, at para. 517.

[143] *Ibid.*, at para. 515.

[144] *Ibid.*

[145] Mobil v. Argentina, *supra* note 17, at para. 911. The interpretation given by the State can be found at para. 904.

[146] *Ibid.*, at para. 927.

[147] *Ibid.*, at para. 957.

[148] *Ibid.*, quoting El Paso v. Argentina, *supra* note 17, at paras. 376-377.

which only a limited confidence [could] be given',[149] nor the treaty preamble of the Argentina-US BIT could be considered a specific commitment towards stability.[150] Specific commitments were found in the combination of guarantees offered by the Gas Law and Gas Decree and their incorporation into the two concession contracts under scrutiny in the case at hand: the investors could then legitimately expect that natural gas producers would be granted the right to freely dispose of and market their gas at deregulated prices for the duration of their contracts.[151]

The Emergency Law and Decree 214/02 disregarded such commitments. The tribunal did not give any relevance to the reasons that buttressed the measure, solely noticing that the changes had put a *de facto* price freeze on natural gas in the domestic market, in contrast with the previous regulatory framework. The change led to the conclusion that the Government had 'exceeded the scope of its authority'[152] and had therefore violated the investors' rights.[153] Identical reasonings were employed for the imposition of export restrictions and of export withholdings.[154] The violation of the commitments led the tribunal to conclude that the measures (and the subsequent specific renegotiation process) constituted a breach of the FET standard.[155]

2.3.1. Preliminary considerations

The cases grouped in the second subsection show the emergence of deference at some stage of the standard-of-review analysis, unlike the cases analysed in the previous paragraph. Such a different approach manifested in different ways. In the *National Grid* award, the tribunal resorted to the most-deferential intensity-of-review analysis seen until this point, recognizing the dire situation that the State was facing and not considering the emergency measures in violation of the FET

[149] Mobil v. Argentina, *supra* note 17, at para. 970.

[150] *Ibid.*, at para. 971.

[151] *Ibid.*, at para. 973.

[152] *Ibid.*, at para. 975.

[153] *Ibid.*, at para. 976. In addition, a violation of the investors' rights was found in the behaviour kept by the State in relation to the specific contracts. See paras. 977-979.

[154] *Ibid.*, at paras. 981-987.

[155] *Ibid.*, at paras. 980, 984, 987.

standard. The analysis was carried out upon the broad reading of the FET obligation, according to which investor's legitimate expectations could well arise out of the general framework. Consequently, the little-deferential scope-of-review analysis ultimately lowered the overall standard of review employed in this case.

Similarly, the *El Paso* tribunal, while seemingly adopting a narrow interpretation of the FET obligation, ultimately considered the overall legal framework as capable of generating investor's expectations, thereby showing little deference in the identification of the scope of review. It required, however, a high threshold for their violation, identified in the total alteration of the existing conditions, as well as displaying a deferential intensity-of-review analysis of the single measures under scrutiny.

The remaining two tribunals, on the other hand, resorted to less-deferential intensity-of-review analyses. The tribunal in *Continental Casualty* linked the scrutiny to the piercing requirements of the necessity standard, which led to second-guessing many of the State's determinations; the *Mobil* tribunal followed the quasi-contractual approach seen in the previous paragraph and was satisfied that mere changes to the legislative framework had breached the investor's legitimate expectations. However, these tribunals construed the FET obligation in narrow terms, that translated into the rejection of the stability of the legal framework as an element of the standard and the in a narrow understanding of the circumstances that could give rise to the investor's legitimate expectations. Such determinations have limited the following analysis of each tribunal to the legitimate expectations that arose out of specific promises made to the investor and to the effects of the State actions on such expectations. Consequently, while still displaying an overall little-deferential standard of review, they showed some elements reflecting deference towards the State's determinations.

Overall, the cases surveyed above can be considered as reflecting a more-deferential standard of review than the ones observed in the previous paragraph.

2.4. Awards reflecting a deferential standard of review

Finally, other proceedings have displayed a deferential standard of review. The narrow reading of the scope of review of the FET obligation was, with the exception of the *Metalpar v. Argentina* award, always paired with deferential analyses of the

State's behaviour during the emergency situation, unlike the proceedings seen in the previous sections. This approach has not refrained tribunals from finding violations of the FET standard in all cases, although on the basis of different and specific conducts carried out vis-à-vis the investors.

i. Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic (2008)

The case *Metalpar v. Argentina* is an example of how a narrow identification of the scope of FET, as such closer (although not identical) to the one identified by the State, can affect the overall standard of review. The tribunal focused on the element of the investor's legitimate expectations, which required 'a promise of the administration on which the [investors relied].'[156] Such a promise could not be included in the regulatory framework, but required a closer relationship between the State and the investor. This could take place, as found in previous Argentine cases, through the invitation of foreign investors to participate in a bidding process ended with the signing of a contract, or through other types of contractual engagements.[157] In the absence of a contractual relationship, the investor did not enjoy any expectations.

The narrow scope of dispute automatically led to the dismissal of the FET claim. Since in this specific case 'there was no bid, license, permit or contract of any kind between Argentina and [the investors]',[158] the tribunal considered that there were no legitimate expectations entertained by the latter that were breached by State.

ii. Total S.A. v. The Argentine Republic (2010)

The tribunal in *Total v. Argentina* adopted a broader interpretation of the FET standard and explained that investor's legitimate expectations might be based 'on any undertaking and representations made explicitly or implicitly by the host

[156] Metalpar v. Argentina, *supra* note 20, at para. 183, quoting *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, at para. 241.

[157] Metalpar v. Argentina, *supra* note 20, at para. 185.

[158] *Ibid.*, at para. 186.

State'.[159] On the one hand, this meant that specific legal obligations assumed by the host State by contracts, concessions or stabilization clauses on which the investor relied were clearly capable of giving rise to legitimate expectations.[160] On the other hand, it still allowed legitimate expectations to descend from legislation or regulation of a unilateral and general character. There was no need for legislation to be directed specifically at the investor: in the words of the tribunal, 'a claim to stability [could] be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations.'[161]

Still, when looking at the first claim over the investor's investment in the gas sector, the tribunal considered that the provisions Gas Law, the Gas Decree, and the investor's license, according to which the gas tariffs were to be calculated in US dollars and adjusted in line with the US PPI, could not be construed as promises to the investor, since they were not addressed directly or indirectly to the investor.[162] In particular, the license was issued to the company to which the investor was a shareholder, and this was not a sufficient link in the tribunal's view.[163] Furthermore, the Government Memorandum not only contained no commitments, but it 'warn[ed] potential investors of the general commercial risk of [the company]'s default and of decreasing demand for [the company] caused by a devaluation of peso'.[164] Therefore, the investor enjoyed no expectations as to the denomination of the tariffs in US dollars.[165] The only expectation that emerged from the gas legal framework was that of a 'reasonable rate of return', as claimed by the State.[166] Since the dispute was purely regulatory, in the analysis of the effects of the Emergency Law the tribunal resorted to 'an evaluation of whether they [were] proportional, reasonable and not discriminatory'.[167]

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[159] Total v. Argentina, *supra* note 11, at para. 120.

[160] *Ibid.*, at para. 117.

[161] *Ibid.*, at para. 122.

[162] *Ibid.*, at para. 145.

[163] *Ibid.*

[164] *Ibid.*, at para. 146.

[165] *Ibid.*, at para. 150.

[166] *Ibid.*, at para. 96.

[167] *Ibid.*, at para. 162.

The tribunal thus proceeded to identify the purpose of the de-dollarization measures in the avoidance of the general collapse of the economy and in fostering a progressive recovery of the latter.[168] The de-dollarization of the public utilities' tariff regimes was a non-discriminatory measure of general application, and was not an isolated measure, forming part of the de-linkage of the Argentine monetary system from the US dollar that was carried out through the general pesification via the Emergency Law, in the exercise of Argentina's monetary sovereignty.[169] Given the exceptionality of the circumstances, such changes to general legislation, in the absence of specific stabilization promises to the foreign investor, reflected 'a legitimate exercise of the host State's governmental powers that [was] not prevented by a BIT's [FET] standard'[170] and was not in breach of it. A similar reasoning led the tribunal to consider that the emergency measures that froze tariffs were not violating the FET standard for as long as the emergency situation was present.[171]

The same could not be said for the state of affairs in 2003, when Argentina had emerged from the crisis, a new president had taken office, and a general mechanism to carry out tariff re-adjustments was set up:[172] Argentina's public authorities repeatedly established new deadlines, causing protracted delays in the renegotiation of concessions and licenses (including the tariff regime) in the public utility sector for almost six years. Consequently, while the failure to promptly readjust the tariffs during the economic crisis had been justified, with regard to the post-crisis period it was in violation of the FET obligation.[173]

A similar approach and similar conclusions were drawn when dealing with the second investment, carried out in the energy sector. Legislative provisions and regulations of a unilateral normative or administrative nature were, once again, not specifically addressed to the stability of the conditions of the investment and could

[168] *Ibid.*, at para. 163.

[169] *Ibid.*

[170] *Ibid.*, at para. 164.

[171] *Ibid.*, at para. 171.

[172] *Ibid.*

[173] *Ibid.*, at para. 184.

not be construed as specific commitments towards the investor.[174] The tribunal found that the rules contained in the Electricity Law could not form the basis of the investor's legitimate expectations and that the only expectation that the investor enjoyed under the legal framework was that of a reasonable return of its investment.[175] When addressing the pesification of payments, the tribunal followed exactly the same reasoning and conclusions carried out in the analysis of the gas sector above and considered the measures as not violating the FET standard.[176]

The measures that led to the alteration of the price mechanism were, on the other hand, subject to the reasonableness and proportionality test: given the investor's expectation of a reasonable return, it was conceivable that the State adopted a different system that would equally respect the principle of the economic equilibrium allowing generators to cover their costs and make a reasonable return on their investment.[177] However, the new measures massively reduced the returns of the generators, barely permitting them to cover their variable costs, contrary to sound economic management principles for power generators.[178] Since the State's measures 'disregard[ed …] the basic principles of the Electricity Law'[179] they were considered unreasonable. In addition, the measures were then considered disproportionate because they kept tariffs below the threshold of economic sustainability for electricity generators placing the burden entirely upon the latter.[180]

The tribunal in *Total v. Argentina*, while still envisaging the legal framework as capable of generating investor's legitimate expectations, identified the latter with a simple reasonable rate of return, thereby requiring a high threshold for their violation. The scope-of-review phase therefore displayed some level of deference, as

[174] *Ibid.*, at para. 309.

[175] *Ibid.*, at para. 327.

[176] *Ibid.*, at paras. 315-327.

[177] *Ibid.*, at para. 327.

[178] *Ibid.*, at para. 328.

[179] *Ibid.*, at para. 331.

[180] *Ibid.*, at paras. 328-329. The same exact reasoning and identical conclusions as the two claims here summarized were then reached by the tribunal while addressing the investor's final claim regarding the impact of the measures on its investment in the exploration and production of hydrocarbons, and will therefore not be repeated here. See paras. 347-479.

opposed to the cases surveyed in the previous paragraphs. In addition, the tribunal's reasoning reflected a deferential intensity-of-review analysis, as it gave relevance to the exceptional situation Argentina was facing and recognized a margin of manoeuvre to the State to deal with the situation.[181] Equally, it did not second-guess the new regime: it was only the freezing of tariffs below the threshold of economic sustainability which carried on for years after the economic crisis was overcome that ultimately led to a violation of the standard. Consequently, the tribunal employed a deferential standard of review in the analysis of the case.

iii. Salini Impregilo S.p.A. v. Argentine Republic (2011)

The narrow reading of the scope of review led the tribunal in *Impregilo v. Argentina* to exclude many of the investor's claims for being purely contractual. The tribunal clarified that the FET standard did not affect the 'State's undeniable right and privilege to exercise its sovereign legislative power':[182] save for the existence of an agreement, in the form of a stabilization clause or otherwise, amending the regulatory framework that existed at the time the investment was made was entirely within the power of the State.[183] The tribunal then clarified that contractual obligations were not, in and of themselves, sufficient to create legitimate expectations. Violations of a contract required the additional exercise of sovereign powers to fall under the protection of the BIT.[184] Such interpretation widely limited the investor's claims based on the concession contract between the State and the investor analysed by the tribunal, as the majority of them fell within the realm of purely contractual disputes.[185]

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[181] See Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577, at 596.

[182] Impregilo v. Argentina, *supra* note 36, at para. 290, quoting *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (Parkerings v. Lithuania), at para. 332.

[183] Impregilo v. Argentina, *supra* note 36, at para. 290, quoting Parkerings v. Lithuania, *supra* note 182, at para. 332.

[184] Impregilo v. Argentina, *supra* note 36, at paras. 292-295.

[185] *Ibid.*, at paras. 299-209.

The deferential scope-of-review analysis was then followed by a deferential intensity of review. As to the regulatory claims, the tribunal found that, based on the concession contract, the investor solely enjoyed the expectation that tariffs would provide a reasonable return,[186] as argued by the State, and not the specific exchange rate as argued by the investor. The emergency measures did not violate such expectations, since they gave rise to a different situation altogether, namely the abandonment of the pegging of tariffs to the US dollar, and not to the one protected in the contract.[187] The tribunal did not question the adoption of the emergency legislation, and solely looked at its effects on the investor's expectations.[188]

In a similar fashion to the *Total* tribunal seen above, if the emergency measures were not in breach of the FET standard, the same could not be said for the ones adopted in the aftermath of the economic crisis. The continuous reluctancy of the State to renegotiate the concession contract as provided for in the emergency legislation ultimately failed to restore a reasonable equilibrium in the concession and violated the investor's expectations.[189] Consequently, in the *Salini* case, the tribunal employed a deferential standard of review.

iv. Hochtief AG v. The Argentine Republic (2014)

The *Hochtief v. Argentina* case only touched upon the ability of contractual obligations to give rise to legitimate expectations, given the specific object of the dispute. According to the tribunal, a mere contractual breach was not enough to trigger the protection of the treaty,[190] the violation of which required 'an outright and unjustified repudiation of the transaction'.[191] The legitimate expectation that arose from the concession contract was that of the maintenance of the value, in

[186] *Ibid.*, at para. 324.

