# What are the Means for Ensuring Fair Treatment for Foreign Investors?

Dağhan Güran*

**ABSTRACT**

The investments made by the foreign investors are crucial for economic development. In order to attract foreign investors, they must feel safe enough to be brave enough to invest their resources into another state's territory. How can that be achieved? In the first part of this piece of work, a brief introduction will be made to the international investment treaties in terms of how they emerged and how they are formed in today's world. After such an explanation, the international investment treaty models, such as bilateral investment treaties and multilateral investment treaties, will be examined in order to make sense of the latter part. After covering what those treaties are, this essay will focus on its main point, which is standards of protection of foreign investments. In the standards of protection, this part of this work will aim to describe what is meant by national treatment, most-favoured nation treatment, fair and equitable treatment, full security and protection, umbrella clauses, expropriation and compensation, and lastly, dispute settlement. Then, this essay will conclude that even though there are debates on whether the form of these measures might be up for debate, they still offer considerable protection to the investors while balancing the public welfare of the host state.

**Keywords:** *Foreign investors, bilateral investment agreements, international investment, fair-treatment, international economic law*

* PhD student, Bahçeşehir Cyprus University, daghangg1905@gmail.com

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## I. PRELIMINARY CONSIDERATIONS

In the ancient times, the people from the other countries were seen as outsiders and aliens, so they did not have the legal rights of the nationals in that particular territory. However, the status of the aliens improved significantly over the years.[1] In 1758, Emmerich de Vattel examined the legal status of foreigners in 'Law of Nations'. By doing so, he laid the groundwork for the principle of diplomatic protection. Mistreating a foreigner or their property would be understood as an injury made to the foreigner's home nation.[2] Later in the 17th century, there were further crucial improvements, such as the Peace of Westphalia in 1648, which formed the concept of sovereign states. This treaty did not only end the long war, but it also acknowledged the non-interference principle with the internal works of the states.[3] As there were different states, the rules on how to deal with each other states emerged more sophisticatedly. Even though the international law in the 17th century had been shaped mainly by colonialism, it is a great starting point for understanding the early emergence of International Investment Agreements (IIAs). The European countries were acting on their economic interests overseas, so even if we cannot state that they were foreign investors in the strict sense, these actions could be viewed as investment in a colonial context. However, at that time those economic actions were completely indicative of double standards, as the rights of the colonised people were overlooked at the expense of the economic gain of the powerful countries. The decrease of colonisation and promotion of free trade enhanced the opportunities for investments overseas on more equal grounds for both the investors and the invested parties.[4] In early times, customary law was used mainly to deal with trade matters. Customary law refers to established practice of states with opinio juris (a sense of obligation to act in a way). Customary law has offered many groundworks that are still essential today, such as state immunity, the 'minimum standard' treatment, and diplomatic protection. These provisions still carry so much importance in international investment law today, and these standards are embedded within the treaties that are still used today. Traditionally, FCN

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[1] (Historical origins of international ...) <https://www.itd.or.th/wp-content/uploads/2019/09/Annex-02-A.-Newcombe-et-al-pp-3-41-1.pdf> accessed 7 May 2024.

[2] The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Liberty Fund, 2008).

[3] Klabbers J. The setting of international law. In: International Law. Cambridge University Press; 2013:3-20.

[4] Herdegen M, Principles of International Economic Law (2nd edn, Oxford University Press 2016).

Treaties (Friendship, Commerce, and Navigation) were used as a source of investment provisions from approximately the 18th century to the 20th century. However, today, there are more sophisticated ways of articulating the international investment agreements. Treaties dominate modern international investment law even though they might mainly reflect or clarify the standards set by the customary law years ago.[5] These are introduced below.

