

# Investments, International Protection

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## A. Introduction

- 1 The international protection of investments is concerned with the safeguarding of foreign investments against interference by the host State. The nature and duration of investments as well as the special risks involved make stability and predictability particularly important in this area of → *international economic law*. Once the investor has sunk in its resources, it becomes vulnerable to changes in the position of the host State. This is why the nature, structure and purpose of foreign investment law are distinct in comparison to trade law.
- 2 At the same time it is important to protect the host State's interests. There is no doubt that foreign investments are subject to the law and administrative control of host States. The guarantees afforded to foreign investors must not jeopardize the States' right to legitimate regulation. In some areas of investment important interests of the local population are at stake. The task of international investment law is to find an appropriate balance between these potentially conflicting interests.
- 3 International investment law has undergone substantial changes during the second half of the 20<sup>th</sup> century. After the demise of → *colonialism*, major investments were often governed by agreements between host States and investors, usually termed →

*concessions*. These agreements typically granted far-reaching rights to foreign investors and left the host State with limited control over their activities. The 1970s saw a new assertiveness of developing host States towards foreign investors often described as → *New International Economic Order (NIEO)*. The position of these States was bolstered by the doctrine of Permanent Sovereignty over Natural Resources (→ *Natural Resources, Permanent Sovereignty over*). In the 1980s and 1990s, the failure of these policies led to a new pragmatism coupled with a desire to attract foreign investment. These new attitudes were driven by the recognition that foreign investment was an important tool of economic development. Contributing factors were a growing trend towards → *globalization* as well as the belief in the superiority of market economies and a resulting wave of privatizations of previously public services.

- 4 The desire to attract foreign investment has led most countries, especially → *developing countries*, to adopt policies that are designed to create a favourable investment climate. An important part of these policies are legal safeguards. These legal safeguards include the stability of the legal conditions under which an investor can operate, the quality of the local public administration, the transparency of the system of local regulations and an effective system of dispute settlement. Many countries have adopted → *investment codes* which are designed to combine clarity with favourable conditions for foreign investments.
- 5 In addition to guarantees contained in domestic law, potential host States to investment also give international legal guarantees to investors. These are mostly laid down in bilateral as well as multilateral treaties (→ *Investments, Bilateral Treaties*).

## **B. Sources of International Investment Law**

### ***1. Bilateral Investment Treaties***

- 6 The most important source in contemporary investment law is bilateral investment treaties ('BITs'). The first country to start entering into BITs was Germany (in 1959), closely followed by Switzerland (in 1961). Other countries have followed suit. It is estimated that by 2008 there were about 2600 BITs worldwide. Countries with particularly active BIT programmes are Germany (135 treaties), China (121 treaties) and Switzerland (114 treaties). Developing States have also negotiated an increasing number of BITs among themselves. Some free trade agreements ('FTAs') contain sections dealing with the protection of investments.
- 7 BITs are designed to provide guarantees for foreign investors from the respective countries. They do not normally address obligations of investors, although some BITs provide that investments, in order to be protected must be in accordance with the host State's law. The idea to include duties for investors, such as certain → *human rights*, environmental and labour standards are only beginning to be reflected in treaty practice.
- 8 BITs typically contain the following features: a broad definition of 'investments'; a definition of 'investor'; a provision on admission of investments; a guarantee of → *fair and equitable treatment* ('FET'); a guarantee of full protection and security as well as a guarantee against arbitrary and discriminatory treatment; national treatment (→ *National Treatment, Principle*) and most-favoured-nation treatment (→ *Most-Favoured-Nation Clause*); guarantees in case of expropriation; guarantees concerning the free transfer of payments; settlement of disputes between the contracting States; settlement of disputes between the host State and the investor, including → *arbitration*.

- 9 Although many BITs display similarities, they are by no means identical. In some respects, BITs display significant variations. Therefore, each BIT must be examined on its own terms.

## ***2. Multilateral Treaties***

- 10 The first efforts to create a multilateral treaty protecting foreign investments dates back to the 1950s and 1960s (the Abs-Shawcross Draft). Between 1995 and 1998 the → *Organization for Economic Co-operation and Development (OECD)* launched a new initiative to establish a Multilateral Agreement on Investment ('MAI'). The breakdown of this effort was caused by a number of factors, including widespread opposition by → *non-governmental organizations* and the desire of France to protect French culture. An effort in the framework of the → *World Trade Organization (WTO)* started in 1996 but came to a halt in 2004. The main reason was the fear of developing countries that a multilateral treaty might unduly narrow their regulatory space.
- 11 On the regional level the → *North American Free Trade Agreement (1992)* ('NAFTA') between Canada, Mexico and the United States ('US') addresses both matters of trade and investment. Its chapter 11 covers most of the issues that can be found also in BITs including investor-State arbitration.
- 12 The Energy Charter Treaty ('ECT'; in force 1998) is both regional and sectoral. It is designed to cover the co-operation of European States with → *Russia* and the new States in Eastern Europe and Central Asia in the energy sector. So far, 48 States have ratified the treaty. Russia has signed but not ratified it. The scope of the treaty is not limited to investments but covers a wide range of issues such as trade, transit, energy efficiency and dispute settlement. The chapter on investment is mostly patterned along the lines of BITs.
- 13 Other regional arrangements that cover investment protection include the Agreement Establishing the → *Association of Southeast Asian Nations (ASEAN)*, the Protocol of Colonia for the Promotion and Protection of Investments (→ *MERCOSUR*) and the Dominican Republic–Central America–United States Free Trade Agreement ('CAFTA').
- 14 Multilateral treaties exist in specialized areas of investment law. These include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), which provides a framework for the settlement of disputes between host States and foreign investors through arbitration and → *conciliation* (see also → *Arbitration and Conciliation Treaties*). The Convention Establishing the → *Multilateral Investment Guarantee Agency (MIGA)* establishes an international framework for political risk insurance. The Agreement on Trade Related Investment Measures ('TRIMS') of 1994 regulates aspects of foreign investment which may lead to direct negative consequences for a liberalized trade regime including so-called performance requirements. The → *General Agreement on Trade in Services (1994)* ('GATS') of 1995 provides for market access in the services sector, allowing inter alia commercial presences in the host State.