[187] *Ibid.*, at paras. 321-323.

[188] Identifying the case under scrutiny as an example of the reasonableness analysis, see Henckels, *supra* note 93, at 117.

[189] , *supra* note 36, at paras. 328-331.

[190] Hochtief v. Argentina, *supra* note 37, at para. 216.

[191] *Ibid.*, at para. 281, quoting Waste Managment II v. Mexico, *supra* note 25, at para. 98.

dollar terms, of the revenues under the concession contract,[192] while no specific promise was made as to a strict adherence to peso-dollar parity.[193]

Among the measures brought to the attention of the tribunal, the only regulatory dispute concerned the pesification process carried out by the Emergency Law and Decree No. 214/02, which abrogated the Convertibility Law and converted into Argentine pesos money obligations that had previously been expressed in foreign currency.[194] The tribunal resorted to a reasonableness test for determining whether the measures were in breach of the investor's legitimate expectations. It firstly identified the reason underpinning the emergency legislation, namely the unsustainability of the peso-dollar parity in the midst of the economic crisis,[195] to which the State responded with the pesification of the contracts. The tribunal then recognized that the emergency legislation, though not optimal, was motivate by the emergency situation that Argentina was facing at the time,[196] thereby respecting the State's choice of means in response to the crisis. Because the emergency measures did not affect the right of the investor of the maintenance of value of the investment, and because they still allowed the investor to apply for renegotiations to this end, they were considered to be 'a sound and coherent approach to the unavoidable facts of the extraordinary financial crisis then confronting Argentina.'[197] It was only the unacceptable delay in the implementation of the renegotiation process under the terms of the very emergency legislation that led the tribunal to declare the violation of the FET standard.[198]

The *Hochtief* tribunal, in line with the other cases surveyed in the present paragraph, adopted a narrow interpretation of the expectations enjoyed by the investor. The deferential scope of review was then followed by a deferential intensity-of-review analysis, in which the tribunal recognized the existence of an emergency

[192] Hochtief v. Argentina, *supra* note 37, at para. 238.

[193] *Ibid.*, at paras. 238-239.

[194] *Ibid.*, at para. 231.

[195] *Ibid.*, at para. 243.

[196] *Ibid.*, at para. 243.

[197] *Ibid.*

[198] *Ibid.*, at para. 288.

situation and recognized a margin of manoeuvre to the State when dealing with it. Consequently, the analysis reflected, once again, a deferential standard of review.

v. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (2015)

In the most-recent Argentine case, namely *Urbaser v. Argentina*, the tribunal gave a narrow reading of the scope of the FET protection. In particular, legitimate expectations required specific 'promises and undertakings made by […] the host State in support of the investment and its promotion',[199] usually in the form of contractual commitments. However, even under such occurrence, the protection of investor's expectations was not absolute and needed to be balanced with the rights and obligations of the host State instead.[200] This included

> 'the respect for the rights and powers exercised by the competent authorities as provided for under the Concession Contract and the Regulatory Framework. […] In the instant case, this obligation relate[d] to the Government's responsibilities under the Federal Constitution to ensure the population's health and access to water and to take all measures required to that effect.'[201]

Consequently, the concession contract concluded with the investor did not engender the expectation that the tariffs would remain fixed to the conversion rate originally envisaged. The reference to the Convertibility Law contained in the concession contract did not cover 'any economic consequences of any future change in convertibility, including changes that [were] detrimental to the economic equilibrium of the Concession'.[202] In doing so, the tribunal endorsed the interpretation given by the State of the guarantees offered by the concession contract.[203]

The high threshold required by the *Urbaser* tribunal was then paired with a reasoning that was antithetic to that carried out by the *El Paso* one as to the analysis of the effects of the emergency legislation, among which the Emergency Law: if

[199] Urbaser v. Argentina, *supra* note 23, at para. 627.

[200] *Ibid.*, at para. 619.

[201] *Ibid.*, at para. 622.

[202] *Ibid.*, at para. 674.

[203] *Ibid.*, at paras. 667-668.

viewed in isolation, they would have appeared as hurting the FET standard, since they determined a two-third reduction of the investor's income.[204] However, in the tribunal's view, they were to be confronted with the dire economic situation that had characterized the concession already before the economic crisis: while the pesification was found to have a contributory effect to the conditions of the investment, it affected an investment already compromised by the economic crisis, so that 'the [investor] would not be going to meet the goals for work and investment it had undertaken […] by the end of 2004, even if the emergency had not occurred.'[205] The emergency caused a serious drop in income and it contributed to the cutting-off from external funding. Still, the emergency legislation, while detrimental to the equilibrium of the concession contract, 'did not cause the [c]oncession to abate operation'[206] and was consequently not considered in breach of the FET obligation.[207] This conclusion was then confirmed by, and not identified with the necessity pleading as in the *Continental Casualty* case.[208]

As seen on other occasions, it was then the post-emergency behaviour of the State that led to a finding of violation of FET. In the present case, it was the treatment specifically received by the investor in the context of the renegotiations which was in breach of the transparency requirement.[209]

The narrow interpretation of investor's legitimate expectations adopted by the *Urbaser* tribunal was coupled with a deferential analysis of the measures adopted by the State. The single measures, even if harmful to the investment, were not considered sufficient to infringe the protection of the standard when seen collectively, as they had been implemented to face an exceptional situation. Overall, the tribunal employed a deferential standard of review.

[204] *Ibid.*, at para. 680.

[205] *Ibid.*, at para. 682.

[206] *Ibid.*, at para. 673.

[207] *Ibid.*

[208] *Ibid.*, at paras. 739-847.

[209] *Ibid.*, at para. 845.

2.4.1. Preliminary considerations

In conclusion, the cases grouped in the last paragraph reflected a deferential standard of review, as opposed to the other Argentine cases seen above. This can be seen especially in the recognition of some leeway to the State in the adoption of the measures to face the economic crisis. To different extents, these tribunals have accepted that the emergency situation that Argentina was facing justified the adoption of legislation that was detrimental for investors, though ultimately not in breach of the FET standard. It is true that most of these tribunals still found that the State had violated the BIT, although such determinations were based on the behaviour of the State when the emergency situation was over.

A deferential approach was consistently adopted during the second prong of the analysis. With the exception of the *Total* case then, tribunals have adopted deferential interpretations of the scope of the standard, and, differently from the cases seen in the previous two subsections, consistently rejected the stability argument.

2.5. Preliminary assessment of the Argentine cases

The Argentine cases reflected a less-deferential approach in the reasoning of arbitral tribunals if compared to the arbitral jurisprudence surveyed in the other sections of the present work. To this end, it must be recalled that the common framework for the current section saw tribunals consistently rejecting the State's identification of the FET standard with the MST under customary international law and the State's exclusion of investor's legitimate expectations from the elements that contributed to the formation of the standard. The differences among the cases discussed above were based on a yardstick (the narrow interpretation given to the content of the investor's expectations) that was the *secondary* argument of the State, should the first one be rejected, as tribunals in fact did. While the study has passed over this common framework to focus on the traits that could highlight the differences in the approach employed by the tribunals, this element cannot be ignored in the final remarks.

In addition to a general low level of deference, the Argentine cases also show how volatile the interpretation of the FET clause by arbitral tribunals can be. Unlike the ECT cases seen in the previous section, in the lack of a specific inclusion in the

treaty provisions, the stability of the legal framework ranged from being considered a fundamental element of the standard[210] to being dismissed as merely informative,[211] even in the presence of the same exact treaty text. Equally different were the interpretations given to the circumstances that could give rise to the investor's legitimate expectations, that ranged from statements contained in the general legislation[212] to contractual commitments specifically given to the investor and not to the entity to which the investor was a shareholder.[213]

The identification of any trends emerging from the approach adopted by arbitral tribunals must then be addressed. The three groups identified above, while overlapping to a great extent, roughly correspond to subsequent temporal blocks and disclose some tendencies that are relevant to the present research. The first group addressed here, which contains awards that reflect a non-deferential standard of review, includes all the earlier Argentine proceedings and consists of 8 cases that range from year 2005 to year 2012. The second group, which is composed by 4 awards that reflected some degree of deference, encompasses cases from 2008 to 2013. The third group of deferential cases incorporates 5 proceedings decided between 2008 and 2015. Although such findings do not portray a resolute scenario as seen in the ECT realm, they can still be considered in line with the tendency that emerged in the previous sections towards a greater deference in the standard of review employed by arbitral tribunals in the analysis of the State's regulatory measures.

Particularly indicative is, once again, the comparison between awards reflecting the two opposite approaches, namely the group of non-deferential cases and the group of deferential ones. Not only the first group includes cases decided earlier (2005-2012) than the other (2008-2015). Of relevance is also the distribution of cases within the single groups: 5 out of 8 non-deferential awards were decided between 2005 and 2007, leaving only three cases to be decided between 2010 and

[210] See, among others, LG&E v. Argentina, *supra* note 17, at para. 124.

[211] See Continental Casualty v. Argentina, *supra* note 17, at para. 258.

[212] See, e.g., National Grid v. Argentina, *supra* note 23, at paras. 117-124.

[213] Total v. Argentina, *supra* note 11, at para. 145.

2012.[214] On the contrary, among the deferential awards, only one case was decided in 2008, while 4 cases over 5 were decided between 2010 and 2015.[215] While non-deferential approaches have been progressively abandoned, deferential reasonings have increasingly characterised the awards rendered in the Argentine framework.

Consequently, even though one should avoid drastic statements to this end, the Argentine case seem to confirm what has been seen in the jurisprudence of arbitral awards up to this point, and seems to answer in the positive the research question presented above. In other words, it seems possible to identify a trend in the analysis of the FET standard carried out in the 'Argentine cases' towards a greater respect for State sovereignty.

3. Arbitral jurisprudence based on other BITs

The final subsection covers arbitral jurisprudence generated by alleged violations of the FET obligation contained in BITs that have no other elements of commonality and will be dedicated to answering the following research sub-question: is it possible to identify any trend in the remaining arbitral jurisprudence based on unqualified FET provisions with regard to the respect that arbitral tribunals pay to State sovereignty?

The proceedings analysed in the following paragraphs do not share a unitary framework such as a common treaty basis or the same historic factual circumstances, and do not find an ensuing body of jurisprudence that could guide the arbitral tribunals' interpretation of the relevant FET provision. However, this does not necessarily translate into a greater variability in their outcomes, as will be seen in the course of the present enquiry. The 10 cases analysed here will be grouped in

[214] The cases decided between 2005 and 2007 were CMS v. Argentina, *supra* note 17 (2005); LG&E v. Argentina, *supra* note 17 (2007); Enron v. Argentina, *supra* note 17 (2007); Sempra v. Argentina, *supra* note 17 (2007); BG v. Argentina, *supra* note 20 (2007). The cases decided after 2010 were Suez v. Argentina, *supra* note 11 (2010); AWG v. Argentina, *supra* note 23 (2010); EDF v. Argentina, *supra* note 11 (2012).

[215] The case decided in 2008 was Metalpar v. Argentina, *supra* note 20. The other cases were Total v. Argentina, *supra* note 11 (2010); Impragilo v. Argentina, *supra* note 36 (2010); El Paso v. Argentina, *supra* note 17; Hochtief v. Argentina, *supra* note 37 (2014); Urbaser v. Argentina, *supra* note 23 (2010).

three blocks, covering awards reflecting little-deferential standards of review, overall-deferential standards of review, and highly deferential standards of review.[216] While overlapping −sometimes to a great extent−, these blocks can still offer valuable information as to the undergoing tendency emerging in arbitral jurisprudence.

3.1. Awards reflecting a little-deferential standard of review

Two out of 10 cases, namely *Eastern Sugar v. Czech Republic* and *Achmea v. Slovakia*, reflect, to different extents, a little-deferential standard of review. Arguably non-deferential was the standard employed in the early *Eastern Sugar* case, although such conclusion must acknowledge the difficulty in giving an account of the interpretation of the FET clause offered by the parties due to a fragmented −if at all present in the award− synthesis of the parties' position. Difficult was then the identification of the tribunal's approach in the *Achmea* case, although in this case it is possible to conclude that the tribunal agreed to some extent with the State in the identification of the scope of the standard, to then employ otherwise non-deferential analyses.

i. Eastern Sugar B.V. (Netherlands) v. The Czech Republic (2007)

Eastern Sugar B.V. (the investor) was a company incorporated in the Netherlands that invested in sugar producing facilities in Czech Republic prior to its accession to the EU. Between 2000 and 2004, the Czech government introduced various regulatory decrees designed to bring the sugar market in line with EU requirement and abandon the liberal regime in place. The First and Second Sugar Decrees provided for a national production quota, in accordance with EU legislation, while retaining a governmental quota to allocate to domestic producers. The Third Sugar Decree reduced the quota for producers which had closed factories.[217] The investor

[216] For greater clarity, a *deferential* standard of review is found when the tribunal's reasoning reflects deference both in the interpretation of the FET clause and in the analysis of the contested measure. On the contrary, an *overall deferential* standard of review is found when the deferential analysis of the measures is mitigated and made less-deferential by a little-deferential interpretation of the FET clause.