**a. Bilateral Investment Treaties (BITs):**

BITs involve international agreements that establish the terms and conditions for investments in another country or territory. Those investments include those made by nationals as well as the companies. FCNs already promote a minimum standard on how to treat the foreign investors in the host country.[6] FCNs managed to encourage friendly relations and cooperation between the states, but BITs offer more influential measures, which could be viewed as investor-centric. That is why bilateral investment treaties became the standard of protection on a bilateral level, and FCNs are not as popular as they used to be. However, it is worth noting that FCNs still offer value, as the USA was noted to be involved in more than 60 FNCs until today.[7] Germany and Pakistan were the two parties that signed the initial BIT agreement, which they agreed on creating favourable conditions for investments that would be made by nationals or companies of either state in the territory of the other state. Since then, more than 3,000 BITs had been registered by the year of 2015.[8] BITs offer various protections to investors.[9]

Investors can be assured that they can benefit from the MFN or national treatment principles. How these principles are applied is articulated within the annexes or protocols in the treaties that the parties are agreed to be bound by. BITs help the parties to agree on clear boundaries on occasions such as when the foreign investment is being expropriated by the host government and how the foreign investors can pursue compensation in regard to host states actions. BITs can uphold these expropriations in accordance with international law standards. This would constitute a lawful expropriation that is for public purpose in a non-discriminatory manner, and the investor gets just compensation for the due process.

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[5] Ibid 4.
[6] 'Bilateral Investment Treaty' (Legal Information Institute) <https://www.law.cornell.edu/wex/bilateral_investment_treaty> accessed 9 May 2024.
[7] Herdegen (n 4).
[8] UNCTAD, World Investment Report 2016 (United Nations Publications 2016) 115.
[9] 'The Basics of Bilateral Investment Treaties' (Sidley Austin LLP) <https://www.sidley.com/en/us/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties/> accessed 13 May 2024.

'Expropriation' within the meaning of the BIT can extend beyond physical taking and can protect the investor in terms of. assuring the investor that the investment will be fully recovered proportionally in regard to its legitimate economic worth. Fair and equitable treatment, which is a non-discriminatory principle, is also acknowledged in BITs, and the investors can rely on that principle as well as the full protection and security principles to make sure that their investments will be protected. BITs also enable the foreign investors to transfer money more effortlessly as they will be granted the privilege to transfer funds freely. Moreover, another protection the foreign investors will enjoy is that the host state would not be able to hold any authority over their practices, which will push them to function inefficiently or distort the fair trade.

For instance, the host government cannot prevent the investors from purchasing foreign products by forcing them to purchase domestically produced products. Moreover, oftentimes the BIT protects the investors rights to engage the top managerial personnel; this allows the investor to choose their top managerial personnel regardless of nationality. BITs are lastly concerned with how investors and the host country solve disputes between each other, but this will be looked into in more detail in the later parts of this essay.

**b. Multilateral investment treaty (MIT):**

Unlike bilateral international agreements, which are between two parties, multilateral investment treaties involve the agreement made between several countries and containing provisions to encourage investments within each party's territories. The Energy Charter Treaty (ECT) can be a good example to indicate what MIT is; therefore, examining the purpose and aims of this treaty will be useful to understand the real meaning of this concept. ECT was developed to enhance energy cooperation by ensuring a multilateral framework in accordance with international law.[10] Signatories of the Energy Charter Treaty can enjoy their sovereignty over their energy resources while also being able to trade in more competitive energy markets to benefit from fairly investing in other territories.

Mainly, this treaty covers the non-discriminatory principles that were also ensured underneath the BITs, such as NT and MFN. It also guards the investors in case of non-commercial dangers. This treaty also protects investors from facing discriminatory actions or inactions within other signatory territories in energy-related materials, products, or

[10] (The Energy Charter Treaty, trade amendment ...) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download> accessed 13 May 2024.

equipment based on WTO rules. It also secures pipelines, grids, or any other transmission networks that are available within the invested territory in order to ensure the transit of energy flows reliably. In case of disputes, similar to BITs, MITs offer a structured framework in order to help solve problems between the investors and host states. Lastly, this treaty improves efficiency in the energy sector and aims to protect the environment by minimising the effects of energy production and use.[11]

There are also regional investment treaties that could be viewed as multilateral treaties. This type of investment treaty applies within a certain territory and usually constitutes a smaller group of parties. For instance, NAFTA, by the virtue of their Chapter 11 provisions, introduces the regulations of investment protections. It is also similar to other treaties in the sense that it relies on common values on trade, such as non-discriminatory principles, which were also protected by the other treaties.

## II. STANDARDS OF PROTECTION

For the purposes of this piece of work, the means of protections available to the foreign investors shall be explained. These following measures apply after an investment has been successfully made by a foreign investor, whether it is an individual, a group of individuals, or another entity that has a separate legal identity, into the host state territory. However, some treaties can broaden the scope of protection by involving pre-establishment periods to ensure that no discrimination will take place.