## ***3. Interpretation of Investment Treaties***

- 15 In interpreting applicable treaties investment tribunals rely on the → *Vienna Convention on the Law of Treaties (1969)*, especially its Arts 31 and 32. Tribunals have frequently interpreted investment treaties in light of their object and purpose, often by looking at their preambles (*Continental Casualty v Argentina [Decision on Jurisdiction of 22 February 2006]* para. 80). But this development has also come under criticism (*Plama v Bulgaria [Decision on Jurisdiction 8 February 2005]* para. 193).

- 16 Some tribunals seem to have favoured a restrictive interpretation of treaty provisions that led to a limitation of the State's sovereignty (*Noble Ventures Inc v Romania* [Award of 12 October 2005] para. 55). Others have rejected a restrictive interpretation, at times favouring an interpretation that gives full effect to the rights of investors (*SGS Société Générale de Surveillance SA v Republic of the Philippines* [Decision on Objections to Jurisdiction of 29 January 2004] para. 116). Yet other tribunals have distanced themselves from either approach and have advocated a balanced interpretation (*Mondev International Ltd v United States of America* [Award of 11 October 2002] para. 43).
- 17 Resort to *travaux préparatoires* is determined primarily by their availability. The drafting history of the ICSID Convention is documented in detail. As a consequence, ICSID tribunals frequently resort to it. By contrast, the negotiating history of BITs is typically not documented.
- 18 In some cases the parties to a treaty may have given authoritative interpretations of its meaning (→ *Interpretation in International Law*). Unilateral assertions of the disputing State party, on the meaning of a treaty provision, made in the process of ongoing proceedings, are of limited value since such statements are likely to be perceived as self-serving. The tribunal may seek information from the investor's home State on the treaty's interpretation (*Aguas del Tunari v Bolivia* [Decision on Jurisdiction of 21 October 2005] paras 47 and 249–63). The two States, parties to a BIT, may issue a joint, non-binding statement on a question of interpretation pending before a tribunal (*CME v Czech Republic* [Final Award of 14 March 2003] paras 87–93). NAFTA, in Art 1131 (2), provides a mechanism whereby the Free Trade Commission ('FTC'), a body composed of representatives of the three States parties, can adopt binding interpretations of the treaty.
- 19 Consistency in the interpretation of investment treaties is made difficult by the fact that investment tribunals are established *ad hoc* and vary in their composition. Tribunals frequently rely on previous decisions of other tribunals. At the same time they stress that they are not bound by previous cases (*AES Corp v Argentina* [Decision on Jurisdiction of 26 April 2005] paras 17–33). Some tribunals see it as their duty to contribute to consistency and certainty (*Saipem SpA v Bangladesh* [Decision on Jurisdiction 21 March 2007] para. 67). At times tribunals openly disagree with previous decisions (*SGS Société Générale de Surveillance SA v Republic of the Philippines* [Decision on Objections to Jurisdiction of 29 January 2004] para. 97).
- 20 One perceived method to increase the consistency of case law is the creation of an appeals mechanism that would open the possibility to review decisions. A number of US treaties and the United States Model BIT of 2004 in its Annex D foresee this possibility in the form of an appellate body or similar mechanism. The usefulness of such a system for the achievement of more coherence remains in doubt. The ICSID at one point circulated a draft that foresaw the creation of an appeals facility at ICSID. But the idea was dropped as premature.

#### **4. Customary International Law**

- 21 → *Customary international law* also plays an important role in investment law. The international → *minimum standards* for the treatment of → *aliens* is still relevant in a number of contexts including → *denial of justice*. → *State responsibility* is another area of international law that is frequently applied in cases involving the protection of investments. International rules on the → *nationality* of individuals and corporations are sometimes important in determining the applicability of treaties.

### **5. Guidelines and Codes of Conduct**

- 22 Non-binding standards covering investment law such as guidelines and → *codes of conduct* have been formulated by a number of international organizations. Among these are the 1992 World Bank's Guidelines on the Treatment of Foreign Direct Investment (→ *World Bank Group*), the OECD Guidelines for Multinational Enterprises of 2000 and the abortive UN Code of Conduct for Transnational Corporations (UNGA Res 45/186 [21 December 1990]).

### **6. Investment Contracts**

- 23 Many, but by no means all, investments are made on the basis of agreements between the investor and the host State or one of its instrumentalities. These investment contracts vary widely in designation, form and contents. They are frequently referred to as concessions (→ *Contracts between States and Foreign Private Law Persons*). Investment contracts include joint ventures with a host State entity, production-sharing agreements, service contracts, build, operate and transfer ('BOT') contracts and build, operate and own ('BOO') contracts.
- 24 An important feature of investment contracts is a choice of law clause. The host State will typically favour the choice of its own legal order. The investor will favour a system of law that provides stability and security from unilateral changes in host State law. In practice, choice of law clauses range from a reference to the law of the host State to an exclusive choice of the rules of international law. At times, there is a choice of general principles of law, of the usages of the industry and, more seldom of rules of natural justice or of equity. Often, a combination of national law and international rules as applicable law is negotiated as a compromise. If international law is part of the host State's law, the choice of the latter will include the former. But national constitutions vary in the significance and applicability they give to international law.
- 25 An investment contract may provide for dispute settlement under the ICSID Convention. Art. 42 ICSID Convention provides that any choice of law agreed by the parties will prevail. In the absence of a choice a tribunal is to apply the host State's law and such rules of international law as may be applicable.
- 26 Any reference in a choice-of-law clause to two different legal orders raises the question of a hierarchy in case of a collision between the two. Some choice of law clauses provide that, in case of a conflict, international law will prevail. International tribunals have tended to give precedence to international law over domestic law in case of a conflict.
- 27 A stabilization clause is a variant of a choice-of-law clause. Such a clause will provide that the chosen law, typically the host State's law, will apply as in force at a particular date. Alternatively, it may provide that future changes in the host State's law that work to the investor's disadvantage, will not be applied to it. The exact meaning of a stabilization clause, especially on a State's right to expropriate, has remained unclear (*Government of the State of Kuwait v American Independent Oil Company [Aminoil]*; *Amoco International Finance Corporation v Government of the Islamic Republic of Iran*).
- 28 A compromise between flexibility and stability is sometimes sought through the inclusion of renegotiation clauses. These clauses provide for renegotiation of the contract often subject to certain triggering events.
- 29 In the context of investment treaties, the sanctity of contracts has received renewed attention in the application of the FET standard and of so-called 'umbrella clauses'.
- 30 Investment contracts typically contain clauses for the settlement of disputes arising from the interpretation and application of the contract. Some investment contracts provide for