[217] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (Eastern Sugar v. Czech Republic), at paras. 1-11.

considered the Decrees in violation, among other things, of the FET standard provided at Art. 3(1) of the Czech Republic-Netherlands BIT,[218] which reads:

> '[e]ach 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.'[219]

The award did not give account of the debate between the parties over the scope of the FET, nor it delineated in plain terms the contours that they attributed to the standard. The only element in this regard was the State's argument that only a 'blatant and outrageous interference'[220] could violate the BIT, not accepted by the tribunal that required a lower threshold instead.[221] This notwithstanding, it is possible to ascertain the standard of review employed by the tribunal in the analysis of the Decrees. The tribunal first focused on the First Sugar Decree, which introduced several changes to the existing regulatory framework, among which: high import duties to foreign white sugar and foreign raw beet; a maximum domestic sugar sales price and domestic sugar quotas; an obligation to export excess sugar.[222] At the same time, the Decree reserved a quota for the State to open its market to newcomers.[223] Such features clashed with various newspaper interviews of government officials and to a statement by the Minister of Agriculture, in favour of the free market economy.[224] While the tribunal recognized that the aim of the measure was that of bringing the sugar regime closer to those in the other EU member States,[225] it did not accept that the solution adopted by the State, namely the identification of a

[218] *Ibid.*, at para. 20.

[219] Czech Republic-Netherlands BIT Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1991), 10 January 1992 (Czech Republic-Netherlands BIT), Art.3(1).

[220] Eastern Sugar v. Czech Republic, *supra* note 217, at para. 272.

[221] *Ibid.*

[222] *Ibid.*, at para. 245.

[223] *Ibid.*, at para. 262.

[224] *Ibid.*, at para. 244.

[225] *Ibid.*, at para. 246.

reserved quota to the State itself to open the market to new producers.[226] Such solution was, as the tribunal argued, 'illogical'.[227] Overall, the First Decree was considered as being 'introduced on an insufficient legislative basis […], ineffectively implemented […], and [having] a disturbing feature, the discretionary reserve quota'.[228] This notwithstanding, the tribunal did not believed it was in breach of the FET standard.[229]

The analysis of the Second Sugar Decree was in most respects the same as the First Sugar Decree. The additional traits, namely the reduction of a producer quota if a historical quota went unused, and the increase of the reserved quota contextually made available to new entrants only, were once again considered against the rationalization of the internal market but still not in violation of the BIT.[230]

The Third Sugar Decree reacted to the EU reduction of Country quotas allocated to Czech Republic by abandoning the whole quota basis altogether,[231] adopting a new system to determine the quota to be allocated,[232] and increasing the reserved quota available dedicated to newcomers in the sugar market.[233] The tribunal's analysis into the choices carried out by the State was here more piercing than in the previous cases. It enquired into the specific criterion employed for the allocation of the new quotas, considered 'internationally unusual'[234] and criticized the motives that led the State to a particular choice of measure and the justifications adduced for being 'not persuasive'.[235] According to the tribunal, the only rational explanation was to appease the beet growers that had been previously damaged by the closure of one of the investor's sugar mills and that were seeking retaliation

[226] *Ibid.*, at para. 262.

[227] *Ibid.*, at para. 265.

[228] *Ibid.*, at para. 274.

[229] *Ibid.*

[230] *Ibid.*, at paras. 278-279; 287.

[231] *Ibid.*, at para. 292.

[232] *Ibid.*, at para. 293.

[233] *Ibid.*, at para. 2965.

[234] *Ibid.*, at para. 298.

[235] *Ibid.*, at para. 313. See also paras. 299-313.

against the investor.[236] Conversely, a correct way to implement the EU requirements would be that of a proportional reduction of the quotas already allocated by manufacturers.[237] Consequently, the Third Sugar Decree was found to violate the FET standard since the investor was 'unfairly and inequitably targeted by the Third Sugar Decree'[238] and for the same reasons it was considered a discriminatory and unreasonable measure in the sense of the same provision.[239]

While it is not possible to properly reconstruct the deference employed by the tribunal in the determination of the scope of review (the only indicator in this regard is the lower threshold adopted by the tribunal as opposed to that indicated by the State), the standard of review emerging from the present case is little-deferential. While examining the First and Second Decree, the tribunal criticized the measures for not being adequate to pursue the aims that the State was attempting to achieve. The tribunal defined the choice of the State measures 'illogical' and 'ineffective', thereby substituting its judgement to that of the State, short only of the indication of the correct measure. As to the Third Decree, the tribunal questioned the stated aims of the measure as not being genuine and proceeded to a fully-fledged *de novo* review by indicating what would have been the correct way to implement EU legislation.[240]

ii. Achmea B.V. v. The Slovak Republic (2012)

Achmea B.V. (the investor) was a Dutch private company operating in the field of international insurance that invested in a health insurance company in Slovakia in 2005.[241] In 2004, Slovakia passed the so-called 2004 Reform of the health insurance sector, which aimed at reducing the debt of the Slovakian healthcare system through a mix of public and private investment. A change in Government in July 2006 led to the introduction of a series of changes to the legal framework governing

[236] *Ibid.*, at paras. 314-328.

[237] *Ibid.*, at para. 291.

[238] *Ibid.*, at para. 335.

[239] *Ibid.*, at para. 338.

[240] See, to this end, Van Harten, *supra* note 101, at 108–109.

[241] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012 (Achmea v. Slovakia), at paras. 1-2.

the health insurance market that, according to the investor, constituted a systematic reversal of the 2004 liberalisation in violation, among other things, of the FET provision contained at Art. 3(1) of the 1991 Czech Republic-Netherlands BIT. The provision reads:

> '[e]ach 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 investor.'[242]

Slovakia identified the FET standard provided for by the BIT with the MST under customary international law.[243] While including the protection of the investor's legitimate expectations in the standard (which still required to be balanced with the State's legitimate regulatory interests) the standard did not include the stability of the legal framework, which was by definition subject to change, in the absence of specific representations made to the investor to this end.[244] As to the scope of the investor's legitimate expectations, the State claimed that the investor could not expect that the legislative framework would have not changed, since it was already clear at the time the investment was made that an imminent legislative change would have likely taken place.[245] While bad faith was an element of the standard, the State denied every allegation in this regard arguing that the measures taken were legitimately within the scope of its regulatory discretion.[246]

While it is not possible to reconstruct the tribunal's interpretation of the scope of the FET standard, it seems possible to infer that the threshold required for its violations were high. When discussing the FET claim, among the sweeping reforms passed by the State, the tribunal focused on two measures. The first was Act No. 530/2007, which introduced a requirement that all profits from health insurance be used for healthcare purposes (the so-called 'ban on profits'). The second was Act No. 192/2009, which ended the possibility that a health insurance company sold its

[242] Czech Republic-Netherlands BIT, *supra* note 219, Art.3(1).

[243] Achmea v. Slovakia, *supra* note 241, at para. 247.

[244] *Ibid.*, at para. 248.

[245] *Ibid.*, at para. 250.

[246] *Ibid.*, at para. 251.

insurance portfolio to another health insurance company and required that in the case of insolvency its portfolio was transferred without payment to one of the two State insurance companies (the so-called 'ban on transfers').[247] In its brief argumentation, the tribunal adopted a high threshold for the violation of the FET standard, namely the total disruption of the commercial value of the investment.[248]

The tribunal considered the Ban on Profit and the Ban on Transfers to meet the required threshold. While focusing on the sole effect of the measures, it maintained that, by completely depriving the investor of the possibility to make any profit from its investment, they were 'incompatible with the most basic notions of what an investment is meant to be, and that the imposition of those measures upon the investment after it had been made was incompatible with the obligation to accord the investment [FET]'.[249] In doing so, the tribunal seemed to acknowledge that the State could have in fact enacted far-reaching reforms to its own health system without violating the treatment imposed by the BIT, thereby recognising a degree of regulatory autonomy for the State.[250] However, that power did not encompass the total destruction of the investment, which therefore constituted a violation of the FET obligation provided for in the BIT.[251] The FET analysis was considered by the tribunal to cover also the ground of unreasonableness and discrimination of the measures, which were therefore included in the violation of the FET obligation.[252]

The identification of the tribunal's approach in the *Achmea* case was made difficult by a very scant reasoning, which translated into minimal justification for the conclusions reached in the award. The tribunal determined the existence of a breach of FET following a grave violation by the State, therefore not departing much from the high threshold required by the State itself. However, how this translates in the level of deference paid to the determinations of the State is not entirely clear, given the absence of a clear justification or of a broader analysis. Consequently,

[247] *Ibid.*, at paras. 96, 99.

[248] *Ibid.*, at para. 279.

[249] *Ibid.*, at para. 281.

[250] *Ibid.*, at para. 280.

[251] *Ibid.*, at para. 283.

[252] *Ibid.*, at para. 283.

notwithstanding the finding of FET violation, the tribunal's reasoning seems to suggest the existence of at least a certain degree of deference, although it is not possible to go any further and identify a deferential standard of review. Consequently, the award is included in the present subsection and not in the next one.

3.2. Awards reflecting an overall deferential standard of review

Five cases reflected an overall standard of review. Here, it must be clarified that the tribunals' approach in the analysis of the debated host State's measures was markedly deferential and differed to a great extent from the cases seen above. In all cases, the standard was made less-deferential following the first prong of the enquiry, where tribunals have disagreed with the interpretation of the FET provision argued by the State and carried out broader analyses instead.

i. Saluka Investments B.V. v. The Czech Republic (2006)

Saluka Investments B.V. (the investor), a legal person constituted under the laws of the Netherlands, was a subsidiary of the Japanese merchant banking Nomura. Nomura acquired the Czech Republic's shareholding in one of the Big Four Czech banks, known as IPB, during the privatisation of the Czech banking sector that had formerly existed under the centralised banking system of the Communist period,[253] and transferred the shares to the investor in 1998. By mid-1998 the Czech banking sector was in serious difficulties, so the Government embarked on a process of finally privatizing the Big Four banks which had previously only been partially privatised.[254] While a number of measures were offered to the new owners of the other Big Four,[255] the investor was not granted any additional assistance, ultimately leading it to be subject to forced administration and to selling its business. The investor initiated international investment proceedings for the alleged violation, among other things, of Art. 3(1) of the Czech Republic-Netherlands BIT, which provided that

[253] Saluka v. Czech Republic *Saluka Investment BV (The Netherland) v. The Czech Republic*, PCA, Partial Award, 17 March 2006, at para. 1.

[254] *Ibid.*, at paras. 76-77.

[255] *Ibid.*, at paras. 78-80.

'[e]ach 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.'[256]

In the identification of the scope of protection of the FET standard, the tribunal rejected the interpretation given by the State, which had linked the protection offered by the FET standard to that of the MST under customary international law[257] and required, in the State's view, the high threshold determined in the *Neer* award.[258] The tribunal considered the unqualified FET clause as an autonomous standard, which included the protection of the investor's legitimate expectations (indicated as 'the dominant element of that standard')[259] and the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.[260] The stability of the legal framework was not included in the investor's legitimate expectations, that needed to consider 'the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.'[261]

The tribunal then moved on to address the investor's claims, two of which concerned State's regulatory measures. Initially, it focused on the claim over the alleged discrimination of the Revitalisation Programme, which excluded the investor from financial assistance from the Government. The tribunal identified

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[256] Czech Republic-Netherlands BIT, *supra* note 219, Art.3(1).

[257] Saluka v. Czech Republic, *supra* note 253, at para. 289, quoting Genin v. Estonia, *supra* note 29, at para. 376.

[258] Saluka v. Czech Republic, *supra* note 253, at para. 290, quoting Mexico/USA General Claim Commission, *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, Reports of International Arbitral Awards 60, at para. 556, which required conducts that amounted to 'an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency' to violate the international standard of treatment of aliens.

[259] Saluka v. Czech Republic, *supra* note 253, at para. 302.

[260] *Ibid.*, at paras. 294, 303.

[261] *Ibid.*, at para. 305. See also Kingsbury and Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', *NYU School of Law, Public Law Research Paper No. 09-46* (2009) 1, at 37.

discrimination with a situation in which similar cases were treated differently and without reasonable justification.[262] Consequently, it initially determined that the four banks operating in Czech Republic were in a sufficiently comparable situation in that all of them had large non-performing loan portfolios resulting in insufficient regulatory capital, while none of them was able to absorb the losses by calling on shareholder equity.[263] Upon this common background, IPB was the sole bank to be excluded as a beneficiary from the Revitalisation Programme, while the Czech Government's strategy to solve the debt problem of IPB's competitors was the provision of direct financial assistance to the banks.[264] In order to determine the reasonableness of the different treatment, the tribunal enquired into several points concerning the specific behaviour of the investor, that will therefore not be addressed here, finding the conduct of the State to be discriminatory. However, one of the defensive arguments raised by the State framed the financial assistance granted to the investor's competitors as part of the broader Czech Government's privatisation strategy. As such, it was considered a policy choice in the discretion of the Czech State.[265] Here, the tribunal did not question the aims nor the means adopted by the State, by specifying that it was 'clearly not for this [t]ribunal to second-guess the Czech Government's privatisation policies. It was perfectly legitimate for the Government to sell its stakes in the remaining banks only after they had been relieved from the bad debt problem.'[266] It was, however, the overall treatment received by the investor that the tribunal considered discriminatory and lacking a reasonable justification, and hence in violation of the FET obligation provided by the BIT.[267]

The second set of claims regarded the alleged violation of the investor's expectation as to the stability of the Czech legal framework. Initially, the tribunal focused on the investor's expectation that it would not be treated differently from other

[262] Saluka v. Czech Republic, *supra* note 253, at para. 313.

[263] *Ibid.*, at para. 322.

[264] *Ibid.*, at para. 326.

[265] *Ibid.*, at para. 336.

[266] *Ibid.*, at para. 337.