### a. National Treatment

This principle compels the host state to treat foreign investors on an equal footing with the domestic investors. Therefore, the foreign investors must not be treated less favourably than the investors who are from the host country. This standard involves investors as well as investments. This principle is highly involved in investment protection treaties but not in customary international law.[12] Briefly, the provision is based on non-discrimination of foreigners, and the precedents on that subject matter indicate that the provision prohibits de jure discrimination (by law and regulations) methods as well as de facto discrimination (which can be harder to detect) methods used by states. In this matter, it does not matter whether

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[11] 'Energy Charter Treaty - Energy Charter' (Delegates, 18 February 2019) <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> accessed 13 May 2024.

[12] Ivan, C. (2024), *National treatment*, *Jus Mundi.* Available at: https://jusmundi.com/en/document/publication/en-national-treatment (Accessed: 22 May 2024).

the actions taken were motivated by a discriminatory intent. This issue was examined in Siemens v. Argentine Republic, as the International Centre for Settlement of Investment Disputes (ICSID) cited that "intent is not decisive or essential for a finding of discrimination," and it further noted that in order to settle down the debate on whether a measure is discriminative or not, the focus point must be on "the impact of the measure on the investment."[13]

In the Bilateral Investment Treaty Model used by the US (2012), the national treatment was cited in Article 3 of the treaty as:

> "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[14]

In this treaty, the US upholds the criteria for likeness, which means that the foreign and domestic investors must be treated on a non-discriminatory basis in similar situations. So what does the term 'like' mean, and how can it be defined in order to improve certainty? In world trade law, the standard applied to products could be an easier concept to grasp, as by defining the nature of the products, it could be concluded whether they are like products or not. However, in terms of investment, the 'like circumstances' can be more complex. It is worth looking into the case of Occidental Exploration v. The Republic of Ecuador.[15] In this case, the claimant (an oil company in Ecuador) was under a contract with a state-owned oil company to extract and produce oil. The issue was that the national companies in the other sectors were receiving a refund of the Value Added Tax; however, Occidental was not receiving them because the Ecuadorian legislation prohibited such a refund for the claimant and other oil companies. Against this claim, Ecuador argued that this treatment is not intended to discriminate against foreign investors, as the legislation also included domestic producers in the oil industry. The tribunal concluded the case by stating that even though Ecuador's tax policy is not intended to grant more favourable treatment to one party, all of the exporters are situated in 'like' circumstances in terms of tax refund. Therefore, it was concluded that Ecuador violated its national treatment obligation. In this case, the claimant

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[13] Siemens AG v Argentine Republic, ICSID Case No ARB/02/8 (Award 2007) para 321.
[14] US Model Bilateral Investment Treaty (2012); Article 3 (1).
[15] Occidental Exploration and Production Co v The Republic of Ecuador, LCIA Case No UN 3467 (Final Award 2004).

(an oil company in Ecuador) was under a contract with a state-owned oil company to extract and produce oil. The issue was that the national companies in the other sectors were receiving a refund of the Value Added Tax; however, Occidental was not receiving them because the Ecuadorian legislation prohibited such a refund for the claimant and other oil companies. Against this claim, Ecuador argued that this treatment is not intended to discriminate against foreign investors, as the legislation also included domestic producers in the oil industry. The tribunal concluded the case by stating that even though Ecuador's tax policy is not intended to grant more favourable treatment to one party, all of the exporters are situated in 'like' circumstances in terms of tax refund. Therefore, it was concluded that Ecuador violated its national treatment obligation. Occidental case suggests that, when it comes to investment, the condition of likeness might not solely focus on the nature of the products or services produced within the meaning in WTO law; instead, the tribunal examined the situation in which the exporters were located to make a determination.

**b. Most-Favoured Nation Treatment (MFN)**

Previously, it was stated that the national treatment principle could be briefly viewed as a provision that prevents discriminatory measures between the national and foreign investors in the sense of investment law. The MFN principle could be argued to be a different variation of that rule, but MFN is not concerned with domestic actors; rather, it is focused on the treatment between different nations. That means a host state should not treat one foreign investor from a certain area less favourably than another investor from a different territory. Just as with national treatment, there needs to be the condition of likeness, and this provision applies de jure and de facto least favourable treatments.