international arbitration, often in the framework of ICSID. Other contracts provide for settlement through the host State's domestic courts or through arbitration under the local law. Difficulties have arisen where a contract provided for dispute settlement through domestic courts while an applicable treaty provided for international arbitration. International tribunals have held that they have jurisdiction for claims based on treaty breaches while disputes based on contract would have to be brought before the domestic court or tribunal (*Compañía de Aguas del Aconquija, SA. & Compagnie Générale des Eaux/Vivendi Universal v Argentina* [Decision on Annulment of 3 July 2002] paras 93–115).

### C. Investors and Investments

- 31 International protection is restricted to foreign investments. The foreignness of the investment is determined by the investor's nationality and not by the origin of the invested capital. The investor's nationality determines from which treaties it may benefit. Exceptionally, the status of a foreign investor may be extended to permanent residents (Art. 201 NAFTA; Art. 1 (7) (a) (i) ECT).

#### 1. Investors

- 32 Investors may be individuals but are, more often, companies. An individual's nationality is determined primarily by the law of the country whose nationality is claimed (*Soufraki v United Arab Emirates* para. 55). The nationality of a corporation is typically determined by the place of its incorporation or by the main seat of its business.
- 33 Tribunals do not normally pierce the corporate veil to look at the nationality of a company's owners (*Tokios Tokelés v Ukraine* [Decision on Jurisdiction of 29 April 2004 and Dissenting Opinion of President Prosper Weil] paras 27–71). This enables investors to engage in nationality planning by establishing companies in countries with favourable treaties (*Saluka v Czech Republic* [Partial Award of 17 March 2006] paras 239–42; *Aguas del Tunari v Bolivia* [Decision on Jurisdiction of 21 October 2005] paras 330–2). At the same time, tribunals have indicated that there are outer limits to nationality planning (*Banro American Resources Inc v Democratic Republic of the Congo* [Award of 1 September 2000]; *Phoenix Action Ltd v Czech Republic* [Award of 15 April 2009] paras 135–45). In order to counteract such practices, some treaties go beyond formal requirements and require a bond of economic substance between the corporate investor and the State whose nationality it claims. Other treaties contain so-called 'denial of benefit clauses'. Under such a clause the States reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the State on whose nationality it relies (Art. 17 (1) ECT; *Plama v Bulgaria* [Decision on Jurisdiction 8 February 2005] paras. 143–78).
- 34 Under the ICSID Convention, nationals of the host State are excluded from international protection even if they also hold the nationality of another State (*Champion Trading v Egypt* [Decision on Jurisdiction of 21 October 2003] 282). On the other hand, host States often require that investments be made through locally incorporated companies. In order to afford protection to investments made through subsidiaries in the host State, Art. 25 (2) (b) ICSID Convention provides that locally incorporated but foreign controlled companies may be treated as foreign nationals on the basis of an agreement.
- 35 Investments often take place through the acquisition of shares in a company that has a nationality different from that of the investor. In the → *Barcelona Traction Case*, the →

*International Court of Justice (ICJ)* held, on the basis of customary international law, that the State of the nationality of the shareholders controlling a company that is incorporated in another State may not exercise → *diplomatic protection* for damage done to the company (see *Ahmadou Siado Diallo [Republic of Guinea v Democratic Republic of Congo]* decided by the ICJ in 2007). Most investment treaties offer a solution that gives independent standing to shareholders: the treaties include shareholding or participation in a company in their definitions of ‘investment’. This means that the participation in the company becomes the investment and the foreign shareholder in the company becomes the investor. It may pursue claims for adverse action by the host State against the company that affects its value and profitability. In this way even foreign minority shareholders enjoy the protection of the treaty (*CMS Gas Transmission Company v The Republic of Argentina [Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003]* paras 43–65).

## **2. Investments**

- 36 The concept of an ‘investment’ is not clearly established. It may involve the use of capital, technical and managerial skills, patents and other intellectual property as well as a variety of other assets. Activities that have been accepted as investments include mining operations, the construction and operation of hotels, banking, infrastructure projects, provision of various services, civil engineering and construction projects, shareholding as well as financial instruments including loans. International investment law does not distinguish generally between direct investments and portfolio investments.
- 37 Tribunals have held that when establishing the existence of an investment, they had to proceed from the general unity of an investment operation. Since an investment is frequently a complex operation composed of various interrelated transactions, what matters is not a specific transaction but the overall operation (*Ceskoslovenska Obchodni Banka, AS v Slovak Republic [Decision on Objections on Jurisdiction of 24 May 1999]* para. 72).
- 38 Most BITs, as well as NAFTA and the ECT, contain general definitions of the term ‘investment’ which are extremely broad. They often refer to ‘every kind of asset’ followed by a list of examples that includes movable and immovable property, shares and other participation in companies, claims to money or to any performance having a financial value, intellectual property rights, know-how and business concessions.
- 39 The ICSID Convention establishes in Art. 25 (1) the existence of a ‘legal dispute arising directly out of an investment’ as a jurisdictional requirement but does not offer a definition of the term ‘investment’. Tribunals have developed a list of criteria that they have accepted as features or even definitional elements of an investment. These criteria are: (a) a certain duration; (b) the assumption of risk; (c) a substantial commitment; and (d) significance for the host State’s development. These criteria are generally referred to as the ‘*Salini* test’, named after one of the first cases in which they were applied. The tendency of some tribunals to apply these criteria as a test for the existence of an investment and hence as jurisdictional requirements has been criticized by other tribunals and by observers.
- 40 Where a case involves the application of a BIT containing a definition as well as the ICSID Convention, tribunals have adopted the ‘double keyhole approach’: an operation had to meet both the definition contained in the treaty and the definitional criteria developed for purposes of the ICSID Convention (*Noble Energy Inc v Ecuador [Decision on Jurisdiction 5 March 2008]* paras 125–42).