[267] *Ibid.*, at para. 347. See also F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (2019), at 347–348.

banks. The investor argued that the Minister of Finance had given express assurances that the Government would not have address the bad loan problem by supporting the banks. In any case, the investor argued that changes in the Government's policy to overcome the systemic problem of bad loans should have been systemic and thus non-discriminatory.[268] The tribunal noticed that 'whatever assurance the Minister of Finance may have given, he could not bind future Governments'[269] and consequently that the investor had no basis for expecting that there would be no future change in the Government's policy towards the banking sector's bad loan problem.[270] The second claim regarded the introduction of more stringent prudential rules for the banks. The tribunal here noted that the increased stringency of the Czech National Bank's prudential rules contributed to the distress suffered by the Czech banking system;[271] however, the tightening of the regulatory regime was seen as part of the State's accession process to the EU, and a prudent investor could have envisaged that the State might introduce a more rigid system of prudential regulation and thereby change the framework.[272] Ultimately, the investor did not enjoy any legitimate expectation. The third claim referred to the State's failure to improve the legal framework by providing an effective mechanisms to enforce loan security. Once again, the tribunal recognized that the lack of adequate protection of creditors' rights 'will most certainly have contributed to the aggravation of the bad debt problem';[273] however, the tribunal pointed out that an investor could not legitimately expect that the shortcomings existing in a legal framework be fixed quickly, or at least within a timescale of help. Ultimately, the investor enjoyed no expectations as to the stability of the legal framework, or for that matters, at all.[274]

The tribunal in *Saluka v Czech Republic* displayed an overall deferential standard of review. In acknowledging the existence of some policy space to the State, it

[268] Saluka v. Czech Republic, *supra* note 253, at paras. 351-352.

[269] *Ibid.*, at para. 351.

[270] *Ibid.*

[271] *Ibid.*, at para. 356.

[272] *Ibid.*, at paras. 357-358.

[273] *Ibid.*, at para. 360.

[274] *Ibid.*

refused to delve into the analysis of the contested measures and rejected all claims related to the enactment of regulatory measures.[275] Ultimately, the finding of a breach of the BIT only stemmed from the behaviour kept by the State in the specific relationship with the investor. This notwithstanding, the overall standard of review is lowered by the non-deferential attitude adopted in the first prong of the analysis. By adopting a much-wider interpretation of the scope of the standard, the tribunal extended the analysis to elements, such as the stability of the legal system, that were far beyond the scope of the norm as argued by the State.

ii. Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (2011)

A similar approach to the one adopted by the *Saluka* tribunal was followed in the *Sergei Paushok* case. Paushok, a Russian national, and two Russian enterprises (collectively, the investors), acquired 100% of the shares in the Mongolian corporation GEM, Mongolia's second largest gold producer, in 1997.[276] The investors initiated arbitration proceedings following the enactment of the 2006 Windfall Profit Tax Law, which imposed additional tax rates on gold production (WPT), and of the 2006 Minerals Law, which placed a new limitation on the employment of foreign nationals by a mining company to 10% of its workforce, unless the company paid a penalty called Foreign Workers Fee (FWF). According to the investors, these changes were in violation of the FET treatment granted by Art. 3(1) of the Russia-Mongolia BIT. The provision reads:

> '[e]ach Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.'[277]

[275] Henckels, *supra* note 93, at 112–113; Van Harten, *supra* note 101, at 110.

[276] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL Award on Jurisdiction and Liability, 28 April 2011 (Paushok v. Mongolia), at paras. 1-2 .

[277] Mongolia - Russian Federation BIT (1995), 26 February 2006. Original text in Russian and Mongolian, translation provided in Paushok v. Mongolia, *supra* note 276, at para. 563.

In the interpretation of the scope of the standard, the tribunal starkly departed from the extremely narrow reading argued by the State. According to the latter, the protection provided by the FET was limited to the standard of 'non-impairment by discriminatory measures',[278] given the specific text of the treaty. FET was then further limited to the operation and disposal of the investment, and did not cover, as argued by the investor, its use and enjoyment.[279] In other words, since the investors were shareholders, the investors' claims with respect to the use and enjoyment of their investment (shares) were not covered by the FET clause.[280] The tribunal embraced a much-wider notion, that included 'transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations.'[281] The broad interpretation of the scope of the standard led the tribunal to scrutinize each of the several measures brought to its attention under the numerous elements of the standard.

Among the numerous investors' claims, two concerned regulatory measures of the State. The first one regarded the enactment and enforcement of the 2006 WPT Law, that imposed additional tax rates on gold production and which was criticised by the investor under several grounds. During the scrutiny of the measure, the tribunal interpreted the elements of the FET standard narrowly: the investors were found to not enjoy any legitimate expectation on the stability of the legal framework in the absence of a stabilization agreement.[282] Notwithstanding various attempts, they never secured a stability agreement on a certain number of taxes and could not expect 'that they would not be exposed to significant tax increases in the future.'[283] Connected to the claim on stability was also the claim on predictability, equally tied to the existence of a stabilization agreement. In the absence of the latter, even 'a

[278] Paushok v. Mongolia, *supra* note 276, at para. 239.

[279] *Ibid.*, at para. 244.

[280] *Ibid.*, at para. 245.

[281] *Ibid.*, at para. 253, quoting *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, at para. 583.

[282] Paushok v. Mongolia, *supra* note 276, at paras. 301-302.

[283] *Ibid.*, at para. 302.

radical change in the taxation of the gold mining industry in Mongolia [that] had a severe negative impact upon the industry as a whole and upon GEM in particular'[284] was not in violation of the FET standard. The tribunal then rejected the claim over breaches of the MST under international law, noticing that '[t]he fact that a particular [C]ountry happen[ed] to have, at a particular time, the highest taxation level affecting a certain industry [did] not automatically mean that there ha[d] been a breach of a BIT.'[285] The enactment and adoption of the WPT was then challenged on the ground of transparency, since the measure had been adopted in less than one week and no consultation had taken place with the industry. The tribunal noticed that the proceedings that led to the adoption of the law had taken place in conformity with the Mongolian Constitution and had been subject to Parliamentary debate.[286] The transparency requirement had thus been met, also on the argument that '[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there is urgency and there is unanimity of views among parliamentarians.'[287]

The WPT Law was then analysed for the alleged violation of the non-impairment standard. In this case, the tribunal began with the alleged discriminatory nature of the measure, resorting to the reasoning employed in the WTO framework when comparing the impact of State measures on different sectors of the economy.[288] Under such circumstances, WTO Panels and Appellate Bodies require that the sectors in comparison be related by competitive and substitutable products. In the case at hand, the tribunal juxtaposed the two fields, specifically copper and gold, and concluded that they were not comparable,[289] refraining then to extend the enquiry into the objectives that the Government aimed to reach. As explained on the point,

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[284] *Ibid.*, at para. 305.

[285] *Ibid.*, at para. 303.

[286] *Ibid.*, at para. 304.

[287] *Ibid.*

[288] See A. D. Mitchell, D. O. F. Heaton and C. Henckels, *Non-discrimination and the role of regulatory purpose in international trade and investment law* (2016), at 67.

[289] Paushok v. Mongolia, *supra* note 276, at para. 315.

> '[t]he WPT may have been a poor instrument to achieve the objectives […] and the Tribunal has no evidence to the effect that they were in fact achieved. It is not the role of the Tribunal to weigh the wisdom of legislation, but merely to assess whether such legislation breaches the Treaty.'[290]

Finally, the arbitrariness and unreasonableness of the WPT Law were enquired jointly. The tribunal recognized that the Government aimed at profiting from the steep rise in gold prices by imposing higher taxes on the sector.[291] It also acknowledged that such increase conflicted with the IMF recommendations and was subject to criticism in the Parliamentary debate.[292] Although the WTP was generally considered excessive and ultimately detrimental for the Mongolian economy, the tribunal still did not consider it arbitrary or unreasonable, especially because it was 'dealing with fiscal legislation which on its face [was] not targeting [the investors] in particular or foreign investors in general.'[293]

The second claim regarded the enactment and enforcement of FWF and imposition of quota by means of the 2006 Minerals Law. In this case, the different treatment of foreign workers in the mining sector was not considered discriminatory because it did not target specifically GEM, while imposing limitations in a key industrial sector for the State.[294] More interesting for the present analysis, the tribunal addressed the investor's legitimate expectations that the legislative framework would not significantly change.[295] Once again, the tribunal required a stabilization agreement to shield the investment for future changes.[296] In addition, it did not give relevance to the investor's argument over the true aim of the 2006 Minerals Law, namely that the FWF was 'not really a fee to encourage the employment of local citizens but a disguised tax to raise revenues.'[297] Finally, in determining the arbitrariness and reasonableness of the measure, the tribunal limited its enquiry to the

[290] *Ibid.*, at para. 316.

[291] *Ibid.*, at para. 319.

[292] *Ibid.*, at para. 320.

[293] *Ibid.*, at para. 321.

[294] *Ibid.*, at para. 366.

[295] *Ibid.*, at para. 352.

[296] *Ibid.*, at para. 370.

[297] *Ibid.*

conformity with the procedure required for the adoption of a new law.[298] The tribunal did not question the aim of the measure and was satisfied with the choice of a legislative act (recognized by the investor as an appropriate means) to reach the stated objective.[299] As a consequence, it considered the 2006 Minerals Law to be in conformity with the FET obligation.[300]

Similarly to the *Saluka* case examined above, the tribunal in *Paushok v. Mongolia* employed an overall deferential standard of review in its analysis of the State's regulatory measures. The investor's legitimate expectations were interpreted strictly, by requiring the conclusion of a stabilization agreement for them to arise.[301] As to the other elements, the tribunal paid much respect to the State's determinations, without substituting its judgment to that of the State. Consequently, although on some occasions it acknowledged that the relevant measure under scrutiny could be considered a non-optimal choice, it refrained from drawing any further conclusions and still deemed the measures compatible with the BIT. The overall standard of review is made less deferential by the total disagreement between the State and the tribunal as to the scope of protection provided by the BIT. Although the tribunal's interpretation of the FET provision would be considered strict if compared to other arbitral tribunals, it was still sensibly broader than that argued by the State and led the former to extend its enquiry to several elements in addition to those otherwise included by the State.

iii. Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (2013)

The Micula brothers (Romanian-born who had acquired Swedish nationality) and three Romanian companies of which the brothers were majority shareholders (collectively, the investors) engaged in food and beverage production in a disfavoured region of Romania. They initially invested in the production of low-cost beverages, given a favourable programme enacted by the State to attract

[298] *Ibid.*, at para. 371.

[299] *Ibid.*

[300] *Ibid.*, at para. 373.

[301] Ortino, *supra* note 267, at 29.

investments in disfavoured regions between 1991 and 1996, which included incentives, various customs duties, and profit tax exemptions.[302] Starting the year 1998, with the adoption of Emergency Government Ordinance No. 24/1998 (EGO 24), a new legislative framework was enacted, in reliance of which the investors expanded their investment to cover also the food production business.[303] Following Romania's accession process to the EU, the incentives granted under the EGO 24 framework were repealed to align Romania's competition policy and State aid laws with the *acquis communautaire*.[304] According to the investors, the changes were in violation, among other things, of the FET obligation contained at Art. 2(3) of the Romania-Sweden BIT. The latter reads:

> '[e]ach Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.'[305]

Romania partially agreed with the investor in considering FET as an autonomous standard,[306] different from the MST.[307] The scope of protection of the FET standard was described as offering protection from 'unreasonable, arbitrary, or discriminatory conducts', 'denial of justice or lack of due process, retroactive or secret regulation, or inconsistent and non-transparent administration',[308] and the violation of the investor's legitimate expectations arising out of specific assurances entered into by the State.[309] Absent a stabilization clause or other specific assurance giving

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[302] Micula v. Romania *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, at paras. 158-165.

[303] *Ibid.*, at paras. 166-171.

[304] *Ibid.*, at paras. 179-245 .

[305] Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (2002), 4 January 2003, Art.2(3).

[306] Micula v. Romania, *supra* note 302, at paras. 463-481.

[307] *Ibid.*, at para. 503.

[308] *Ibid.*, at para. 487.

[309] *Ibid.*

rise to a legitimate expectation of stability, the investor could not expect that the legal framework would not be changed to its detriment.[310] Given the substantial correspondence of the parties' arguments over the scope of the standard, the tribunal followed suit and identified the standard in the very same terms.[311]

The tribunal initially focussed on the alleged breach of the investor's legitimate expectations of the stability of the legal framework as a consequence of Romania's accession process to the EU. Firstly, it determined whether the legal framework in place at the time the investment was made created the specific entitlement, namely that investors would receive incentives for 10 years until 1 April 2000. Here, the tribunal adopted a broader notion of the circumstances that could give rise to legitimate expectations than the one argued by the State. According to the latter, the regulatory regime could not carry with it any promise that the law would remain unchanged indefinitely,[312] and Foreign Workers Fee (FWF), namely administrative act released by the relevant State agency, 'were not individually negotiated documents. They were standard administrative certifications of eligibility that were received by thousands of beneficiaries of the [EGO 24] [S]tate aid scheme.'[313] In the State's view, expectations required specific assurances given to the investor by State officials, absent in the case at hand.[314] Conversely, the tribunal deemed that the EGO 24 had created a generalized entitlement to incentives, which was later crystallized with respect to qualified investors through the granting of the PICs, 'becoming from that moment on a specified entitlement with respect to specified investors.'[315] Hence, the investors enjoyed the legitimate expectation that they would be entitled to the EGO 24 incentives, in substantially the same form as when they received their PICs, until 1 April 2009.[316] Given the fact that, in the tribunal's view, the investors had reasonably relied on such expectation at the time of the

[310] *Ibid.*, at para. 492.

[311] *Ibid.*, at paras. 502-535.

[312] *Ibid.*, at para. 605.

[313] *Ibid.*, at para. 616.

[314] *Ibid.*, at para. 614.