In the Bilateral Investment Treaty Model used by the US (2012), the MFN principle was cited in Article 4 of the treaty as:

> "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory".[16]

Basically, the host state cannot discriminate against other states under the MFN rule, as it must provide the same provisions to the other countries in order to put them in the most favoured nation status. It must be worth noting that the limitations of this principle are

[16] US Model Bilateral Investment Treaty (2012); Article 4 (1).

customs unions, free-trade areas, and certain tax privileges. For instance, the European Union would be a good example of customs unions, and goods and products can move without any tariffs between the countries. A South American country cannot claim such benefits on the ground of the MFN principle. The MFN principle also does not apply if the agreement arises from highly specific negotiations, which makes the treaty a unique investment treaty. In the Tecmed case, the tribunal stated that, when the benefits linked with each other are very specific that they cannot be suitable for being applied to any other investment treaties, the MFN rule does not automatically apply.[17]

A controversial area where the MFN principle is involved is dispute settlement. In the case of Salini Construttori v. Jordan, an Italian company tried to rely on the MFN rule in order to grant a better dispute settlement process than the one between Italy and Jordan BIT.[18] The tribunal rejected this claim as the parties were agreed to exclude ICSID jurisdiction in contractual disputes, and within the agreement there was no connection of the MFN rule and dispute settlement procedures. According to the Italy v. Jordan BIT, the Tribunal had no jurisdiction on their claim, so Italy could not rely on the MFN principle. In Plama v Bulgaria, the tribunal stated that the parties must indicate a willingness to be bound by the MFN principle in dispute settlement in order to be applicable. [19] The tribunal, in the Maffezini v. Spain case, concluded that the dispute settlement provisions may be subject to MFN clauses in the exceptional cases. In the Maffezini v. Spain case, the Argentine-Spain BIT indicated that the parties were willing to involve the MFN rule in the dispute settlements between the parties. Argentina wanted to rely on a clause that was within the Chile-Spain BIT, which would enable Argentina to proceed with dispute arbitration, bypassing the Spanish court system as a first step. Briefly, the Tribunal stated that, as the parties were convincingly demonstrating their willingness to be bound by such a rule, the Argentine could rely on the favourable arrangement contained in the Chile-Spain BIT.[20]

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[17] Técnicas Medioambientales Tecmed SA v The United Mexican States, ICSID Case No ARB(AF)/00/2 (Award 2003), (2004) 43 ILM 133.

[18] Salini Construttori SpA and Italstrade SpA v Jordan, ICSID Case No ARB/02/13 (Decision on Jurisdiction 2004), (2005) 44 ILM 573.

[19] Plama v Bulgaria, ICSID Case No ARB/03/24 (Decision on Jurisdiction 2005), (2005) 44 ILM 721, para 223; see for an introductory note A Reinisch (2005) 44 ILM 717.

[20] Maffezini v Spain, ICSID Case No ARB/97/7 (Award 2000), (2001) 16 ICSID Rev 212, para 64.

**c. Fair and Equitable Treatment**

Fair & equitable treatment is a cornerstone of international law, but it lacks a precise definition. The controversy relies on the question of whether this standard merely expresses the minimum standard (which was recognised by customary law) or whether it refers to a different protection standard separate from the minimum standard.[21] Even though there are discussions about its definite meaning, the fair and equitable treatment standard is widely used in foreign investment protection agreements. Additionally, it is clear that the concepts of minimum standard and fair and equitable treatment are connected. In the case of Waste Management v. United Mexican States, it was articulated that,

> "The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—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."[22]

As this paragraph suggests, the principles of the minimum standard on how host states should treat foreign investors overlap with the fair and equitable treatment principles. One fair interpretation of this quotation shall be that, actually, the minimum standard that was recognised in basic international law is, in fact, what makes up the standard for fair and equitable treatment.