- 41 Negotiations for the purpose of reaching an investment contract which remain unsuccessful have been held not to constitute an investment. Expenditures incurred in the course of such negotiations are not actionable (*Mihaly v Sri Lanka [Award of 15 March 2002]* paras 60–1).

#### **D. Admission of Investments**

- 42 Under customary international law, States are under no obligation to admit foreign investments. A State is free to exclude foreign investment altogether or to admit it in certain sectors or regions only. It is also free to admit investments subject to prescribed conditions and procedures.
- 43 Treaties concluded by European countries do not grant a right of admission. Investments are to be admitted in accordance with the host State's legislation. The host State retains the freedom to revise its laws on admission even after the investment treaty has entered into force. Treaties of this type will often contain 'soft' obligations providing for encouragement and promotion of investments. Whether a most-favoured-nation clause in such a treaty extends to matters of admission will depend primarily on the wording of the clause. The ECT follows this model, although it envisages a supplementary treaty that would grant a right to admission (Art. 10 (1)–(4)).
- 44 The US, as well as Canada and Japan, have adopted a different admission policy in their investment treaties. They have negotiated treaty provisions which, to some extent, grant a right of access to foreign investments. Under these treaties, national treatment and most-favoured-nation clauses typically extend to matters of admission. However, admission provisions of this type are nearly always subject to far-reaching exceptions and limitations. One approach is to identify the sectors that are open to the investors of the other party (positive list). The other is to identify the sectors that are closed (negative list). NAFTA follows this model (see Arts 1102, 1103).
- 45 Some host States impose performance requirements upon foreign investors. These include export requirements, local contents requirements, trade balancing requirements, transfer of technology requirements, local processing requirements and capitalization requirements. Performance requirements are often seen as undesirable and are prohibited under some treaties, especially those concluded by the US and Canada (Art. 8 United States Model BIT of 2004; Art. 1106 NAFTA). The annex to TRIMS also contains a prohibition of certain performance requirements.
- 46 Many investment treaties provide that they cover investments made 'in accordance with the laws' of the host State. Sometimes, the requirement of compliance of the investment with domestic laws is part of the definition of 'investment'. Sometimes it is found in other parts of the treaty. The requirement that the investment must be made in accordance with host State law relates not just to the laws on admission and establishment, but also to other rules of the domestic legal order. Investments made in violation of domestic rules may be outside the substantive guarantees of the treaty. But this consequence depends upon the nature and gravity of the violation. A minor error of a procedural nature will not render the entire investment illegal (*Tokios Tokeles v Ukraine [Decision on Jurisdiction of 29 April 2004 and Dissenting Opinion of President Prosper Weil]* paras 83–6).
- 47 Investment tribunals have decided repeatedly that investments brought about by illegal means will not enjoy the protection of the law. This applied where the investor had presented false information about its financial condition and about its experience and ability (*Inceysa Vallisoletana SL v El Salvador [Award of 2 August 2006]* paras 184–264). Bribery of the host State's head of State in bringing about an investment contract



prevented the claimant from complaining about the violation of the contract (*World Duty Free Company Ltd v Kenya [Award of 4 October 2006]* paras 128–88). Arrangements to circumvent restrictions under the local law on shareholding and management of public utility enterprises by foreigners meant that there was no investment ‘in accordance with law’ under the applicable BIT. This meant that the tribunal had no jurisdiction (*Fraport v Philippines [Award of 16 August 2007]* paras 300–404). Fraudulent misrepresentation about the identity of the investor precluded the application of the protections under the ECT, despite the fact that the ECT does not contain an explicit provision requiring the conformity of the investment with host State law (*Plama v Bulgaria [Award of 27 August 2008]* paras 96–146). In one case, the tribunal found that the attempt to channel a domestic investment through a foreign registered company after a dispute had arisen, for the sole purpose of gaining access to international arbitration was an abuse of rights (*Phoenix Action Ltd v Czech Republic [Award of 15 April 2009]* paras 135–45).

## **E. Standards of Protection**

- 48 Treaties for the protection of investments, especially BITs, typically provide for certain standards of protection. These standards are FET, full protection and security, protection against arbitrary and discriminatory treatment, national treatment and most-favoured-nation treatment. These standards may be found in most investment protection treaties.
- 49 Some tribunals have regarded some of these standards as being closely interrelated. In fact, FET was at times seen as an overarching standard that embraced the other standards. The better view, subscribed to by a majority of tribunals, is to see the standards as analytically distinct even though there may be a certain degree of overlap among them (*Plama v Bulgaria [Award of 27 August 2008]* paras 161–3, 183–4).

### **1. Fair and Equitable Treatment**

- 50 → *Fair and equitable treatment* (‘FET’) has become the most important standard in investment disputes. The FET standard is designed as a rule of international law and is not determined by the laws of the host State. The FET standard may be violated even if the foreign investor receives the same treatment as investors of the host State’s nationality. For the same reason, an investor may have been treated unfairly and inequitably even if it is unable to benefit from a most-favoured-nation clause because it cannot show that investors of other nationalities have received better treatment.
- 51 It is possible to identify typical fact situations to which the standard of FET has been applied by investment tribunals. On the basis of these fact situations certain principles have evolved which may be described as transparency, consistency, stability and protection of the investor’s legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in → *good faith (bona fide)* and freedom from coercion and harassment. These categories by no means exhaust the possibilities of the FET standard.

### **2. Full Protection and Security**

- 52 Most investment treaties contain clauses promising ‘full protection and security’ although the exact wording may vary. Some treaties refer to ‘constant protection and security’ or to ‘security and protection’. These clauses suggest that the host State is under an obligation to take active measures to protect the investment from adverse effects. The duty to grant

physical protection and security may operate in relation to encroachments by State organs (*Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka [Award and Dissenting Opinion]* paras 45–53, 78) or in relation to private acts (*Wena Hotels Ltd v Arab Republic of Egypt [Award of 8 December 2000]* para. 84).