[315] *Ibid.*

[316] *Ibid.*, at para. 677.

making of their investments, the State's repeal of the incentive system constituted a violation of the investors' legitimate expectations.[317]

The second element that attracted the tribunal's attention was the reasonableness of Romania's actions. Here it must be noted that, although the reasonableness element was part of the non-impairment standard contained in a separate sentence introduced at Art. 3(2) by the conjunction *and,* it was still analysed as an element of the FET standard. At first, the tribunal addressed the investors' claim that the Government's active promotion and extension of the EGO 24 regime until 2003 to attract foreign investors was unreasonable. The tribunal began by determining whether the State's behaviour was in pursuit of a rational policy and embarked on a lengthy analysis of Romanian officials' belief as to the compatibility of the ECO 24 legislation with EU legislation. It found that, at the beginning of the accession negotiations, Romania believed that the EGO 24 incentives were compatible State aid,[318] and ceased to promote the scheme once it realized it was incompatible with the EU accession process.[319] Consequently, it rejected the investors' claim.[320] A second claim concerned the alleged premature nature of the revocation of the incentives, in the absence of a requirement to do so. In a similar fashion to the previous case, the tribunal maintained that

> 'the repeal of the EGO 24 incentives was reasonably related to a rational public policy objective (i.e., EU accession), and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives).'[321]

A third claim then argued the unreasonableness of Romania's revocation of benefits, while preserving the investors' obligations under that regime, in particular the obligation to maintain the investments for twenty years.[322] Here, the tribunal found no rational justification for the obligation that investors maintain their

[317] *Ibid.*, at para. 725.

[318] *Ibid.*, at para. 786.

[319] *Ibid.*, at para. 800.

[320] *Ibid.*, at para. 798.

[321] *Ibid.*, at para. 802.

[322] *Ibid.*, at para. 813.

investments after the incentives were terminated for twice the period they received the incentives.[323] In doing so, it dismissed the State's argument that the measure was justified by the survival of some exemptions after the repeal of the incentive scheme, and labelled the State's conduct as unreasonable,[324] specifying that

> it was 'not for this Tribunal to say what would have been the right decision (i.e., possibly shortening the period or diminishing in other ways the obligations imposed upon the investors), but it was not reasonable for Romania to maintain as a whole the investors' obligations while at the same time eliminating virtually all of their benefits.'[325]

Finally, the tribunal quickly dismissed the claim of bad faith for lack of evidence,[326] while it found the State's behaviour regarding its progress towards EU accession as ambiguous (and perhaps even misleading, even if unintentionally)[327] and ultimately failing to meet the transparency requirement.[328] Consequently, the State was found to have breached the FET standard provided in the Romania-Sweden BIT.[329]

The *Micula* award is yet another example of an otherwise deferential standard of review made less-deferential by the interpretation of the scope of review. Differently from the cases seen above, it was not the identification of the elements of the standard, but the identification of the circumstances that could potentially give rise to the investor's legitimate expectations, namely the general legal framework. While the broad interpretation of such requirement ultimately led the tribunal to find a violation of the FET obligation, the analysis of the measures reflected a deferential approach of the tribunal towards the determinations made by the State.[330]

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[323] *Ibid.*, at para. 824.

[324] *Ibid.*, at para. 827.

[325] *Ibid.*, at para. 826.

[326] *Ibid.*, at para. 836.

[327] *Ibid.*, at para. 865.

[328] *Ibid.*, at para. 870.

[329] *Ibid.*, at para. 872.

[330] On the reasonableness test employed in Micula v. Romania, see Ortino, *supra* note 267, at 149.

iv. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (2016)

Philip Morris Brand S.àr.l. (PMB) and Philip Morris Products S.A., two companies incorporated under the laws of Switzerland, acquired a long-standing cigarette producer in Uruguay, Abal Hermanos S.A, in 2010 (collectively, the investors). The acquisition represented the investors' investment, together with the interest they held in brand assets (namely, brands and brand families), the associated intellectual property rights, and the goodwill associated with their brands.[331] Between 2005 and 2007 Uruguay took a range of increasingly stringent regulatory measures of tobacco control, including restrictions on advertising, mandatory health warnings, increased taxation, and prohibition of smoking in enclosed spaces.[332] The investors challenged two Governmental regulations adopted in 2008 and 2009 respectively, which included a single presentation requirement precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family, and the increase in the size of graphic health warnings appearing on cigarette packages. In the investor's view, the regulations violated, among other things, the FET provision contained at Art. 3(2) of the Switzerland-Uruguay BIT, which read: '[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.'[333]

In the identification of the scope of the standard, Uruguay denied the autonomous nature of the FET, linking the protection it granted to that offered by the MST under customary international law.[334] The level of scrutiny was that defined by the *Neer* standard, even though the State acknowledged that this could have evolved.[335] The tribunal rejected the equation between FET and MST and the ensuing

[331] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (Philip Morris v. Uruguay), at paras. 70-73.

[332] *Ibid.*, at paras. 102-103 .

[333] Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (1988), 22 April 1991, Art.3(2).

[334] Philip Morris v. Uruguay, *supra* note 331, at para. 314.

[335] *Ibid.*

description of the former by means of the *Neer* case,[336] adopting a broader understanding that included 'transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith',[337] and the stability of the legal framework.[338]

The first claim concerned the alleged arbitrariness of the changes. Arbitrariness was defined through the famous *ELSI* formula as 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'[339] The tribunal first noticed that the measures had been implemented by the State for the purpose of protecting public health,[340] and found scientific support, at the international level, in studies published by that time in leading international journals.[341] Furthermore, they were adopted in an effort to give effect to general obligations under the World Health Organization (WHO) Framework Convention on Tobacco Control, ratified by Uruguay.[342] As such, the State was not required to perform additional studies or to gather further evidence in support of its measures.[343] The connection between the objective pursued by the State and the utility of the two measures was also recognized by the WHO and the Pan American Health Organization through their Amicus Briefs.[344] After having identified the aim and scientific soundness of the measures, and after having clarified that '[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health',[345] the tribunal addressed the measures individually.

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[336] *Ibid.*, at paras. 316, 319.

[337] *Ibid.*, at para. 320.

[338] *Ibid.*, at para. 324.

[339] *Ibid.*, at para. 390, quoting ICJ, Elsi case, *supra* note 38, at para. 128.

[340] Philip Morris v. Uruguay, *supra* note 331, at para. 391.

[341] *Ibid.*, at paras. 392-393.

[342] *Ibid.*, at paras. 395, 401.

[343] *Ibid.*, at para. 396.

[344] *Ibid.*, at para. 391.

[345] *Ibid.*, at para. 399.

The first measure was the single presentation requirement (SPR), which precluded tobacco manufacturers from marketing more than one variant of cigarette per brand family, adopted by Ordinance 514 of 2008, and which was subjected to a reasonableness test by the tribunal. The aim was identified in preventing 'the false impression that a particular tobacco product [was] less harmful than other tobacco products'.[346] The tribunal did not question the validity of this concern, that was also accepted by the investor,[347] nor it decided whether the measure actually had the effects that were intended by the State.[348] Regardless of the effectiveness of the measures to reach the result aimed at by the State,

> 'it [was] sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith. The effect of the SPR was to preclude the concurrent use of certain trademarks, without depriving the Claimants of the negative rights of exclusive use attached to those trademarks.'[349]

Notwithstanding the mention to proportionality, the tribunal did not carry out a structured proportionality test, resorting to a reasonableness test instead. It then added a consideration on the fact that the effects of the measures did not seem to have negatively affected the ongoing downward trend of the tobacco industry in Uruguay.[350] In addition, the Ordinance was not discriminatory since it applied to foreign and domestic investors alike.[351] Consequently, 'the SPR was a reasonable measure, not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure'[352] that did not breach the FET standard.

The second measure was the so-called 80/80 Regulation, that enacted the increase in the size of graphic health warnings appearing on cigarette packages. The tribunal first addressed the claim over the discriminatory nature of the Regulation

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[346] *Ibid.*, at para. 404.

[347] *Ibid.*, at para. 405.

[348] *Ibid.*, at para. 409.

[349] *Ibid.*

[350] *Ibid.*, at para. 408.

[351] *Ibid.*, at para. 402.

[352] *Ibid.*, at para. 410.

for lack of evidence.[353] The aim of the measure, namely the reduction of the number of smokers, was not questioned, given the strong scientific consensus as to the lethal effects of tobacco.[354] Since it boiled down to a legislative policy decision, '[s]ubstantial deference [was] due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem.'[355] The tribunal then refused to enquire into the decision to set the size of health warnings to the 80% of the package, by stating that '[h]ow a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority.'[356] Like the Ordinance, also the Regulation was thus considered as not being arbitrary, grossly unfair, unjust, discriminatory or a disproportionate, and ultimately as not violating the FET obligation.[357]

The second claim concerned the alleged violation of the investors' legitimate expectations and the stability of the regulatory framework. The tribunal adopted a narrow interpretation of the element, requiring specific undertakings and representations made by the host State as to the stabilization of the legal framework, or a stabilization clause.[358] Conversely, '[p]rovisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.'[359] In the absence of clear commitments, the State enjoyed regulatory power in the pursuance of a public interest. This was the scenario in the case at hand, where no commitments whatsoever were given and the investor could not enjoy any expectations that the State would refrain from imposing restrictive regulations.[360] A prudent investor, given the evolution of the

[353] *Ibid.*, at para. 415.

[354] *Ibid.*, at para. 418.

[355] *Ibid.*

[356] *Ibid.*, at para. 419.

[357] *Ibid.*, at para. 420. Framing this analysis through the margin of appreciation doctrine, see V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018), at 222.

[358] Philip Morris v. Uruguay, *supra* note 331, at paras. 423, 426.

[359] *Ibid.*, at para. 426.

[360] *Ibid.*, at para. 429.

normative framework, should have expected the opposite instead.[361] The State's right to regulate was still to be exercised within an 'acceptable margin of change':[362] since the measures had already been found to be not arbitrary, and since they had limited impact on the investor's business, they were an expression of legitimate regulatory authority of the State.[363] Finally, the FET claim was considered to incorporate the non-impairment claim based on Art. 3(1) of the BIT, which protected investors from 'unreasonable or discriminatory measures', which was consequently not addressed by the tribunal.[364]

The analysis of the contested measures carried out by the Philip Morris tribunal was certainly deferential.[365] The tribunal did not question the scientific validity of the public health concerns, nor it looked into whether the measures actually had the effects that were intended by the State, and was satisfied by the existence of a rational link between the aim and the specific State conduct. Also, the enquiry of the investor's legitimate expectations highlighted a narrow reading of the element, that led the tribunal to the conclusion that no legitimate expectations had arisen.[366] If the analysis of the measures was deferential, however, the overall standard of review must be lowered following the little-deferential identification of the scope of

[361] *Ibid.*, at para. 430.

[362] *Ibid.*, at para. 423.

[363] *Ibid.*, at para. 434.

[364] *Ibid.*, at para. 445.

[365] Several commentators have focused on the tribunal's recognition of regulatory space in the case under scrutiny. See, e.g., Foster, 'Respecting Regulatory Measures: Arbitral Method and Reasoning in the Philip Morris v Uruguay Tobacco Plain Packaging Case', 26 *Review of European, Comparative & International Environmental Law* (2017) 287, at 291; Pratyush, 'Philip Morris v Uruguay: A Breathing Space for Domestic IP Regulation', 40 *European Intellectual Property Review* (2018) 277'284. Addressing the deference under the margin of appreciation doctrine, see, among others, Radi, 'Philip Morris v Uruguay: Regulatory Measures in International Investment Law: To Be or Not To Be Compensated?', 33 *ICSID Review - Foreign Investment Law Journal* (2018) 74; Yang, 'The Margin of Appreciation Debate over Novel Cigarette Packaging Regulations in Philip Morris v. Uruguay: A Step toward a Balanced Standard of Review in Investment Disputes', 1 *Brill Open Law* (2018) 91.

[366] Ortino, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?', 21 *Journal of International Economic Law* (2018) 845, at 851.

the standard. This followed the extremely narrow reading given by the State, which identified the FET protection with the *Neer* standard, in a fashion rarely seen in recent cases. This notwithstanding, it must be noted that the analysis focused on the arbitrariness of the measures, which has been widely considered as falling within the protection offered by the MST. The broader interpretation only led to the additional enquiry into the stability of the legal framework. Consequently, the first prong of the analysis only mildly affected the overall standard of review employed by the Philip Morris tribunal, which was still deferential.

v. Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela (2016)

Rusoro Mining Ltd (the investor) was a corporation constituted in Canada that had indirectly acquired several mining concessions and contracts to explore and produce gold in Venezuela (in addition to leasing agreements and joint venture agreements) through the acquisition of a number of Venezuelan mining companies between 2006 and 2008.[367] Starting year 2003, Venezuela was confronted with a situation in which the reduction in oil exports caused a shortage of foreign currency. The State decided to impose a strict exchange control regime, in order to guarantee the stability of the Venezuelan currency. Limitations for privately owned gold-producing companies were then imposed in 2009, as opposed to a more relaxed regime for State-owned gold producers,[368] later reduced in 2010 through the unification of the regime for private and public producers.[369] In 2011, the President publicly announced the immediate nationalization of the gold mining industry in Venezuela.[370] The investor initiated investment arbitration proceedings for the violation of numerous provisions of the Canada-Venezuela BIT. In particular, the measures adopted prior to the nationalization of the gold mining industry were considered by the investor to be in violation, among other things, of the FET obligation contained at Art. 2(2) of the BIT, which provides that '[e]ach Contracting Party shall, in

[367] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (Rusoro Mining v. Venezuela), at paras. 78-79.

[368] *Ibid.*, at paras. 144-150.

[369] *Ibid.*, at paras. 156-159.