In the Neer case, the arbitral tribunal created the expression of minimum standard, as host authorities or states acting "in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action".[23]

Even though these quotations are helpful to indicate a strong connection between the two principles, they are not fully decisive. In ADF Group v. US, the arbitral tribunal addressed the interpretation of such terms, which are not static but are in fact evolving constantly. It explicitly argued that what was understood as a minimum standard of treatment of aliens within the meaning of customary law in 1927 is not the same as what the standards

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[21] Herdegen (n 4).
[22] Waste Management Inc v United Mexican States, ICSID Case No Arb(AF)/00/3 (Award 2004), (2004) 43 ILM 967, para 98.
[23] LFH Neer and Pauline Neer (USA) v United Mexican States (Arbitral Award 1926) 4 RIIA 60 para 5.

are today.[24] For instance, it can be stated that, in the Neer case (which was previously discussed), the arbitral tribunal uses the word 'bad faith.' However, in the Mondev International v. US case, the arbitral tribunal examined the case and came to the conclusion that a state without bad faith still can treat unfairly and inequitably an investment made by foreigners.[25]

**d. Full Security and Protection**

As the name suggests, this measure of investment protection aims to protect investors and their investments within the host state. It is host states' obligation to take and maintain the appropriate measures that ensure security against threats to life and property. In Saluka Investment v. the Czech Republic, the arbitral tribunal stated that,

> "The standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners."[26]

However, it is evident that the scope of the protection of investment depends on various factors, such as the type of the investment or where it is located. The main factor that affects the standards of protection of the treaty is the type of investment protection agreement. Just as the discussions focused on the previous protection measure, fair and equitable treatment, what amounts to full security and protection is also controversial. According to NAFTA Article 1105(1), the Free Trade Commission interprets the 'minimum standard' (which is recognised by customary law) and 'full protection and security' as separate provisions where full security and protection standards have more obligations than the minimum standard. On the other hand, the US BIT Model (2012) interprets the full protection and security means as the "level of police protection required under customary law" (Article 5(2)(b)).[27] Therefore, within the meaning under the US BIT Model (2012), this principle does not require any type of treatment that goes beyond the meaning of minimum standard, which is recognised under international law. Such interpretations have also been made by the arbitral tribunal. In the case of Asian Agricultural Products v. Sri Lanka, the words like "constant"

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[24] ADF Group Inc v United States of America, ICSID Case No ARB(AF)/00/1 (Award 2003), (2003) 6 ICSID Rep 470.
[25] Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2 (Award 2002), (2003) 42 ILM 85 para 116.
[26] Saluka Investments BV v The Czech Republic, PCA (Partial Award 2006), para 484.
[27] US Model Bilateral Investment Treaty (2012); Article 5(2)(b).

or "full" in regard to "protection and security" indicated a clear intention to exercise the standard of "due diligence," which is superior to the "minimum standard" of customary law.

When it comes to describing what the standard of protection is, some treaties limit the scope of protection only against physical harm. CETA, for instance, in its Article 8 (10)(5), states that "full protection and security refers to the Party's obligations relating to the physical security of investors and covered investments." There is still ambiguity when it comes to the level of the scope of the protection, as it is often closely associated with the minimum standard recognised by international law. If the standard of protection in full protection and security does not go beyond and does not protect rights that are recognised by customary law, then it would not be possible to state that the concept incorporates protection beyond physical protection.[28] It is fair to conclude that the provision of full protection and security has different standards in different areas.

For instance, in CME Czech Republic BV (The Netherlands) v. The Czech Republic, the arbitral tribunal extended the sphere of protection by referring to the host state. According to the tribunal, the host state should not take any administrative or legal action that would make investors investments withdrawn or devalued under the meaning of security and protection.[29] Although there is no universal agreement on whether the full security of protection amounts to merely the minimum standard or whether it adds more responsibilities on states, this provision is important in protecting foreign investors as well as their investments within the territory of the host states.

**e. Umbrella clauses**

Today most of the BITs include umbrella clauses. In its general sense, the provision refers to host states obligations regarding foreign investments within their territory by the investors of the other contracting party. For instance, Model German BIT (2008), which outlines that the host states shall fulfil any obligation in regard to investments made by the investors of the other party.[30] It could be argued that the explanation could be deemed to be wide as it refers to 'any' type of obligation. Moreover, within the Energy Charter Treaty, it is articulated

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[28] Herdegen (n 4).
[29] CME Czech Republic BV (The Netherlands) v The Czech Republic (UNCITRAL Final Award 2004), para 613.
[30] Model German BIT 2008, Art.7 (2).

that, "..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." [31]