- 53 Traditionally, the primary purpose of this standard was to protect the investor against physical violence, including the invasion of the premises of the investment. But there is also authority that indicates that the principle of full protection and security reaches beyond safeguards from physical violence and requires legal protection for the investor (→ *Elettronica Sicula Case*). In fact, some treaties specifically refer to protection and legal security (see eg Art. 4 (1) Treaty between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investment).
- 54 Case law also supports the view that the formula ‘full protection and security’ covers not only protection against violence but also provides protection against infringements of the investor’s rights (*Azurix Corp v Argentina [Award of 14 July 2006]* paras 406–8). The standard may be violated by a change of the legal framework that renders the investor vulnerable to adverse action by private persons (*CME v Czech Republic [Partial Award of 13 September 2001]* para. 613). At a minimum, the standard guarantees access to the host State’s judicial system (*Lauder v Czech Republic [Award of 3 September 2001]* para. 314).
- 55 The standard does not provide an absolute protection against physical or legal infringement. In terms of the law of State responsibility, the host State is not placed under a strict liability to prevent such violations. Rather, it is generally accepted that the host State will have to exercise → *due diligence* and will have to take such measures protecting the foreign investment as are reasonable under the circumstances (*Noble Ventures Inc v Romania [Award of 12 October 2005]* para. 164). Whenever State organs themselves act in violation of the standard, no issues of attribution or due diligence will arise because the State will then be directly responsible.
- 56 Some treaty provisions on protection and security tie the standard to general international law (‘full protection and security in accordance with international law’). Other treaties refer to protection and security as an independent standard. To clarify the issue for the purposes of NAFTA, the three parties have stated in a note of interpretation that not only the standard of fair and equitable treatment, but also the provision on full protection and security in Art. 1105 (1) NAFTA, merely reflects customary law.

### **3. Protection against Arbitrary or Discriminatory Measures**

- 57 Many investment treaties offer protection against arbitrary or discriminatory measures. The precise wording varies between ‘arbitrary or discriminatory’, ‘unjustified or discriminatory’ and ‘unreasonable or discriminatory’. The ECT provides the standard in Art. 10 (1). NAFTA does not have a separate provision containing this standard.
- 58 The words ‘arbitrary’ and ‘discriminatory’ are typically separated by the word ‘or’. Therefore, in order to violate these standards, a particular measure need not be arbitrary as well as discriminatory (*Azurix Corp v Argentina [Award of 14 July 2006]* para. 391).
- 59 In the *Elettronica Sicula Case*, the ICJ gave an often cited definition of the term ‘arbitrary’: ‘Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety’ (at para. 128).
- 60 Investment tribunals have held host State action to be arbitrary if it inflicts damage on the investor without serving any apparent legitimate purpose. The decisive criterion for the

determination of the unreasonable or arbitrary nature of a measure harming the investor would be whether it can be justified in terms of rational reasons that are related to the facts (*Lauder v Czech Republic [Award of 3 September 2001]* paras 221, 232, 270). Arbitrariness would be absent if the measure is a reasonable and proportionate reaction to objectively verifiable circumstances (*LG & E Energy Corp, LG & E Capital Corp and LG&E International Inc v Argentine Republic [Decision on Liability]* para. 158; ‘*LG & E Case*’). Similarly, a measure is arbitrary if it is not based on legal standards but on discretion, prejudice or personal preference (*Azurix Corp v Argentina [Award of 14 July 2006]* paras 392, 393). The same applies to a measure taken for reasons that are different from those put forward by the decision maker. This conclusion applies, in particular, where a public interest is put forward as a pretext to take measures that are designed to harm the investor (*CME v Czech Republic [Partial Award of 13 September 2001]* para. 612).

- 61 The relevance of an adverse intention on the part of the host State is not clear. In one case the tribunal found that the clause had been violated in light of an intention to deprive the investor of its rights (*CME v Czech Republic [Partial Award of 13 September 2001]* para. 612). In another case, the tribunal determined that the standard was violated because of the ‘very confusion and lack of clarity that resulted in some form of arbitrariness, even if not intended...’ (*Occidental Exploration and Production Company v Republic of Ecuador [Final Award of 1 July 2004]* para. 163).
- 62 In *Siemens AG v Argentina (Award of 6 February 2007)*, the tribunal attempted a comprehensive definition of the term ‘arbitrary’. It said: In its ordinary meaning, ‘arbitrary’ means ‘derived from mere opinion’, ‘capricious’, ‘unrestrained’, ‘despotic’. Black’s Law Dictionary defines this term as ‘fixed or done capriciously or at pleasure; without adequate determining principle’, ‘depending on the will alone’, ‘without cause based upon the law’. The tribunal considers that the definition in the *Elettronica Sicula Case* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the wilful disregard of the law (*Siemens AG v Argentina [Award of 6 February 2007]* para. 318).
- 63 In a number of cases, tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the FET standard. This tendency is particularly pronounced with tribunals applying NAFTA, which does not contain a separate provision on arbitrary or discriminatory treatment (*Waste Management Inc v United Mexican States [Award of 30 April 2004]* para. 98). But even tribunals applying treaties that offered FET, as well as protection from arbitrary or discriminatory measures, did not always distinguish between the two standards (*Saluka v Czech Republic [Partial Award of 17 March 2006]* para. 460). Other tribunals stressed the difference between the two standards (*LG & E Case* paras 162–3).
- 64 Discrimination can take many forms. In the context of the treatment of foreign investment, the most frequent problem is discrimination on the basis of nationality. Not every differential treatment on the basis of nationality is illegal under general international law (*Genin v Estonia [Award of 25 June 2001]* para. 368) but most BITs contain specific standards of non-discrimination. These are contained in provisions that guarantee national treatment and in most-favoured-nation clauses. These two standards are often combined in one provision.
- 65 A finding of discrimination is independent of a violation of domestic law. Domestic law may be the cause for a violation of the international standard (*Lauder v Czech Republic [Award of 3 September 2001]* para. 220).

- 66 Tribunals have held that what mattered was the discriminatory effect of a measure (*Siemens AG v Argentina [Award of 6 February 2007]* para. 321), although discriminatory intent is not entirely irrelevant (*LG & E Case* paras 146, 148).