[370] *Ibid.*, at para. 160.

accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party [FET] and full protection and security.'[371]

Though it is not possible to reconstruct in detail the interpretation of the FET standard given by the State, the latter identified the protection of the FET clause with the MST under customary international law, as did the tribunal.[372] Even though the tribunal went on to argue that the evolution of the MST had led to a substantial correspondence between the MST and the FET,[373] the threshold required to find a violation of the standard remained high: FET required 'States to adopt a minimum standard of conduct vis-à-vis aliens',[374] entailing that State conducts that 'violate[d] certain thresholds of propriety or contravene[d] basic requirements of the rule of law'[375] would be in breach of it. The elements of the standard were the protection from harassment, coercion, abuse of power or other bad faith conduct by the host State, protection from arbitrary, discriminatory or inconsistent actions or omissions, respect for the principles of due process and transparency.[376] The stability and predictability of the legal framework could be included within the investor's expectations only when specific representations to this end were made to the investor prior to the investment.[377] The usual disclaimer applied, with the tribunal recalling the need to balance the investor's rights with the State's 'sovereign right to amend legislation and to adopt new regulation in the furtherance of public interest'.[378]

Among the measures contested by the investor, two were regulatory in nature. The first was the 2010 *Ley de Reforma Cambiaria*, which modified the general exchange control regime in place at time the investment was made. The regime forced

[371] Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (1996), 28 January 1998, Art.2(2).

[372] Rusoro Mining v. Venezuela, *supra* note 367, at para. 520. For the interpretation given by the State, see para. 514.

[373] *Ibid.*, at paras. 519-520.

[374] *Ibid.*, at para. 523.

[375] *Ibid.*

[376] *Ibid.*, at para. 524.

[377] *Ibid.*

[378] *Ibid.*, at para. 525.

exporters to sell (at least) 90% of the foreign currency revenues earned by the export of goods to the Central Bank of Venezuela (BCV), at the official exchange rate. Although from 2003 through 2010 Venezuela tolerated the existence of a parallel unregulated swap market, which permitted the exchange of Venezuelan currency of US dollars at market prices, the 2010 *Ley de Reforma Cambiaria* made the swap market illegal.[379] In this case, the tribunal noticed that the investor took the decision to invest in Venezuela when the Bolivarian Republic already had an exchange control regime in place, which imposed compulsory repatriation of (at least) 90% of foreign currency earned.[380] In the absence of any specific representation made to the investor by the State, the former could not expect that Venezuela would not adopt more restrictive legislation, and that tolerance of the swap market would continue.[381] In the words of the tribunal, 'States have the sovereign right to establish and amend, in furtherance of their economic policy, exchange control regulations, which define the relationship between the State's own currency and that of other sovereigns.'[382] In the absence of any legitimate expectations to the stability of the legal framework, the measure was not in breach of the FET obligation.[383]

The second contested measures were a resolution adopted in 2010 by the BCV and a law named *Convenio Cambiario*. The first one imposed private gold producers to sell 50% of their gold production to the Central Bank at a price expressed in the Venezuelan currency and converted at the official exchange rate. The remaining 50% could be exported, subject to authorization from the BCV.[384] The second measure imposed private gold producers to sell 50% of their foreign currency income from export operations to the BCV at the official exchange rate.[385] Similarly to the reasoning seen above, the tribunal noticed the absence of specific representation that legislation would not be amended and that the gold marketing regime

[379] *Ibid.*, at paras. 529-530.

[380] *Ibid.*, at para. 532.

[381] *Ibid.*

[382] *Ibid.*, at para. 531.

[383] *Ibid.*, at para. 533.

[384] *Ibid.*, at para. 535.

[385] *Ibid.*, at para. 525.

would not become more restrictive, adding that, at the time the investment was made, the investor should have been aware 'that the BCV had the power to impose restrictions on the free sale of gold by Venezuelan mining companies'.[386] Consequently, no expectations could arise as to the stability of the legal framework.[387]

The tribunal briefly looked into the reasonableness of the measures, limiting its analysis to ascertain the existence of procedural reasonableness: since the 2010 measures 'were adopted by BCV in accordance with its statutory powers and in compliance with the appropriate administrative procedures',[388] no violation of the FET was found. The requirement for gold producers to sell 50% of their gold production to the BCV was not considered problematic, given that gold was 'intimately connected with the monetary sovereignty of nations, because central banks use gold as reserve assets to back the national currency.'[389] Equally brief was the finding of non-discrimination, motivated by the fact that 'while the 2009 [m]easures provided for a distinct treatment of publicly and privately owned mining companies, the 2010[m]easures unified the regime.'[390]

The tribunal in *Rusoro Mining v. Venezuela* employed an overall deferential standard of review. The high threshold required for the identification of the investor's legitimate expectations entailed that no expectations could arise in the absence of specific assurances, in recognition of the existence of a margin of control enjoyed by the State when pursuing its fiscal and economic policies. In the analysis of the measures, the tribunal then limited it's analysis to ascertaining whether the process that led to their adoption was procedurally sound, without carrying out a more piercing enquiry into their merits. The inclusion in the present subsection is therefore motivated by the impossibility to reconstruct exactly the State's interpretation of the scope of the MST,[391] which could potentially influence the overall standard of review and lead to a lower level of deference.

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[386] *Ibid.*, at para. 536.

[387] *Ibid.*

[388] *Ibid.*

[389] *Ibid.*, at para. 538.

[390] *Ibid.*, at para. 536.

[391] However, see Y. Radi, *Rules and Practices of International Investment Law and Arbitration*

3.3. Awards reflecting a highly deferential standard of review

The final subsection includes three awards that reflect a deferential standard of review employed by the respective arbitral tribunal. In the following cases, the deference employed in the analysis of the regulatory measures does not differ from the cases seen in the previous subsection. Their inclusion in a different subsection finds justification in the deference expressed in the interpretation of the FET standard.

i. PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (2007)

PSEG Global, Inc. and the North American Coal Corporation, two companies incorporated under the laws of the US, and their Turkish subsidiary Konya (collectively, the investors) were granted an authorization to conduct a feasibility study into the building of a coalfired power plant and a coal mine in Turkey in 1994, following the liberalization of the energy sector in the Country and the enactment of policies to attract foreign investors. The investors in the case at hand took the preparatory steps to initiate their projects, among which a feasibility study and the conclusion of a Concession Contract with the relevant administrative agency.[392] The contract entered into force in 1999, although its finalization was delayed and ultimately abandoned in 2001, following the enactment of the Electricity Market Law No. 4268. The latter eliminated the possibility that the investor obtained a Treasury guarantee for the project (later annulled by the Turkish Supreme Court in 2002) and imposed restrictions on other terms of the agreements concluded under the previous legislation.[393] The investor filed investment arbitration proceedings for the conduct of the State claiming, among other things, that the legislative changes were in breach of the FET obligation contained in Art. 2(3) of the Turkey-United States BIT, which reads: '[i]nvestments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in a manner consistent

(2020), at 84–85, referring to the case under scrutiny as paradigmatic in taking the State's interest into account when determining the scope of the FET obligation.

[392] PSEG v. Turkey, *supra* note 156, at paras. 13-21.

[393] *Ibid.*, at paras. 38-41.

with international law.'[394] The Preamble of the BIT recalled that such treatment was 'desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources […].'[395]

Though the determination of the scope of the standard by the State could not be reconstructed in details because of the scant language of the award, it is still possible to conclude that Turkey required a high threshold for the violation of the FET.[396] Accordingly, '[o]nly acts showing a willful neglect of duty far below international standards and bad faith would qualify under this standard.'[397] The tribunal itself did not linger on theoretical descriptions of the standard, focusing on the alleged violation of the investor's legitimate expectations and the stability of the legal framework.

The tribunal adopted a narrow interpretation of the investors' legitimate expectations and required 'a promise of the administration on which the [investors] rely'[398] for legitimate expectations to arise. Following such a strict reading of the parameter, the tribunal found that no promise or commitment had been made by Turkish officials that ensuing agreements in finalization of the Concession Contract would be made.[399] Consequently, the investors enjoyed no legitimate expectations to this end.

While the claim of bad faith was deemed unsubstantiated, and the corresponding State actions could not amount to violations of that specific element,[400] the tribunal found several traits in the conduct of the Government that were in violation of the FET standard. Although most of them related to the specific treatment of the investor, such as the 'evident negligence on the part of the administration in the handling of the negotiations'[401] or the abuse of authority in the renegotiation

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[394] Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (1985), 18 May 1990, Art.2(3).

[395] *Ibid.*, Preamble.

[396] PSEG v. Turkey, *supra* note 156, at para. 232.

[397] *Ibid.*

[398] *Ibid.*, at para. 241.

[399] *Ibid.*, at para. 242.

[400] *Ibid.*, at para. 245.

[401] *Ibid.*, at para. 246.

process,[402] one encompassed the State's regulatory capacity and addressed the stability of the legal framework.[403] The tribunal did not focus on any specific act, but on the numerous changes to the legislation that took place within a short time-span and led to a 'situation where the law kept changing continuously and endlessly, as did its interpretation and implementation.'[404]

Notwithstanding it ultimately found the State's conduct to be in violation of the FET obligation, the *PSEG* award reflected a deferential standard of review. The tribunal required a high threshold, as argued by the State, for violations of the standard to arise. The requirement was not met in the case of the investors' expectations, that required an explicit promise from the State, absent in the case at hand. A really high threshold was then required for the stability of the legal framework: a single change, or even several changes to the latter were not considered sufficient to violate the requirement. Only an egregious behaviour, identified in 'continuous' and 'endless' changes, was considered as violating the FET obligation.

ii. Ulysseas, Inc. v. The Republic of Ecuador (2012)

Ulysseas (the investor) was an energy corporation registered in the State of Texas, US, that imported and installed two power barges (power plants installed on a barge) in Ecuador in 2003 and 2005 respectively.[405] The Ecuadorian electricity sector had been by then subject to a process of privatization of public services initiated in 1993. In the energy sector, privatization had started with the 1996 Power Sector Regime Law, which provided a series of mechanisms to create a competitive electricity market. It did so by promoting private participation in the sector, by authorizing private companies to enter the market through concession agreements and by setting up a payment trust system in which private generators would be assigned

[402] *Ibid.*, at para. 247.

[403] Framing the analysis in terms of reasonableness, see Henckels, 'Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (2014) 305, at 317.

[404] PSEG v. Turkey, *supra* note 156, at para. 254.

[405] *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL Final Award, 12 June 2012 (Ulysseas v. Ecuador), at para. 92.

a certain priority order for payment by distribution companies.[406] The investor concluded two concession contracts, in 2005 and 2006, with the government agency charged with regulating investment in the electricity sector. Starting 2003, Ecuador enacted a series of reforms that, among other things, changed the priority order so that private capital stock companies, such as the investor, would receive less priority and run a higher risk to not be paid for electricity.[407] The investor initiated investment arbitration claiming that the changes in the regulatory framework were not consistent with the FET provision contained in Art. 2(3)(a) of the Ecuador-US BIT, that read: '[i]nvestment 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.'[408]

The tribunal did not offer a comprehensive analysis of the FET clause, solely focusing on the protection of the investor's legitimate expectations, considered as an element of the standard. Investor's expectations were to be balanced with the State's right to regulate and could cover the stability of the legal and business framework only when the object of specific promises and representations.[409] In doing so, the tribunal did not depart from the interpretation of the BIT provided by the State, which equally that legitimate expectations required specific assurances to the investor, absent in the case at hand;[410] consequently, the investor could not expect that it would be guaranteed market, profitability, price or collection of payments.[411]

The tribunal considered that at the time of the making of the investment (identified with the conclusion of the second contract in 2006), the regulatory framework in the energy sector had been already subject to numerous changes that could not have been ignored by the investor.[412] Specific fuel credits had been available to all

[406] *Ibid.*, at paras. 78, 84.

[407] *Ibid.*, at para. 86.

[408] Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 18 May 2018, Art.2(3)(a).

[409] Ulysseas v. Ecuador, *supra* note 405, at para. 249, quoting EDF v. Argentina, *supra* note 11, at para. 217.

[410] Ulysseas v. Ecuador, *supra* note 405, at para. 221.

[411] *Ibid.*, at para. 224.

[412] *Ibid.*, at para. 253.

generators through a series of emergency decrees which were all subject to a limited duration with no guarantee of renewal. In the absence of a specific commitment that such credits would continue to be available, the investor could not expect the immutability of the legal framework in the energy sector.[413] The tribunal then turned to a specific provision of the concession contract, namely Art. 24, identified by the investor as the source of the stabilization agreement. An opposite reading was given by the State, which considered the provision as still providing for the possibility of a change in laws and regulations, subject only to a right of compensation.[414] The tribunal agreed with the State in that Art. 24 of the concession contract did not contain any stabilization agreement: if anything, it proved the opposite, namely that the investor had specifically accepted that changes might have been introduced to laws or other provisions.[415] Following this finding the tribunal did not proceed any further, since it considered that the investor had waived its right to seek compensation under the provision of the contract by seeking compensation under the BIT.

The *Ulysseas* tribunal offers yet another example of the relevance that the identification of the scope of FET plays in the analysis of the standard of review. By adopting narrow interpretation of the requirements of the standard, as argued by the State, the tribunal ultimately rejected that the regulatory framework could give rise to investor's legitimate expectations.[416] In the absence of any specific promises, it concluded that no expectations could had arisen and consequently no expectations could have been breached. Ultimately, the deferential interpretation of the scope of the standard translated into a deferential standard of review.

iii. Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic (2017)

Three members of the Wirtgen family and the company JSW Solar GmbH & Co. KG, of which they owned the totality of shares (the investors), between 2009 and 2010 invested in three solar photovoltaic plants in Czech Republic, encouraged

[413] *Ibid.*, at para. 256.

[414] *Ibid.*, at para. 236.

[415] *Ibid.*, at para. 258.