Even though the umbrella clauses are easy to read, their exact meaning is hard. These clauses are vague, especially in terms of whether these clauses create obligations in a domestic law context that shifts to international law. In the Noble Ventures v. Romania case, the arbitral tribunal stated that if these clauses were to just point out that the states have certain obligations in regard to investors, then they would not offer anything new, and therefore, umbrella clauses would not be necessary. However, in the interpretation of Article II(2)(c), BIT uses the term 'shall,' and for that reason, it is clear that these provisions are there to create obligations, and these obligations go beyond what is stated in BIT itself. The arbitral tribunal acknowledges that the states do not make agreements for special types of investments; all of the BITs are made on general investment agreements, so in that sense, it is challenging to define what an 'obligation' stands for in different investments made by a foreign investor.[32]

For instance, in SGS Société Générale de Surveillance, SA v. Republic of the Philippines, the host government breached a contract by failing to make a payment in regard to the investment. The arbitral tribunal stated that the host state had violated the umbrella clause.[33] Even though there is no general agreement on to what extent the umbrella clauses cover violations of domestic law in regard to the investment, as previously explained, umbrella clauses add more obligations on states to protect the investments made by the foreign investors.

**f. Expropriation and Compensation**

Expropriation refers to the actions of governments in regard to seizing privately owned property for the use of the public. While doing so, usually the government compensates the owner of the private property. Protection against expropriation for foreign investors is a core element of bilateral and multilateral investment treaties. For instance, Article 1110(1) of NAFTA states that,

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[31] Energy Charter Treaty, Article 10(1).
[32] Noble Ventures, Inc v Romania, ICSID Case No ARB/01/11 (Award 2005), (2005) IIC 179.
[33] SGS Société Générale de Surveillance, SA v Republic of the Philippines, ICSID Case No ARB/02/6 (Decision on Jurisdiction 2004), (2005) 8 ICSID Rep 518.

> "No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1) and (d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment]."

Therefore, expropriation can be direct and indirect. Direct expropriation is not hard to understand and detect; however, the latter is not. In order to make sense of what may amount to indirect expropriation, referring to case law is necessary. In indirect expropriation the subject matter is not concerned with seizure of the legal title.[34] Although there is no definite explanation on indirect expropriation, the general understanding is that whether the measure in question affects the economic value of the property. If this economic impact is neutralised or affects the profitability of the investment in an adverse way, then the indirect expropriation is present. In Tecmed v. United Mexican States, ICSID stated that:

> "There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not." [35]

Examining Model BIT US (2012) Annex B para can introduce some guidelines on what indirect expropriation could be perceived as. The Model BIT US suggests the determination must be done on a case-by-case basis. The Annex B also indicates some factors to consider, such as economic impact on the investment in an adverse way, but it should also be considered that negative economic impact alone would not constitute indirect expropriation. Secondly, whether the government measure intercepts with the reasonable expectations of the investor. Thirdly, the type of government action in question. In the second part of Annex B, it suggests that if the measure taken by the government is to protect public welfare

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[34] Herdegen (n 4).

[35] Técnicas Medioambientales Tecmed SA v The United Mexican States, ICSID Case No ARB(AF)/ 00/2 (Award 2003), (2004) 43 ILM 133, para 122.

objections such as health and safety or environmental protection, that measure does not amount to indirect expropriation in exceptional circumstances.[36]

In regard to compensation, there are well-established general rules. For instance, in the German Model BIT (2008), Para 4 states that compensation must be awarded within a reasonable time, with the usual bank interest, freely transferable, and such transaction must be subject to being able to be reviewed by due process of law.[37] The controversy in that subject matter rather relies on the way of calculating the amount of the compensation. In the case Santa Elena v. Costa Rica, the investment involved land that was expropriated as Costa Rica declared the land as a nature reserve. Costa Rica claimed that the environmental protection treaties, such as the Convention on Biological Diversity, should be taken into account when deciding on the amount of expropriation. However, the arbitral tribunal rejected Costa Rica's argument on the ground that even though the reason for such expropriation is for public purposes and it's a legitimate one, it does not affect the measure of the compensation. In other words, even though the reason for expropriation was important and well recognised by international sources, it does not change the legal character of the seizure for amounting adequate compensation for the seized land, which belongs to the foreign investor.[38]

**g. Dispute Settlement**

As the standards of protections of foreign investors had been examined, the last focus of this essay shall point out the different arbitral bodies and how they ensure that those standards of protection are exercised within the host states. Most of the international investment dispute settlements are held under the Convention of the International Centre for Settlement of Investment Disputes (ICSID), under the UNCITRAL Arbitration Rules, and under the Arbitration Rules of the Stockholm Chamber of Commerce.[39]