#### **4. National Treatment**

- 67 The national treatment principle (→ *National Treatment, Principle*) is embodied in most bilateral investment treaties. It is also reflected in Art. 10 (3) and (7) ECT and in Art. 1102 NAFTA. Essentially, it provides that the foreign investor and its investment are to be treated no less favourably than a national of the host State. A better treatment of the foreign investor remains possible and will even be required if the international standards are higher than the ones applying to nationals.
- 68 Most national treatment clauses apply only once a business is established (post-entry national treatment). Some investment treaties, especially those concluded by the US and Canada, also include provisions concerning a right of access to a national market on the basis of national treatment (pre-entry national treatment). While most national treatment clauses are similar, their practical implications differ due to more or less wide ranging exemptions of certain business sectors.
- 69 In this context, US treaties, including NAFTA, refer to ‘a like situation’ or to ‘like circumstances’. The tribunal in *Pope & Talbot Inc v Canada (Award on the Merits of Phase 2 of 10 April 2001)*, interpreting Art. 1102 NAFTA said with respect to the basis for comparison:
- In evaluating the implications of the legal context, the Tribunal believes that as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector. However, that first step is not the last one. Differences in treatment will presumptively violate Article 1102(2) unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA (para. 78).
- 70 In the context of finding the appropriate basis of comparison or ‘like circumstances’, some investment tribunals have found the practice developed in the framework of the → *General Agreement on Tariffs and Trade (1947 and 1994)* ([adopted 30 October 1947, entered into force 1 January 1948] 55 UNTS 187; [adopted 15 April 1994, entered into force 1 January 1995] 1867 UNTS 190) and the WTO (Marrakesh Agreement Establishing the World Trade Organization [adopted 15 April 1994, entered into force 1 January 1995] 1867 UNTS 154) of limited relevance (*Methanex Corp v United States [Final Award of the Tribunal on Jurisdiction and Merits]* part IV chapter B paras 25–37). Other tribunals have found it ‘highly relevant’ (*Corn Products v United Mexican States [Decision on Responsibility of 15 January 2008]* para. 122).

#### **5. Most-Favoured-Nation Treatment**

- 71 Most-favoured-nation (‘MFN’) treatment is not required under customary law. But a → *most-favoured-nation clause* is contained in virtually every bilateral investment treaty. It is also reflected in Art. 10 (3) and (7) ECT and in Art. 1103 NAFTA. The purpose of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. The standard is relative and depends on the benefits enjoyed by third States and their nationals. As soon as the State confers a

relevant benefit, it is automatically extended to the State in whose favour the MFN clause operates.

- 72 An MFN clause applies subject to the *ejusdem generis* principle, that is, in relation to all matters that fall within the scope of the treaty containing the MFN rule. The exact scope of an MFN clause will be determined by the wording of the clause, and the precise benefit granted will depend upon the right granted to the third State.
- 73 MFN clauses contained in investment treaties vary. Some refer to ‘treatment’ that must not be less favourable than that accorded to investors of third States. Other treaties refer to ‘all matters subject to this agreement’. Yet other treaties specify the articles of the treaty to which the MFN clause is to apply (Art 3 (3) UK Model BIT). Some treaties exclude the applicability of MFN clauses from certain areas (customs unions, free trade areas, economic communities).
- 74 The application of MFN clauses to substantive standards has been relatively uncontroversial. Tribunals have held that MFN clauses would attract the application of a fair and equitable treatment clause in a third party treaty (*Bayindir v Pakistan* [Decision on Jurisdiction of 14 November 2005] paras 231–2) and a more favourable standard for the determination of compensation (*CME v Czech Republic* [Final Award of 14 March 2003] para. 500).
- 75 A larger group of cases deals with the applicability of MFN clauses not to substantive guarantees but to dispute settlement. Opinions on this issue are sharply divided. Some tribunals have excluded the applicability of a generally worded MFN clause to dispute settlement (*Plama v Bulgaria* [Decision on Jurisdiction 8 February 2005] paras 183–227). Other tribunals have allowed the transfer of provisions on dispute settlement from other treaties on the basis of an MFN clause (*RosInvestCo UK Ltd v Russian Federation* [Arbitral Award on Jurisdiction of October 2007] paras 124–39). A number of tribunals have held that it was possible, on the basis of MFN clauses, to overcome the treaty requirement of first litigating the dispute in domestic courts for a period of 18 months (*Maffezini v Kingdom of Spain* [Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000] paras 38–64 [→ *Maffezini v Spain Case*]; but see *Wintershall AG v Argentina* [Award of 8 December 2008] paras 158–97).

## 6. Transfers

- 76 Nearly all bilateral investment treaties contain rules on the transfer of funds. These rules deal with the investor’s right to make transfers, the types of payment allowed, with convertibility and exchange rates and with limitations on the free transfer. Clauses of this kind are also contained in Art. 14 ECT and in Art. 1109 NAFTA.
- 77 Treaties differ on whether the right to transfer funds concerns only the transfer out of the host country or also inward transfers. Most treaties cover both, but some treaties only address outward payments. Whenever transfers are allowed in general terms, such as ‘in relation to investments’, both directions of transfers are covered.
- 78 Practically no treaty grants an absolute right to investors to make transfers. Some treaties state that the rights guaranteed to the investor are ‘subject to the laws’ of the host State. For the investor such a restriction substantially reduces the value of the right to transfer, especially since the national laws of the host State may be revised in the future. The right to transfer is sometimes limited to certain types of transfers.
- 79 Most treaties state that the investor has the right to carry out the transfer in a freely convertible currency, that the transfer takes place at the official rate of exchange of the

host State on the date of the transfer and that the transfer will be authorized ‘without delay’, ‘without undue delay’, or that the procedures are carried out ‘expeditiously’.