[416] In this regard, see J. Chaisse, *Charting the Water Regulatory Future: Issues, Challenges and Directions* (2017), at 160.

by the favourable legal framework already summarized in Chapter 5, Paragraph 4. above. Briefly recalled, the production of energy from renewable sources was liberalized and promoted through a number of legislative acts, among which the so-called Act on Promotion (here called Act 180) that set up a 'support scheme' for investments.[417] Starting in year 2010, Czech Republic amended its support scheme introducing, among other things, a 26% solar levy, the withdrawal of tax incentives and the extension of the depreciation period in violation, according to the investors, of the FET provision contained at Art. 2(1) of the Czech Republic-Germany BIT. The latter provides that '[e]ach Contracting State shall in every case accord investment fair and equitable treatment.'[418]

Although the award did not linger on theoretical discussions on the scope of the standard, it is still possible to reconstruct the State's identification of the requirements of FET in the protection of the investor's legitimate expectations, transparency, reasonableness, non-discrimination. States enjoyed the sovereign right to change their domestic laws, so long as such changes were not manifestly inconsistent.[419] Legitimate expectations could arise out of 'clear, definitive and unambiguous' statements,[420] and could encompass the stability of the legal framework only in the presence of stabilization commitments,[421] absent in the case at hand.[422] The tribunal did not depart from the State's interpretation. It limited its analysis to the alleged breach of the investor's legitimate expectations and the reasonableness of the measures, thereby not adding additional elements to the already broad definition given by the State. In addition, investors' expectations required representations made by the host State, through direct contacts with the investor or through general legislation.[423] In the absence of a specific commitment towards stabilization, the

[417] *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017 (JSW Solar v. Czech Republic), at paras. 11-28.

[418] Czech Republic - Germany BIT (1990), 8 February 1992, Art.2(1).

[419] JSW Solar v. Czech Republic, *supra* note 417, at para. 308.

[420] *Ibid.*, at para. 311.

[421] *Ibid.*, at para. 310.

[422] *Ibid.*, at paras. 313-318.

[423] *Ibid.*, at para. 407.

State enjoyed a right to regulate and the investor could not legitimately expect otherwise.[424]

When confronted with the existence of investors' expectations, the tribunal first addressed the Solar Levy. It confirmed that the sole expectation that the existing legal framework could generate was that of obtaining a return on investment or profit of at least 7% per year over 15 years.[425] In doing that, it agreed once again with the State, according to which the only expectations that investors enjoyed were that of a reasonable profit for the life of the investment, and that of receiving a 15-year return on their investment.[426] Contrarily to what was argued by the investors, the Solar Levy had not affected this expectation, because the investors were still receiving a level of revenues in conformity with such parameters, even if lower than that obtain prior to the reforms.[427] Equally strict was the analysis of the discontinuation of tax incentives: here, the tribunal found no stabilization guarantees given by the State,[428] and consequently the investors could not 'legitimately expect that the laws at the time of investment [would] not be changed'.[429]

The tribunal also looked at the reasonableness of the changes to the legal framework. It noticed how Czech Republic had quickly met its stated objectives in renewable energy production and soon found itself in a situation of so-called 'solar boom', where the FIT (feed-in tariffs) programme had gone beyond the limit of economic sustainability for the State with fallbacks on consumers, that were called to pay higher prices for electricity.[430] The State had adopted various measures in 2010,[431] although the situation had not improved and additional measures were discussed by the Parliament and later adopted, among which the withdrawal of the tax exemption and the Solar Levy.[432] As to the first measure, the tribunal limited to

[424] *Ibid.*, at paras. 409-411.

[425] *Ibid.*, at para. 413.

[426] *Ibid.*, at paras. 323-325.

[427] *Ibid.*, at para. 416.

[428] *Ibid.*, at para. 432.

[429] *Ibid.*, at para. 437.

[430] *Ibid.*, at paras. 378-383.

[431] *Ibid.*, at paras. 385-387.

[432] *Ibid.*, at para. 391.

identify that it was adopted for a specific purpose and had a clear rationale, identified in the explanatory report accompanying the act.[433] The second measure did not alter the framework of the Act on Promotion: in the tribunal's view, the Act granted a return on investment or profit of at least 7% per year over 15 years[434] and was not changed by the Solar Levy.[435] In doing so, the tribunal did not accept the investor's argument, according to which the Act guaranteed an absolute FIT price level in the abstract.[436] As a consequence, the measures were considered 'reasonable, being a carefully calibrated response to developments in the Czech solar sector at a time of economic and political uncertainty.'[437]

The *JW Solar* award reflected a deferential standard of review, both in the identification of the level of protection provided by the BIT and in the analysis of the measures. The narrow interpretation of the investors' legitimate expectations, along with the recognition of the existence of a room for manoeuvre for the State in the adoption of regulatory acts, led the tribunal to find no violations of the FET. Though the deferential analysis is not dissimilar from that seen in other recent cases such as *Philip Morris v. Uruguay* and *Rusoro Mining v. Venezuela*, the difference here lies in the much-broader interpretation of the FET standard given by Czech Republic. The State's approach seem to have been influenced by the previous cases discussed in the ECT framework, and by the high level of protection provided by Art. 10 of the ECT. Notwithstanding the different treaty provisions, the FET claim was argued in similar terms.

3.4. Preliminary assessment of arbitral jurisprudence based on the remaining BITs

One thing that emerged from the cases analysed above and that might reveal unexpected is the general uniformity between the cases, notwithstanding the differences between them. The great majority of tribunals surveyed in the present subsection have given an (interestingly) consistent interpretation of the FET standard:

[433] *Ibid.*, at paras. 394-395.

[434] *Ibid.*, at para. 367.

[435] *Ibid.*, at para. 401.

[436] *Ibid.*, at para. 371.

[437] *Ibid.*, at para. 406.

they have required a high threshold for its violation and have denied the existence of the investor's expectations of the stability of the legal framework in the absence of specific representations or promises given by the State. The minor differences in FET provisions have thus not led to wide-ranging interpretations by tribunals. Accordingly, the different standards of review that emerge in the determination of the scope of review do not stem from a variability in the interpretation given by tribunals, but from the readings of the relevant FET provision provided by the respondent State.

Notwithstanding a legal basis of almost-identical provisions, States' arguments have ranged from the identification of FET with the *Neer* standard[438] or even narrower clauses,[439] to more up-to-date interpretations of the MST,[440] to the identification of an autonomous standard,[441] to broad ECT-inspired notions.[442] When confronted with the consistent interpretation of arbitral tribunals, such variations have given back different levels of deference in the first prong of the present analysis.

Connected to the uniformity explained above is then the acknowledgment of the deferential standard of review generally displayed by arbitral tribunals during the analysis of the State measures under scrutiny, namely the second prong of the present standard-of-review analysis. As noted above, variations in the overall standard of review largely depended on the mutating level of deference that emerged in the identification of the scope of FET protection. On the contrary, 8 out of 10 cases reflected deferential approaches in the ensuing analysis of the contested measures. It must then be noted that some cases have not been included in the last subsection (which contains the awards that reflect a deferential standard of review) because of the impossibility to reconstruct the debate over the scope of the standard, falling within the cases displaying an *overall* standard of review instead. Still, what can be

[438] Saluka v. Czech Republic, *supra* note 253, at para. 290; Philip Morris v. Uruguay, *supra* note 331, at para. 314.

[439] Paushok v. Mongolia, *supra* note 276, at para. 239.

[440] Achmea v. Slivakia, *supra* note 241, at para. 248; Rusoro Mining v. Venezuela, *supra* note 367, at para. 520.

[441] Micula v. Romania, *supra* note 302, at para. 503.

[442] JSW Solar v.Czech Republic, *supra* note 417 at paras. 308-311.

inferred from this is that, in regulatory disputes that arise out of BITs in general, the recognition of the host State's policy space is generally high.

Finally, it can be noted that the awards reflecting a little-deferential standard of review, in addition to constituting the minority of cases (2 out of 10 cases) have been released in 2007 and 2012 respectively.[443] Conversely, cases reflecting an overall deferential standard of review or a deferential standard of review have been decided between 2006 and 2017. A distinction between the cases in this two last blocks seems little indicative of the changes in the approach of arbitral tribunals towards the State's regulatory autonomy. A highlighted above, tribunals have been consistent in the interpretation of the scope of the FET standard and in adopting a deferential analysis of the State measures.

While the last two blocks greatly overlap, it can be noted that 5 out of 8 cases have been decided since 2012:[444] past that date and until 2017, all the cases analysed in the present subsection reflected a deferential approach. Consequently, it is possible to conclude that the non-deferential approach seen in some early cases has not been replicated after 2012, with tribunals employing (to different extents) deferential standards of review from that date on.

In a similar fashion to the cases seen above, the remaining cases stemming from BITs with unqualified FET provisions show the increasing employment of deferential standards of review. It seems therefore possible to answer in the positive the research sub-question asked above and identify a trend in the remaining arbitral jurisprudence based on unqualified FET provisions towards a greater respect for State sovereignty.

4. Conclusion: a detectable trend towards the recognition of a greater role for the State in arbitral jurisprudence based on unqualified FET clauses?

The survey of arbitral jurisprudence based on unqualified clauses allows for some final comments.

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[443] Eastern Sugar v. Czech Republic, *supra* note 217 (2007); Achmea v. Slovakia, *supra* note 241 (2012).

[444] Ulysseas v. Ecuador, *supra* note 405 (2012); Micula v. Romania, *supra* note 302 (2013); Philip Morris v. Uruguay, *supra* note 331 (2016); Rusoro Mining v. Venezuela, *supra* note 367 (2016); JSW Solar v. Czech Republic, *supra* note 417 (2017).

Firstly, through the analysis carried out above, it was possible to appreciate the higher level of protection offered by unqualified FET clauses as opposed to qualified ones. Leaving aside the standard of review reflected by the reasoning of arbitral tribunals, the latter have, in the vast majority of cases, considered FET as an autonomous standard, that offered *additive* protection from that provided by the MST under customary international law.[445] Particularly indicative, in this regard, was the constant inclusion of the investor's legitimate expectations among the features of the standard, that was a much debated issue in NAFTA-based jurisprudence instead.

Secondly, the analysis has shown the variability of investment arbitral jurisprudence in the identification of the specific elements of the standard, even when confronted with texts built upon a similar structure and which overlapped to a great extent. This trait comes by no means as a surprise and constitutes the inescapable consequence of the ad-hoc nature of arbitral jurisprudence, especially when comparing a broad number of cases. In addition to a bulk of widely accepted common traits, and while the focus of arbitral tribunals ultimately depended on the investor's claims, tribunals have enquired into different features they considered part of the standard: in some cases they looked into the arbitrariness of the State's regulatory measures,[446] in others into their reasonableness,[447] in others again they required that the measures were proportional.[448] In addition, depending on the presence in the relevant treaty of non-impairment provisions, tribunals have included or excluded

[445] The only cases in which tribunals have linked the FET standard with the MST under customary international law were: El Paso v. Argentina, *supra* note 17, at para. 336; Mobil v. Argentina, *supra* note 17, at para. 911; Infrastructure v. Spain *Infrastructure Services Luxembourg S.à r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ICSID Case No. ARB/13/31, at para. 443; RREEF v. Spain *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, at para. 530; Stadtwerke v. Spain *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, at paras. 231-232.

[446] See, e.g., National Grid v. Argentina, *supra* note 23; Philip Morris v. Uruguay, *supra* note 331.

[447] See, e.g., BG v. Argentina, *supra* note 20.

[448] See, e.g., Total v. Argentina, *supra* note 11.

from the protection of the FET standard other elements such as the protection from discriminatory measures.[449] To this end, arbitral jurisprudence has not helped clarify the relationship between non-impairment provisions and the FET standard, conflating the two standards of protection on numerous occasions.

Shifting the attention to the standard of review employed by arbitral tribunals, this showed the employment of an increasingly deferential standard of reviews in the respective arbitral jurisprudence. This tendency could be appreciated in each single paragraph, but it can also be identified when considering the paragraphs jointly. The Argentine cases, generally decided earlier in time, display an overall lower level of deference (which translated in the constant rejection of the State's identification of FET with the MST and the disagreement over the role of investor's legitimate expectations) than the more-recent cases stemming from the remaining BITs.[450] The latter have, generally, displayed a high degree of deference, as highlighted already above.[451] In the body of jurisprudence that has developed in the last fifteen years, least-deferential awards have been released until the early 2010s and have occurred rarely afterwards.[452] Conversely, highly deferential awards have mostly appeared within the last 5 years.[453] Consequently, it seems possible to conclude that the analysis carried out above does in fact show the existence of a trend towards a greater deference in the standard of review employed by arbitral tribunals in the analysis of the host State's regulatory measures.

Translating this into the analysis of State sovereignty, it is therefore possible to answer the research question presented at the beginning of the present Chapter. The trend towards a more deferential standard of review indicates that tribunals are recognizing an increasing space of manoeuvre to States in the adoption of regulatory measures or, in other words, a trend towards a greater recognition of the State's sovereign space in arbitral jurisprudence based on unqualified-FET provisions.

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[449] As an example of the first approach, see, among others, Total v. Argentina *Ibid.*. As to the second approach, see, among others, Eastern Sugar v. Czech Republic, *supra* note 217.

[450] See Paragraph 2.1. above.

[451] See Paragraph 3.4. above.

[452] See Paragraphs 2.2. and 3.1. above.

[453] See Paragraph 2.5. and 3.4. above.

CONCLUSION

The study carried out above has highlighted how, similarly to other fields of international law,[1] the international investment regime is in a state of constant evolution. The regime reflects, first and foremost, the continuous interest of States to favour investment activities that might help them meet their need for economic growth. At the same time, it expresses the careful balance between the limitations to the freedom of action willingly assumed by States and their inherent capacity, as sovereign entities, to wield authority within their own borders.[2]

The changes to the international investment regime concur to the identification of the understanding of State sovereignty in international law and indicate whether the latter is, in any way, gaining or losing relevance in the international panorama. Accordingly, the present research was dedicated to investigating whether the international investment regime is expressing a mutating understanding of State sovereignty that, similarly to other fields of international law, reflects the 'return of the State',[3] thereby pointing to a greater role for State authority and to a more-limited reach of international law than that emerged during the second half of the last century.

