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THE *BITS* IN THE AGE OF GLOBALIZATION

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Summary: India's BIT program is the largest among the developing countries and its integration into the global economy has also increased its exposure to BIT claims. Several foreign corporations presented ITA notices against various Indian regulatory measures prompting India to suspend all trading of BITs in progress that led to a change in its position in the International investment law regime with repercussions in the International business community eager to participate in its business. These recent developments have then determined the need to review India's BIT program in a global vision. The paper 'International Investment Agreements Between India and Others Countries' (2011), showed the importance of ensuring a balance between investor rights and national policy which India has not been able to make guarantor pushing in different circumstances to revise their existing BITs and defining new perspectives for future negotiations. The paper reflects on experiences of BITs in a global vision..

Keywords: Foreign Direct Investments (FDI), Bilateral Investment Treaties (BIT), International Law, Nationality, Fair and Equitable Treatment (FET), National Treatment (NT), Most Favoured Nation (MFN), Sustainable Development, Expropriation, Arbitration Clauses.

1. Introduction

The first BIT was signed between Germany and Pakistan in 1959 and up to now, globally, there are more than 3,000 BITs born from the desire of capital-exporting developed countries to seek the protection of investors and investments in capital-importing developing countries. Things are a bit changed in recent years due to several developing countries, especially BRICS, revealing themselves as important outward investors. Paradoxically, it seems that the current BIT regime is at a crossroads, despite the rapid proliferation of treaties in

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recent years. It will be seen through some jurisprudential cases as fair and equitable treatment, indirect expropriation, umbrella clause can be vague and like other ambiguities can arise from an expansive interpretation of the arbitration Courts, leading to substantial monetary claims by investors. We have been witnessing to a growth of ISDS mechanisms in light of the lack of balance between public and private rights that has attracted the attention of both developed and developing countries in reviewing the provisions of their treaties. Some countries are clarifying the language used in BITs for better uniformity and consistency in the interpretation while others are no longer existing. Throughout the twentieth century there has been intense controversy on international treatment standards applicable to foreign investment. So, while the capital exporting States claimed that foreign investors and investment had to be treated in accordance with international minimum standards, including a requirement for full compensation for the expropriation, many developing States, particularly in Latin America, which challenged investors and foreign investments were allowed to equal treatment with nationals of the State (national treatment). The IIAS resolve this debate firmly in favor of the minimum treatment standards, which because of their consistency and dissemination, are now customary international law[1]. So, some judgments NAFTA, as *Metalclad v. Mexico*[2], with an interpretative statement in 2001, confirm the equivalence of the obligation of a *minimum standard of treatment* to that recognized under customary international law. Subsequently, the US has updated its Model BIT twice (in 2004 and 2012) to limit the expansive interpretation of NAFTA Tribunals. Similarly, the Canadian Model BIT was revised in 2004 and 2012. Because of the strong opposition from civil society and political groups, Norway has abandoned its Model BIT in 2009, paving the way for a new Model BIT in 2015. Australia has rejected the ISDS provisions under Australia-US Free Trade Agreement, which came into force in 2005. In addition, the ISDS provisions are included in Australia's FTAs with Korea and China, but are excluded from those with Japan[3]. The inclusion of ISDS provi-

1 NEWCOMBE, Andrew. Sustainable Development and Investment Treaty Law. *The Journal of World Investment & Trade,* 2007,vol. 8, no. 3, p. 363; SORNARAJAH, Muthucumaraswamy. *The International Law of Foreign Investment.* United Kingdom: Cambridge University Press, 2004; SCHWCBEL, Stephen M. The Influence of Bilateral Investment Treaties on Customary International Law. *American Society of International Law,* 2004, vol. 98, p. 27.