Investor-state arbitration (ISA) relies on agreements that are made by state-to-state. For instance, if Germany makes a bilateral investment agreement with Pakistan, the parties that agreed upon the agreement were Germany and Pakistan. Those parties are obviously states; therefore, the legal groundwork of these agreements also goes back to public international

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[36] Model BIT US (2012).
[37] German Model BIT (2008).
[38] Compañía del Desarrollo de Santa Elena, SA v The Republic of Costa Rica, ICSID Case No ARB/ 96/1 (Award 2000), (2000) 39 ILM 1317.
[39] Herdegen (n 4).

law. When dealing with BIT's or other types of international investment treaties, different legal regimes are combined, and that is why the arbitration concerning investor-state disputes has a hybrid nature.

The arbitral tribunal in Plama v. Republic of Bulgaria gave a reference to Article 26 of the European Energy Charter Treaty and established that private investors have legal standing against sovereign states under these treaties. This right of action was a crucial step in the protection of private actors, as the foreign investors from the home states will be able to bring claims against sovereign states where they invested in. For instance, if Germany and Pakistan sign a bilateral investment treaty, and a German company 'X' goes and makes an investment in the territory of Pakistan, Pakistan needs to fulfil its obligations under the BIT. If they cannot, the German company 'X' will be able to bring a claim against the host state for a violation under the investment treaty. In Plama v. Republic of Bulgaria the arbitral tribunal stated that,

> "By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."[40]

In the general understanding of public international law, the subjects of public international law are concerned with states. However, in the matter of investor-state arbitrations, the state gives consent to investors to be on a more equal footing with the host government, which was not the case before. However, investor-state arbitration is not without criticism. As the many arbitrators have commercial backgrounds and contributed to the legal principles that govern the investor-state arbitration, it was criticised for lacking democratic legitimacy for sensitive public interests. Actions taken to settle disputes are governed by agreements such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which refer to private arbitral tribunals because those international agreements were introduced to cover commercial arbitration.[41]

In this dilemma, one side is concerned with the protection of foreign investors, and on the other side of the dilemma, there are public interests of the host state, such as environmental protection. When examined altogether, it would be fair to argue that ISA also takes into account the former side of the dilemma. For instance, as previously discussed in

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[40] Plama v Republic of Bulgaria, ICSID Case No ARB/03/24 (Decision on Jurisdiction 2005), (2005) ILM 44, 721ff para 141.
[41] M Waibel et al (eds), The Backlash Against Investment Arbitration: Perceptions and Reality (Kluwer 2010).

this piece of work, regulatory takings of property that had private legal titles are also possible in order to pursue public benefits. Which means that states are not in fact powerless, and the fact that those standards of protections are available unless the investment was in accordance with the host state's regulations and democratic processes. Therefore, the "hybrid nature" of ISA has given rise to debates, as, when taking a stance with the public international law and a comparative public law perspective, it favours views that would have more sympathy for the governments in disputes. For instance, in terms of interpreting "necessity" clauses, which states might rely on in order to give justification for non-compliance with obligations in a broader sense. On the other hand, the international commercial law approach would focus more on a narrow interpretation of such terms in order to give effect to the agreement and to protect parties' autonomy.

## III. CONCLUSION

The way different states deal with each other has come a long way, especially in terms of the type of agreements they use. Whether the standards of protection that were ensured by the international treaties are fully influential or not depends mostly on the situation of the facts of the case. However, the transit of private actors into international law to make them able to claim against states is a remarkable step. This gives equal footing to the private investors to challenge governments in order to protect their investments. Although there are concerns about the broad scope of these standards of protection, which protect the foreign investors, the governments are not powerless. The governments can rely on public welfare in order to temporarily justify non-compliance. It's worth also noting that those standards of protections are not without limits. For instance, the most-favoured nation rule has considerable limitations, such as free trade areas, or if the BITs concerned with other states are specific in nature, it does not apply at the expense of the other party. Moreover, those governments that are not happy with welcoming foreign investors indeed can reject allowing them into their territories. However, establishing an attractive investment climate is beneficial to the host country in many ways, as it is seen as a crucial way of promoting economic development.

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