In doing so, the present research has focused on one of the fundamental attributes of State sovereignty, identified in the State's regulatory authority. While by no means the sole expression of State sovereignty, State regulatory authority encompasses one of the most-basic functions of the State, which has attracted the attention of investment scholarship and treaty drafters in recent years.[4] The changing

[1] See the numerous examples indicated in Chapter 1, Paragraphs 2. and 4. above.

[2] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Edition, 2012), at 20 ff.

[3] See, among the numerous authros that make use of this fortunate formula, Alvarez, 'The Return of the State', 20 *Minnesota Journal of International Law* (2011) 223.

[4] Among the authors that have specifically dealt with the regulatory authority of the State, see Y. Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (2019); L. W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016); A. Titi, *The Right to Regulate in International Investment Law* (1st Edition, 2014).

relevance of State regulatory authority was addressed here by examining the two main components of the international investment regime, namely IIA drafting and investment arbitral jurisprudence, as they give account of the different moments in which the regime is shaped, either in its desired and practical form.

The current study has reached the following findings:

1. IIA drafting reflects the effort of States to attribute a greater role to State regulatory authority

The study has initially focused on the relevance given to State regulatory authority in investment treaty making. IIAs, in addition to being a fundamental source of the investment regime,[5] constitute a direct indicator of how negotiating States aim to balance the relationship between investment protection and the exercise of sovereign powers. New-generation IIAs show numerous instances that point towards an increasing relevance of State regulatory authority, as opposed to first and second-generation ones. Negotiating States have either resorted to 'voice' tactics, changing the traditional elements of investment protection while safeguarding its architecture, or to 'exit' tactics, through which they have abandoned some of the most contested traits of the regime. The presence of new-generation provisions has steadily increased in the last twenty years –and especially during the last decade– indicating that States are actively trying to safeguard their regulatory authority or, in other words, trying to preserve a greater role for their sovereign prerogatives. Such a tendency was not unexpected, as it followed numerous international efforts, fostered by States and international organizations to this end,[6] that were aimed to increase the legitimacy of the international investment regime.

At the same time, it was possible to appreciate how the promotion and protection of FDI remains a primary aim of States. Only in isolated cases States have rejected or abandoned the international investment regime altogether. Conversely, the overwhelming majority of international actors has opted for keeping the regime

[5] Juillard, 'L'évolution Des Sources Du Droit Des Investissements', in *Recueil Des Cours* vol. 250 (1994) 9, at 75 ff.

[6] See, e.g., *UNCTAD's Reform Package for the International Investment Regime, 2018 Edition* (2018), available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf (last visited 13 March 2021).

in place and to follow the blueprint offered by traditional IIAs, while at the same time including corrective clauses that aim to better balance the protection of FDI with the continuous exercise of sovereign powers by the State.

2. Investment arbitral jurisprudence is recognizing an increasing role for State regulatory authority

The survey of investment arbitral jurisprudence has proved to be, as expected, less straightforward than the analysis of investment treaties, due to the fragmented and ad-hoc nature of investment arbitration. This notwithstanding, the analysis has shown a slow but steady shift towards a greater recognition for the role of State authority by arbitral tribunals, in the form of an increasingly deferential standard of review. Such a tendency has emerged in all the selected level-playing fields. Awards based on qualified FET provisions, almost exhausted by NAFTA jurisprudence, progressively recognized the existence of a space of manoeuvre enjoyed by the State in the exercise of its sovereign powers. The numerous proceedings based on unqualified FET clauses, be they ECT-based or stemming from BITs with unqualified FET provisions, while offering a more-fragmented picture than the NAFTA framework, equally evolved along similar lines. Inevitable, in this regard, was the presence of cases that did not fall in line with the general trend: the fragmented and ad-hoc nature of investment arbitration constantly bears the risk of unpredictability. However, rulings that departed from the trend did not undermine, as explained above, the findings of the study.

Both the moments of the standard-of-review analysis have concurred to this end. Interpretations given to the FET clause have gradually become more deferential towards the State, in that the narrow interpretations supported by the State and the findings of tribunals have slowly converged, with the ensuing abandonment of extremely broad interpretations. This seems to be the result of a gradual clarification of the meaning of the FET obligation, which is acquiring a more-defined core content in international investment law, even though its exact scope ultimately remains highly dependent on the circumstances of each case. The scope-of-review analysis has also shown that, notwithstanding the support that the ‘theory of convergence’

has found,[7] arbitral tribunals seem to generally recognize that unqualified FET clauses provide a lower liability threshold (hence a higher level of FDI protection) compared to qualified ones.

An increasingly deferential approach has then been detected at the intensity-of-review stage, indicating that investment arbitral tribunals do in fact recognize the need to pay a certain degree of respect to the State's sovereign choices, in line with other international adjudicators.[8] The inconsistency in the exercise of deference by tribunals does not allow to identify a widely accepted level of deference that should be applied (according to arbitral tribunals) when addressing State regulatory measures. Still, it offers a strong argument against a thesis that still finds support in international scholarship and that qualifies international investment arbitration as a form of commercial arbitration, with the ensuing impossibility to pay deference to the role of the State.[9] The increasing degree of deference in international investment arbitration then seems in line with the hopes of part of the international scholarship that had envisaged the need for a standard-of-review analysis informed by a deferential reading of the host State's actions.[10]

Finally, the conclusion that arbitral jurisprudence is giving increasing recognition to the State's regulatory authority is not jeopardized by the restrictions adopted in the present analysis. The focus on the FET standard was justified by the flexibility and −to some extent− lack of guidance that it gave arbitral tribunals, as well as by the wide sample of proceedings that it encompassed. For these reasons, arbitral jurisprudence confronted with the standard was considered a reliable indicator of the relevance that arbitral tribunals gave to the State's regulatory authority in

[7] See, e.g., S. W. Schill, *The Multilateralization of International Investment Law* (2009), at 153 ff, and arbitral jurisprudence recalled therein.

[8] For an example in the WTO framework, see M. Oesch, *Standards of Review in WTO Dispute Resolution* (2003).

[9] See, e.g., Brower, Brower and Sharpe, 'The Coming Crisis in the Global Adjudication System', 19 *Arbitration International* (2003) 415.

[10] See, among others, Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577; Vadi, 'Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration', in A. K. Bjorklund (ed.), *Yearbook on International Law and Politics 2013-2014* (2015) 201.

general. The enquiry would surely benefit from the expansion to other standards of investment protection such as the protection from unlawful expropriation, or to the analysis of exceptions. However, the tendency captured in arbitral jurisprudence on the FET standard makes a strong argument in favour of the existence of similar trends in these latter cases.

3. Treaty changes and arbitral jurisprudence: action and reaction or unitary trend?

The developments detected in the drafting of IIAs and in international investment arbitration allow some considerations on their mutual effect on each other. As seen in Chapter 2, the shift in treaty making began during the 1990s, following the appearance of treaty-based investor-State arbitration in the international investment panorama. Once the regime started operating also in its contentious part, States soon voiced their discontent with an architecture that granted strong protection to foreign capitals and that allowed investors to seek redress through the privileged means of investment arbitration. Early awards that reached far-reaching interpretations of the standards of protection, such as the *Tecmed v. Mexico*[11] case or the *Maffezini v. Spain* one,[12] have triggered the debate over the clarification of the substantive protection provided by IIAs. Concurrently, the surge in the number of arbitral proceedings that see States solely as respondent, and their capacity to affect the State's action even in time of economic emergency such as the Argentine cases, has certainly contributed to the hostility against the existing ISDS system and to a reassertion of the role of State sovereignty. New developments in treaty drafting can well be considered as a reaction to the pro-investor bias emerged in early arbitral proceedings.

Following the narrative of the ongoing conflict between investment arbitral tribunals and States as pursuing opposing aims, one might have expected tribunals to counteract the action of States. Recalling once again the words of Alvarez,

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[11] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

[12] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

> 'if, as indicated, international investment law is driven by the jurisprudence produced by investment arbitrators, does that jurisprudence provide a firewall to protect foreign investors against trends in favor of "re-balancing?" This is far from clear.'[13]

Conversely, the present analysis has shown that investment tribunals have not attempted to rebalance the relationship in favour of investors, recognizing a greater role for State regulatory powers instead, even when confronted with old-generation texts. In this regard, the development of arbitral jurisprudence may be considered surprising. The mutated approach of arbitral tribunals is not, as could be noted during the present work, directly driven by the new provisions included in new-generation IIAs. All the proceedings that have found an outcome to date were based on first-generation treaties that did not contain new wording. The latter will offer a legal basis for investment arbitral proceedings only in the years to come. Consequently, the reasons must be searched outside the strictly legal realm.

The prime suspect could be identified, once again, in the action of States, that have carried out a more-careful selection of arbitrators, choosing those whose background might indicate the attitude to recognise the sovereign role of the State in regulatory disputes. [14] However, the State plays but a partial role in the constitution of an arbitral tribunal.

Relevant concurring factors certainly lie in the relatively young nature of investor-State arbitration without privity and in the quest for legitimacy of

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[13] Alvarez, *supra* note 3, at 241.

[14] If this suggests a greater presence of arbitrators with a public international law background than with a private law one, such conclusion must be taken with a grain of salt, given the presence of renowned public-law scholars among the tribunals that expressed little deference towards the State's determinations. See OECD, *Investor-State Dispute Settlement* (2012), Summary Reports by Experts at 16th Freedom of Information Roundtable - 20 March 2012, available at https://www.oecd.org/daf/inv/investment-policy/50241347.pdf, at 7; A. Roberts and Z. Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy*, 6 June 2018, EJIL: Talk!, available at https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/ (last visited 24 November 2020); EU Commission, *Submission of the European Union and Its Member States to UNCITRAL Working Group III* (2019), available at https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf, at 12.

international investment arbitration. The re-adjustment of the perceived unbalances carried out by early arbitral tribunals can be seen as a physiological consequence of a system that, although is now one of the most relevant examples of international adjudication, is still establishing itself without a prior settled tradition. The criticism to investment arbitration has been captured by arbitrators, that have reacted by abandoning the most-criticised approaches adopted in the past. If the desire for re-appointment of arbitrators has been indicated as a sign of the shortcomings of the ISDS system, it equally speaks volume about the awareness of arbitrators to the surrounding world.

Ultimately, the changes in investment arbitral jurisprudence seem to be the symptom of the more-widespread shift that is currently taking place outside the boundaries of the international investment regime and the small circles of international investment legal experts (be they from Governments, academia, or private practice), which encompasses civil society and politics instead. International investment arbitration shows the picture of a regime that is deeply interconnected with the economic reality and norm-making activity and is influenced by their evolution.

4. Fallbacks on the current debate over the need to abandon investment arbitration

The present research offers some indications as to the ongoing debate over the replacement of investor-State arbitration as it stands today. To this end, it cannot be said whether the system of investor-State arbitration will still characterise the international investment regime in the future, as States seem resolute in switching to a less-unpredictable ISDS system, as the current debate at UNCITRAL is showing.[15] However, the lack of consensus on some of the basic issues of the debate leads to assume that, although ostracized by some relevant actors in the international panorama such as the EU, the current architecture will still be a feature of the investment regime in the years to come, before the new system (if any satisfying alternative is finally found) will become operational.

[15] See UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform*, United Nations Commission on International Trade Law, available at https://uncitral.un.org/en/working_groups/3/investor-state (last visited 22 November 2020).

First, the present analysis has highlighted how investment arbitration ultimately remains an unpredictable tool. Although it has given some important indications as to the clarification of the meaning of FET and to the exercise of deference by arbitral tribunals, the outcome of any specific case ultimately depends on the approach followed by the relevant arbitral tribunal. In every level-playing field identified above, some isolated cases have escaped the trend, reflecting little-deferential approaches in either prong of review. While, statistically, these cases were not relevant enough to oppose to the ongoing trend, States might well not be willing to engage in dispute-resolution mechanism that does not offer some minimum guarantees over the interpretation of treaty obligations. If predictability is the main aim of reforming States, then alternative avenues to investment arbitration might better suit this need.

However, it must be noted how the evolution in investment arbitral jurisprudence has taken place upon the background of old-generation IIAs. Notwithstanding ISDS reforms is considered a fundamental step in increasing the legitimacy of the investment regime, the activity of arbitral tribunals in practice seems to reflect a less-activist role for tribunals, thereby relieving the need for reforms from the urgency it is usually presented with. Even if the foundations of a regime that has allowed the unwarranted compression of State sovereign prerogatives still remain in place in the near future, its operation might avoid the excesses of the past and offer a better balance between the protection and promotion of FDI and the exercise of the State's sovereign powers.

5. Concluding remarks: the evolving role of State sovereignty in the international investment regime

The present work has studied the international investment regime to determine whether the changes it is currently undergoing reflect a mutating understanding of State sovereignty. While focusing on the State's regulatory authority as an embracing attribute of State sovereignty, the study has confirmed the assumption that the international investment regime is, in fact, expressing a greater role for State sovereignty. This aspect has emerged in both the main components of the regime, namely IIA drafting and investment arbitration, and throughout the numerous

research questions that have been answered in the course of the study and that have given concordant indications to this end.

The revamp of State sovereignty in the regulation of international investments conforms to the broader trend that is seen in international law and that has been summarized at Chapter 1, Paragraph 4. above. In doing so, this trend indicates a growing mistrust against internationalization and globalization. The reasons for this dynamics are manifold and cross over the boundaries of the legal realm: among the many, the changing power relationships in the international panorama, with the emergence of new powerful Countries as main international actors, and the recent economic crises that have affected States on a global scale. The changing nature of the international realm highlights the fact that the equilibrium that had characterized the second half of the last century has been lost and that States are attempting to create a new one, that entails a greater role for States as actors in the international panorama.

Ultimately, by adding another piece to the 'return of the State', the international investment regime shows how the role of State sovereignty, far from having waned, still permeates international law. The principle, unlike many have suggested, is not anchored to a Westphalian notion, and is capable of adapting to –and to restate its relevance in– a globalized world.

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