2 ICSID Case no. ARB(AF)/97/1, Award 23, 27 (Aug. 30, 2000) (The arbitration Tribunal deemed not to comply with the investment of *Metalclad* with FET under international law and that Mexico has violated the art.1105 (1) NAFTA (§ 74). Exceedingly, referring failure to satisfy the NAFTA, art.1105 requirements (1) and artt.26, 27 of the Vienna Convention (§ 100), the Court confirms that *Metalclad* breached the FET (§ 101)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf> Accessed: 05.08.2018

3 EWING – CHOW, Michael. Southeast Asia and Free Trade Agreements: WTO Plus or Bust? *Singapore Year Book of International Law,* 2004, no. 8, p. 201; DELLA PERUTA, Maria, Rosaria, CAMPANELLA, Francesco, DEL GIUDICE, Manlio. Knowledge Sharing and Exchange of Information within Bank and Firm Networks: the Role of the Intagibles

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sions in TTIP has become the main obstacle to the conclusion of this agreement between the EU and USA. In the Global South, the violent reaction against the BITs gained power re-emerging around a dozen of claims against Argentina in the period in which the country has imposed new regulatory measures during the financial crisis erupted in 2001. In 2007, Bolivia – followed by Ecuador and Venezuela – has become the first country to denounce the ICSID, ratified by more than 150 Member States and in 2008, Ecuador has finished nine BITs with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. In 2010, Ecuador's Constitutional Court declared the arbitration provisions of more than six BITs unconstitutional and in 2008, Venezuela has issued notice to terminate their BIT with the Netherlands. Several Asian countries are also thinking about the costs and benefits of BITs as the adoption of various policy measures to protect themselves from costly investor-state arbitration. India, Pakistan and Indonesia are revising their old Model BIT and preparing a new model for future treaties[4]. From these few realities it can be well understood a non-harmonious reality regarding FDI which is why it wanted to dedicate a study to be defined as a summary of the extent to which legislation should be devoted more specific studies. Purpose of the paper will be, therefore, providing an overall picture of the role played by BITs and how the legislation contained the same has favored FDI and again, as foreign investors are protected. Mentioned the vastness of the topic it will merely deepen some fundamental principles for any BIT that have the ability to influence the choice of an investor for a host State to another. The paper is introduced by explaining how the internationalization of law affects investment protection by limiting the internal and external sovereignty of States so contracting the domestic jurisdiction that does not protect more States by an international supervision. This is because the States are not only bringers of different and opposing national interests but also of cultures often incommunicable, which is why international judges have, at first sight, decontextualized being able to play their role only to the extent that each Contracting Party (*Each Contracting Party*) involves them in the dispute and attempt a resolution[5]. Following a discussion on the nationality of the investor,

on the Access to Credit. *Journal of Knowledge Management,* 2014, vol. 18, n. 5, *passim.*

4 KAVALJIT, Singh, BURGHARD, Ilde. Introduction. In *Id.* (eds). *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices.* Amsterdam, Patparganj: Both ENDS, Somo, Madhyam, 2016, pp. 1, 7; MANN, Howard. International Investment Agreements: Building the New Colonialism? *American Society of International Law Proceedings,* 2003, vol. 97, pp. 247–250; DAS, Animesh. Foreign Investment Regime and India's Interests: the Desirable Changes in Policy and Approach. *Colloquium Opus Law Journal,* 2014, vol. 1, no. 2, *passim.*

5 VIOLA, Francesco. *Lectio Magistralis di Commiato. Il Futuro del Diritto*. [online]. Available at: <http://www1.unipa.it/viola/Il_futuro_del_diritto.pdf> Accessed: 05.08.2018; *Id.*, *La Concorrenza degli Ordinamenti e del Diritto Come Scelta.* Naples: Editoriale Scientifica, 2008, p. 65; WALDRON, Jeremy. Foreign Law and the Modern Ius Gentium. *Harvard Law Review,* 2005, vol. 119, no. 1, pp. 129–147.