### **7. Umbrella Clauses**

- 80 An umbrella clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed by the host State with respect to investments. Contracts and other obligations are put under the treaty’s protective umbrella. Many, but by no means all, bilateral investment treaties contain clauses of this kind. The exact wording of these clauses varies. The ECT contains a clause of this type in the last sentence of Art. 10 (1) providing: ‘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’. This clause is not found in NAFTA.
- 81 The most contentious issue in relation to umbrella clauses is to what extent and under what circumstances they place contracts between the host State and the investor under the treaty’s protection. Tribunals are sharply divided on this point. Some tribunals have held that such a clause ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments’ (*SGS Société Générale de Surveillance SA v Republic of the Philippines [Decision on Objections to Jurisdiction of 29 January 2004]* para. 128). Other tribunals have sought to minimize the meaning of umbrella clauses (*SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan [Decision on Objections to Jurisdiction of 6 August 2003]* paras 163–73). Some tribunals have sought a compromise position by holding that an umbrella clause will only bind a State with respect to sovereign contracts but not with respect to commercial contracts (*El Paso Energy v Argentina [Decision on Jurisdiction of 27 April 2006]* paras 66–88), a distinction rejected by other tribunals (*Siemens AG v Argentina [Award of 6 February 2007]* para. 206). Another attempted distinction is between mere commercial breaches and significant government interference (*CMS Gas Transmission Co v Republic of Argentina [Award of 12 May 2005]* para. 299).
- 82 Some tribunals have required privity for the application of the umbrella clause: if the contract in question is not with the State itself but with a State entity or a province, the umbrella clause may be of no avail (*Impregilo SpA v Islamic Republic of Pakistan [Decision on Jurisdiction of 22 April 2005]* para. 223; but see *Noble Ventures Inc v Romania [Award of 12 October 2005]* para. 86). Similarly, a contract entered into with the State, not by the foreign investor itself but by its local subsidiary, may not be covered (*CMS v Argentina [Decision on Annulment of 25 September 2007]* paras 86–100; but see *Continental Casualty v Argentina [Award of 5 September 2008]* para. 297).
- 83 Some tribunals have held that the ‘obligations entered into’ by host States were not restricted to contracts. Commitments made by way of laws and regulations may also give rise to liability under an umbrella clause (*Enron Corp and Ponderosa Assets LP v Argentina [Award of 22 May 2007]* paras 274–77).

### **F. Expropriation**

- 84 Protection against uncompensated expropriation is a cornerstone of international investment law (→ *Property, Right to, International Protection*). Provisions addressing direct and indirect expropriation are contained in virtually all modern bilateral investment

treaties. The ECT deals with expropriation in Art. 13. NAFTA addresses expropriation in Art. 1110.

- 85 Although protection against expropriation is still invoked in many investment cases, its central position in international investment law has faded. Several factors are responsible for this development.
- 86 Tribunals tend to recognize expropriations only where the deprivation is total or substantial. Even a grave interference will not amount to an expropriation if it leaves a measure of control in the hands of the investor (*LG & E Case* paras 188, 191).
- 87 Tribunals give increasing weight to the ‘police powers’ of host States. Under this doctrine, legitimate regulations affecting foreign investors will not amount to expropriation. The tribunal in *Methanex Corp v United States (Final Award of the Tribunal on Jurisdiction and Merits)* said in this respect:  
 [A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor ... (at 1456).
- 88 In a similar way, the United States Model BIT of 2004 in Annex B states that except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect public welfare objectives do not constitute indirect expropriations.
- 89 Standards of protection contained in treaties, especially fair and equitable treatment, have assumed the central role once held by protection against expropriation. These standards tend to be more flexible and offer a higher likelihood of success to the foreign investor in litigation before an international tribunal.

## G. Necessity

- 90 Necessity may preclude the wrongfulness of a State’s acts under customary international law (→ *Necessity, State of*). It is widely accepted that Art. 25 of the UN International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd session in 2001 (‘2001 ILC Articles’) reflects customary international law (→ *International Law Commission [ILC]*; → *Gabčíkovo-Nagymaros Case [Hungary/Slovakia]* para 102; → *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]* [(2004) ICJ Rep 136] para. 140).
- 91 Some bilateral investment treaties, especially those of the US, contain clauses on necessity. Art. XI Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (‘US–Argentine BIT’) provides:  
 This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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.
- 92 Many treaties require most-favoured-nation treatment and national treatment to compensation schemes adopted by the host State to deal with the consequences of armed conflict or other violent emergency.
- 93 Both the rule of customary international law, reflected in Art. 25 2001 ILC Articles, and Art. XI US–Argentine BIT were applied in a number of cases related to the economic emergency in Argentina in the years 2001 to 2003. In the majority of these cases the tribunals reached the conclusion that the requirements for a finding of necessity were not met since the measures taken by Argentina were not the only way to cope with the

situation and Argentina itself had contributed to the situation (*CMS Gas Transmission Co v Republic of Argentina [Award of 12 May 2005]* paras 315-378). In at least one case Argentina's plea of necessity was accepted on a different reading of the facts (*LG & E Case* paras 201–66). The tribunals also disagreed on whether the investor was entitled to compensation for losses incurred during any period of necessity.

- 94 Tribunals were agreed that the rules on necessity were not self-judging. The determination of the existence of necessity was not left to the host State's unilateral decision but was ultimately with the tribunal (*Continental Casualty v Argentina [Award of 5 September 2008]* paras 182–8).
- 95 The relationship of the customary rule on necessity, as reflected in Art. 25 2001 ILC Articles, to the rule on necessity in the BIT, is also the subject of some disagreement. Some tribunals have held that the two rules were different in structure and that compliance with them had to be examined separately (*CMS v Argentina [Decision on Annulment of 25 September 2007]* paras 128–36). Other tribunals have held that the treaty provision was inseparable from the customary international law standard and had to be interpreted with its help (*Sempra Energy International v Argentina [Award of 28 September 2007]* paras 376–78).

## H. State Responsibility and Attribution

### 1. State Organs

- 96 Under customary international law governing State responsibility, a State is responsible for all its organs. This principle applies to organs at all levels and regardless of the position of the organ in the State's administrative organization. This principle of attribution is set out in Art. 4 2001 ILC Articles. Investment tribunals have followed this principle of responsibility for all State organs and have applied it to the relationship of States with foreign investors (*CMS Gas Transmission Company v The Republic of Argentina [Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003]* para. 108).