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fundamental, especially in the case it is made to the international Court[6]. While a national treatment to foreigners can really be seen as a profound contribution towards universalism; on the other, it can also be interpreted inappropriate for the inability of the State to take note for the country's internal affairs[7]. It will be recalled the *Fair and Equitable Treatment (FET)* – also contained in other major regional and multilateral treaties[8] – considered one of the most important standards in the protection of foreign investments also being invoked in almost every International investment arbitration[9]. In sequence, so that the Member States uphold non-discrimination, will be quoted the principles of *Most-Favoured-Nation (MFN) treatment* and *national treatment*, considered critical principles for both international trade law and the International investment , having arbitral Tribunals also called for a *regulatory purpose* for the identification of a significant discriminatory action[10]. Also investment protection obligations require it to be paid compensation for expropriation to be determined through a fair market value or other quantification tools[11]. It could not be missing the reference to sustainable development to which the IIAS have given very little attention, not to hinder its implementation[12], compared to the new generation that has begun to integrate the preambles[13]. Nevertheless, the relationship between sustainable development and foreign investment is complex and amorphous as to be almost of love and hate[14]. Finally, it will be taken into account the role of arbitration

6 CARLEVARIS, Andrea. *Nazionalità dell'Investitore e Competenza dei Tribunali Arbitrali ICSID [Commento a Lodo Arbitrale dell'International Centre for Settlement of Investment Disputes, Case n. ARB/02/18, 29 Aprile 2004]. Diritto del Commercio Internazionale: Pratica Internazionale e Diritto*, 2005, vol. 19, no. 2, p. 359.

7 CHOUKROUNE, Leïla. Indian and Chinese FDI in Developing Asia: The Standards Battle Beyond Trade. *The Indian Journal of International Economic Law,* 2015, vol. VII, pp. 113–115; MUSTILLI, Mario, CAMPANELLA, Francesco, D'ANGELO, Eugenio. Measuring causes and effects of firms deleveraging process. In DOMINICI, Gandolfo. *Concreating Responsible Futures in the Digital Age: Exploring New Path towards Economic, Social and Environmental Sustainability,* 2018, pp. 213–215.

8 *See, e.g.,* art.1105 NAFTA and art.10(1) ECT.

9 SCHREUER, Christoph. Fair and Equitable Treatment in Arbitral Practice. *The Journal of World Investment & Trade,* 2005, vol. 6, no. 3, pp. 357–386.

10 *See generally* MITCHELL, Andrew D., HEATON, David, HENCKELS, Caroline. *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law.* Cheltenham, UK – Northampton, MA, USA: Elgar, 2016.

11 REISMAN, W. Michael, SLOANE, Robert D. Indirect Expropriation and its Valuation in the BIT Generation. *British Yearbook of International Law,* 2003, vol. 74, no. 1, pp. 115–150; PAULSSON, Jan, DOUGLAS, Zachary. Indirect Expropriation in Investment Treaty Arbitrations. In HORN, Nobert (ed), *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects.* The Netherlands: Kluwer Law International, 2004, pp. 145,152.

12 NEWCOMBE (note 1) p. 402.

13 *Id.*, p. 407.

14 GAZZINI, Tarcisio. Bilateral Investment Treaties and Sustainable Development. *The Journal of World Investment & Trade,* 2014, vol. 15, no. 5–6, p. 936; SANDS, Philippe, PEEL, Jacqueline, FABRA, Adriana, MACKENZIE, Ruth. *Principles of International Environmental Law.* USA: Cambridge University Press, 2012; CORDONIER, SEGGER, Marie-Claire,

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Courts also become important as a result of the expansion and globalization of investments compared to a national jurisdiction ensuring greater neutrality for the resolution of disputes[15].

2. International Law and Protection of Investments

Historically, investment treaties were designed to protect foreign investors from regulatory and political risks – expropriation, nationalization and other acts by the host countries that deprived investors of the fundamental rights of ownership and control[16] – that coordinated with the international investment disputes settlement system, they have the potential to limit the political choices of States, in an internationalist perspective, being able legal regimes transactional influence state projects directly exerting the *rule of law* according to domestic constitutional standards or, *viceversa*, be the same national constitutions to comply with the requests regional integration or international[17]. The doctrine described the investment law and arbitration as a form of *public law adjudication*[18], *global administrative law*, or *global constitutional and administrative law* and the central topic of the constitutionalisation of investment protection is the idea that the legal regime of investments, having the ability to constrain the action of States looks like the role played by national Con-

NEWCOMBE, Andrew. An Integrated Agenda for Sustainable Development in International Investment Law. In CORDONIER, SEGGER, Marie-Claire, GEHRING, Markus, NEWCOMBE, Andrew (eds). *Sustainable Development in World Investment Law.* The Netherlands: Kluwer Law International, 2011, p. 101.

15 *Latham & Watkins, Guide to International Arbitration*. [online]. Available at: <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> Accessed: 05.08.2018

16 PASCO, Brandt J. C. United States National Security Reviews of Foreign Direct Investment: From Classified Programmes to Critical Infrastructures, This Is What the Committee on Foreign Investment in the United States Cares About. *ICSID REVIEW – Foreign Investment Law Journal*, 2014, vol. 29, no. 2, p. 350.

17 According to Professor Kelsey, investment and other International agreements contain precommitments that are going to bind future generations of citizens to certain institutional forms and predetermined policies. Difficult to amend, they include binding enforcement mechanisms, granting privileges to citizens and tying the nation State and the democratic rights of its citizens. *See* DAGBANJA, Dominic n. The Limitation on Sovereign Regulatory Autonomy and Internalization of Investment Protection by Treaty: An African Perspective. *Journal of African Law*, 2016, vol. 12, no. 1, pp. 60–61; KELSEY, Jane. Global Economic Policy-making: A New Constitutionalism? *Otago Law Review,* 1999, vol. 9, no. 3, p. 545; BEHRENS, Peter. Towards Constituzionalization of International Investment Protection. *Archiv des Völkerrechts,* 2007, vol. 45, no. 2, p. 154.

18 Professor Harten considers the investment treaty arbitration as a unique form of *public law adjudication*, meaning that *a treaty-based regime that uses rules and structures of international law and private arbitration to make governmental regulatory choices regarding the relationship between individuals and the State*. *See* DAGBANJA (note 17) p. 61; HARTEN, Gus, Van. *Investment Treaty Arbitration and Public Law.* Oxford: Oxford University Press, 2007; ROGERS, Catherine A., ALFORD, Roger p. *The Future of Investment Arbitration.* Oxford: Oxford University Press, 2009.

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stitutions[19]. In the international context, one of the main points to be observed is focused in the way of coordinating the national rules on abuse of arbitration of legal institutions – made possible because of differences in national laws – and legal barriers stemming from the sovereignty of States[20]. And, despite the different nations tend not to arbitrability and enforce national laws, the main trend in the international arena, is to limit the doctrine of non-arbitrability, especially in international arbitrations, in order to maintain order and predictability in the system of international trade[21]. In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*[22], the violation of national law by a foreign investor has not hindered therefore the protection from an international point of view. On the contrary, it is considered that there is a *condition of legality*[23] that constrains investment to the compliance with national law to benefit from international protection[24]. In China, for example, no rule or general principle were prom-

19 SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise.* New York: Cambridge University Press, 2008; CASS, Deborah Z. The Constitutionalization of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade. *European Journal of International Law,* 2001, vol. 12, no. 1, pp. 39–75.

20 *See* HARATA, Hisashi. The Laundering of Legal Titles: The Antithesis of the Concept of a "Secure and Stable Transaction". *Journal of Law and Politics,* 2015, vol. 12, p. 75; RILES, Annelise. Managing Regulatory Arbitrage: A Conflict of Laws Approach. *Cornell International Law Journal*, 2014, vol. 47, no. 1, p. 63.

21 VINCENT, Jennifer. Oh, What a Tangled Web We Weave: The Implications of Conflicting Domestic Policy on Arbitrability and Award Enforcement. *Hastings International and Comparative Law Review,* 2015, vol. 38, no. 1, pp. 150, 151.