### 2. Provinces and Municipalities

- 97 Under Art. 4 2001 ILC Articles the State is also responsible for its territorial units such as provinces and municipalities. Some treaties for the protection of investments specifically state that they apply to the political subdivisions of the parties. Art. XIII US–Argentine BIT provides: 'This Treaty shall apply to the political subdivisions of the Parties'. Art. 23 (1) ECT contains a provision on the observance of the treaty by sub-national authorities:  
Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.
- 98 Investment tribunals have consistently applied the rule that the central government is responsible for the acts of its territorial units (*Compañía de Aguas del Aconquija, SA. & Compagnie Générale des Eaux/Vivendi Universal v Argentina [Award of 21 November 2000]* para. 49). Tribunals have applied this rule also to municipalities (*Metalclad Corporation v United Mexican States [Award of 30 August 2000]* para. 73).



### 3. State Entities

- 99 Many States have set up special entities for the purpose of dealing with foreign investors or to administer aspects of the local economy in which foreign investors become active. This has raised issues of attribution of the acts of these entities to the State. Host States have typically argued that acts by entities with separate legal personality cannot be attributed to the State.
- 100 In principle, State entities are separate and their acts will not be attributed to the State (*Jan de Nul NV and Dredging International NV v Egypt [Award of 6 November 2008]* paras 142–74). However, several exceptions qualify this principle: the separation will not be respected if the corporate veil has been created as a means for fraud and evasion. Also, conduct will be attributed to the State in cases where the corporation exercises public power (*Toto Costruzioni Generali SpA v Lebanon [Decision on Jurisdiction 11 September 2009]* paras 43–60). Another exception concerns a situation of ownership by the State where control is exercised in order to achieve a particular result (*EDF [Services] Ltd v Romania [Award of 8 October 2009]* paras 185–213, 260, 269, 275).
- 101 For the most part, these questions are regulated in customary international law. Exceptionally, there are provisions in treaties that provide for the responsibility of States for an action by their entities. Art. 22 Energy Charter Treaty provides for special legal obligations of each State in regard to activities on the part of State enterprises. At times, bilateral investment treaties also provide for obligations of the State with respect to their entities (*Genin v Estonia [Award of 25 June 2001]* para. 327).
- 102 The relevant rules of attribution are reflected in Arts 5 and 8 2001 ILC Articles.

### I. Investment Insurance

- 103 A number of countries provide government sponsored insurance for investments to cover political risks. In the US this task is carried out by the Overseas Private Investment Corporation ('OPIC'). Some of the national programmes are subsidized, such as the German one, while others such as OPIC are self-financing.
- 104 A number of private insurers also offer insurance coverage for certain investments. In 1985 the Member States of the World Bank decided to establish an international organization, the MIGA, for the same purpose. In addition, there are several institutions that provide investment insurance on the regional level, such as the Inter-Arab Investment Guarantee Corporation.
- 105 Covered risks are usually expropriation, non-convertibility of currency and political violence. Government sponsored insurance schemes offer coverage for up to twenty years. Private companies typically offer protection for much shorter periods. Some government agencies, notably OPIC, co-operate with the private sector by way of co-insurance and reinsurance.
- 106 Government insurers typically conclude agreements with host countries that provide for subrogation. This means that the investor's rights against the host country are assigned to the insurer upon payment under the insurance contract. Some countries such as Germany include clauses to this effect in BITs, whereas others, such as the US, conclude specific agreements for this purpose. In Germany governmental insurance will only be granted for investments in countries that have concluded a BIT with Germany or in which a similar degree of legal security exists.
- 107 MIGA insures an investment only if it satisfies its understanding of economic soundness and has received host country approval. The rules of MIGA do not, however, require

specific standards of protection of foreign investment in the host country. This is because MIGA only insures risk in countries where there is a bilateral agreement between MIGA and the host government.

- 108 Insurance contracts typically provide for arbitration in case of disputes arising from the contract.

## J. Dispute Settlement

- 109 From the investor's perspective, the most important aspect of the international protection of investments is the settlement of → *investment disputes*. The traditional method for the settlement of disputes between States and foreign investors is resort to domestic courts followed by diplomatic protection after the exhaustion of local remedies (→ *Local Remedies, Exhaustion of*).
- 110 The unsatisfactory character of the traditional mechanism has led to the widespread acceptance of arbitration between the foreign investor and the host State. A major part of investment arbitration takes place in the framework of the → *International Centre for Settlement of Investment Disputes (ICSID)*. In addition, there is ad hoc arbitration, often under the arbitration rules adopted by the → *United Nations Commission on International Trade Law (UNCITRAL)*.
- 111 Under the international law of State responsibility, reparation for a wrongful act takes the forms of restitution, compensation, or satisfaction. In investment arbitration, the remedy nearly always consists of monetary compensation. Satisfaction does not play a practical role. Restitution in kind is rarely ordered although a tribunal has the power to do so (*Enron Corp and Ponderosa Assets LP v Argentina [Decision on Jurisdiction 14 January 2004]* paras 76–81; *Micula v Romania [Decision on Jurisdiction and Admissibility of 24 September 2008]* paras 158–68).

## K. Conclusions

- 112 International investment law is currently one of the most vibrant areas of international law generating numerous arbitral decisions which deal with diverse legal issues. The burst of activity since the late 1990s has its roots primarily in the large number of investment treaties offering investors direct access to international arbitration. The practice of international investment tribunals is making a valuable contribution to the development of international law in a variety of areas.
- 113 The standards of protection offered by investment treaties and the possibility of their enforcement through investor-State arbitration have improved the legal position of investors considerably. If and to what extent this improvement actually translates into an increase of investment activity and contributes to economic development is the object of some debate.
- 114 Host States have regarded activities in this field with mixed feelings. The divide between capital exporting and capital importing countries has become blurred. For some countries investment treaties and the resulting lawsuits before investment tribunals have become a source of irritation. The enthusiasm for investor protection is no longer unqualified.
- 115 The multiplicity of differently composed investment tribunals has made the development of a coherent and consistent case law difficult. Different tendencies in the practice of tribunals make the outcome of lawsuits hard to predict.
- 116 These developments are leading to a debate about a new architecture for the international protection of investments. Some of the new tendencies point to a more cautious

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interpretation of the substantive standards. More dramatic steps are under discussion in the area of dispute settlement. These range from a return to the traditional method of diplomatic protection and State v State dispute settlement at one extreme to the creation of a court for international investment with general access by investors.

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