22 ICSID Case no. ARB/06/11, Award 31–32, 60 (Oct. 5, 2012) (This case concerns various alleged violations of both international and national law committed by Ecuador, particularly in respect of the Republic of Ecuador-US BIT (§ 105). The dispute concerns the violation of the tax laws of Ecuador and of the Treaty (§ 170–171–172) for which Ecuador's attitude is considered unfair and discriminatory. The judgment is disputed in the English Courts and its annulment is rejected both by the High Court (2006) that the Court of Appeal (2007)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf> Accessed: 19.08.2018

23 The condition of legality was also observed when the legality clause appears in the admission clause. In fact, in the exercise of their territorial sovereignty, States grant to investors a right of access in their territories, that is, the right of admission. Most of the IIAS do not contain rules of law of general admission, and the admission of investment thus depends on its conformity with national law. *See* PAREDES, Francisco-Xavier. La Conformité de l'Investissement au Droit National, Condition de sa Protection Internationale. *ICSID REVIEW – Foreign Investment Law Journal*, 2014, vol. 29, no. 2, p. 486.

24 *See Tokios Tokelės*, ICSID Case no. ARB/02/18, Award 11–12, 41–42, 61–62 (Jul. 26, 2007) (It disputed that, since 1994, *Tokios Tokelės* has been investing more than USD 6.5 million in Ukraine, and that these investments, as expected, were registered with the Ukrainian authorities. In addition, it was argued that *Taki Správy* should be regarded as a *national of another Contracting State,* considering that the subsidiary was wholly owned by *Tokios Tokelės* and had been created expressly for the purpose of making investments on behalf of *Tokios Tokelės* in Ukraine (§ 16). It is recalled the disagreement of the parties so *Taki Správy* were to be treated as a national of another Contracting State pursuant to and in accordance

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ulgated for lack of constitutional laws, which would allow to balance the relationship between international treaties and domestic law. Nevertheless, many Chinese laws and regulations have both confirmed the direct applicability of international treaties or have expressly recognized the predominance of the same national law, thus demonstrating China's willingness to accept the superiority of international treaties as a general principle of law[25]. Except for cases in which an international Court has exclusive jurisdiction, in preliminary rulings, to interpret a treaty and its secondary sources, it should be given to domestic Courts the freedom of interpretation of international law[26]. So in *Bankswitch Ghana Ltd v. Republic of Ghana*, the arbitral Tribunal held, referring to the principle of *estoppel* of customary international law, that the Government of Ghana had been prevented from supporting the applicability of the agreement Bankswitch under the art.181 (5) of the Constitution of 1992,[27] accord-

with art.25 (2) (b) of the ICSID Convention and art.1 (2) of the BIT between the Ukrainian Government and the Government of the Republic of Lithuania (§ 19). It is stated that the present dispute concerns the jurisdiction of the Centre and the jurisdiction of the Court (§ 96) and the Court shares the view expressed in *Wena Hotels Ltd. v. Arab Republic of Egypt*, 41 ILM 933, Decision 941 (Feb. 5, 2002) that the law of the host State must be applied in conjunction with international law if this is justified (§ 140). With regard to the Ukrainian provisions that affect the protection of foreign investments, it has recognized the primacy of international agreements over national legislation (§ 142)); *Salini*, 42 ILM 609, 611 Award, 624 (Jul. 23, 2001) (The Italian companies rely on the art.8 the ICSID jurisdiction of the Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy (§ 9). The Kingdom of Morocco has raised various objections to the referral of the matter to the arbitration Court arguing that, on the basis of art.8 of that Treaty, the application is inadmissible because the Court has no jurisdiction *ratione personae* and *ratione materiae* and that Italian companies have waived all jurisdiction except that of the administrative Courts of Rabat. The Court finally declared to have jurisdiction over the claims of the Italian companies, but specifies that the jurisdiction does not cover the simple breach of contract between Italian companies and ADM does not constitute simultaneously breach of the BIT (§ 10)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0866.pdf> Accessed: 05.08.2018

25 The art.12 of the General Principles of Civil Law (GPCL) stipulate that *if an international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has made reservations thereon. See also* WENHUA, Shan. The International Law of EU Investment in China. *Chinese Journal of International Law,* 2002, vol. 1, no. 2, pp. 560, 564.

26 CONFORTI, Benedetto. *Diritto Internazionale.* Naples: Editoriale Scientifica, 2014; FIORE, Rosario. L'Obbligatorietà del Diritto Internazionale: Elaborazione di una Teoria della "Volontà Arbitraria". *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2015, vol. XIII, pp. 323, 344; IOVANE, Massimo. Benedetto Conforti (In Memoriam). *Italian Yearbook of International Law,* 2016, *passim.*

27 A Power Purchase Agreement (PPA) between Ghana and the Ghanaian subsidiary of Balkan Energy has been much discussed with reference to the art.181 (5) of the Constitution of Ghana. The PPA contained an arbitration clause providing for UNCITRAL arbitration in the Netherlands but until then, the courts of Ghana had demanded the suspension of an arbitration proceeding since only the national Courts had jurisdiction. Balkan considered that, having been established as a Ghanaian company, it was not necessary to refer

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ing to which *Parliamentary approval is required in respect of "international business transactions" to which the State of Ghana is a party*[28]; in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*[29], the Court stated that even if a BIT provides for compliance with the national law of the investment – almost unusual mechanism – non-compliance of the same, will have an international legal effect. The relationship between treaties and customary international law is complex, given that the treaties could reflect existing customary international law[30] or crystallize emerging ones[31]. It remains the recognition of a system of competition laws between national and international law[32] for which the protection of investors, pursuant to the founding of the IIAS, will depend on the application of international law and general principles of law, by the law of the host State[33]. So, in *Compañía del Desarrollo*

to an *international business transaction*, as expected by the art.181 (5) of the Constitution of Ghana, but it should refer to the Ghanaian Companies Act (1979), arguing that the nationality of a company were to be determined according to the place of incorporation. It remains that the discussion upon the art.181(5) is of great importance for any international entities with existing or future companies in Ghana considered that an unfavorable ruling by the Supreme Court could have a negative impact on bilateral investments with Ghana. See STUTTAFORD, Dominic. *Article 181(5) of the Ghanaian Constitution and International Arbitration Agreements*. [online]. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/60375/article-1815-of-the-ghanaian-constitution-and-international-arbitration-agreements> Accessed: 05.08.2018

28 *See also* GBADEGBE, Faisal, Esenam, AMASAH, Edmund, Nelson. Article 181(5) of the 1992 Constitution of Ghana and its Implications on International Commercial Transactions. *Business Law International,* 2016, vol. 17, no. 3, p. 250.

29 ICSID Case no. ARB/03/25, Award 188, 191, 194 (Jul. 19, 2007) (When the question arises whether an investment is in conformity with the law of the host State, it tends to regard the principle *ratione materiae* (§ 396) that lacks the jurisdiction of the Court, since there is no *investment in accordance with law*. With reference to Rules 41 (5) and 47 (1) (i) and (j) of the Arbitration Rules and to art.61 (2) of the Convention, the majority of the arbitral Tribunal has decided to accept the objection part of the Republic of the Philippines, it has no jurisdiction to resolve the dispute and dismiss the claim (§ 401)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0340.pdf> Accessed: 11.08.2018

30 The Investment Treaties have been developed to replace the customary international law and national legal systems that had previously protected foreigners and their properties abroad, including previous principles as non-discrimination of foreign ownership and protect itself from arbitration actions. *See* DAGBANJA (note 17) pp. 63–65; SALACUSE, Jeswald W. *The Law of Investment Treaties.* USA: Oxford University Press, 2015.

31 BERNARDINI, Piero. Private Law and General Principles of Public International Law. *Uniform Law Review. Revue de Droit Uniforme,* 2016, vol. 21, nn.2–3, p. 185; GAJA, Giorgio. *General Principles of Law*. Max Planck Encyclopedia of Public International Law, 2013, § 18.

32 CONFORTI (note 26) *passim*; CARPANELLI, Elena. General Principles of International Law: Struggling with a Slippery Concept. In PINESCHI, Laura (ed). *General Principles of Law: the Role of the Judiciary, Ius Gentium: Comparative Perspectives on Law and Justice.* Switzerland: Springer, 2015; MARRELLA, Fabrizio. *Diritto Internazionale.* Milan: Giuffrè, 2018.

33 According to art.42 (1) of the ICSID Convention states that *the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence*

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de Santa Elena, SA v. The Republic of Costa Rica[34], the Court considers the application of international law exclusively as *governing law*, even where there is no conflict between national laws, rules and principles of international law[35]. In the EU, decisions obtained in the international arbitration against the Members States could contradict the decisions obtained through European law being potentially able to declare the infringement respect to international law[36]. So, in *Electrabel S.A. v. Republic of Hungary*[37], the judgment confirms that European law is the applicable law, as public

of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. [online]. Available at: <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf> Accessed: 11.08.2018

34 ICSID Case no. ARB/96/1, Award 189–190 (Feb. 17, 2000) (The Court should follow the application of art.42 (1) of the ICSID Convention (§ 60) and the law of Costa Rica, so the rules of international law would be applicable only in case of omission of the national law or if the latter was inconsistent with the principles of international law in good faith and *pacta sunt servanda*. In this case, it does not denote inconsistency, thus it is recognized to the Court the application of the law of Costa Rica, although the application of the principles of international law is supposed to give the same result (§ 61)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf> Accessed: 11.08.2018

35 SNEIJ, Florentine. Are IIAs Old-fashioned? How Consistency in the Use of Public Policy Fosters the Object and Purpose of Investment Agreements. *Uniform Law Review,* 2016, vol. 21, no. 2–3, pp. 197, 199; REINISCH, August. The Scope of Investor-State Dispute Settlement in International Investment Agreements. *Asia Pacific Law Review,* 2013, vol. 21, no. 1, p. 3; ROBERTS, Anthea. Clash of Paradigms: Actors and Analoges Shaping the Investment Treaty System. *The American Journal of International Law,* 2013, vol. 107, no. 1, p. 45.

36 KENDE, Tamás. Arbitral Awards Classified As State Aid Under European Union Law. *ELTE Law Journal,* 2015, no. 1, p. 37; ZACHARY, Elkins, GUZMAN, Andrew T., SIMMONS, Beth A. Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000. *University of Illinois Law Review,* 2008, vol. 2008, no. 1, p. 265; BERTOLI, Paolo. *Diritto Europeo dell'Arbitrato Internazionale.* Milan: Giuffrè, 2015, p. 274.

37 ICSID Case no. ARB/07/19, Award Part IV – 1–3, 8–9 (Nov. 25, 2015) (This judgement mentions legal provisions, such as the ECT (Hungary, Belgium and the European Union are contracting parties); the EU Statement (presented by the European Union in application of art.26 ECT relating to the settlement of disputes between an Investor and a Contracting Party, it recognised the responsibility of the European Union and EU Member States to implement it in accordance with their respective areas of competence); the EU BITs (Hungary and Belgium have signed a BIT in 1986); the EU Treaties (in 1958, Belgium was a founding member of what is now the European Union; Hungary concluded the Europe Agreement in 1993, of which Belgium is a contracting party, and has become a State Member of EU in 2004); the EU Lisbon Treaty (entered into force in 2009, it concerns the EU and its Member States, including Belgium and Hungary); the ICSID Convention, the New York Convention and the VCLT (in these three legal provisions, unlike the European Union, Hungary and Belgium are Contracting Parties) (§ 4.3, 4.4, 4.5, 4.6, 4.7, 4.8 , 4.9, 4.10). The Claimant does not consider the EU law applicable to their claims and believes that some disputed acts are not a necessary consequence of the decisions of the European Commission (§ 4.28) and concludes that the EU law was relevant only as a matter of fact or evidence (§ 4.29). Considering the art.26 ECT, the Claimant submits that the Court should apply the ECT and *the rules and principles of international law,* adding

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international law in an arbitration ECT or, on the contrary, arouse various criticisms that European law can not be seen as an international law, but it can only have a role in the municipal law of the host State when and where the latter is applied[38]. In *International Fruit Company n. V. and others, v. Produktschap Voor Groenten en Fruit*[39], a Dutch Court asks the CJEU if the validity of European law also refers to its validity under international law, and if so, whether the specific EU Regulations are ineffective in view of the breach of art.XI of the GATT[40]; in *Nakajima v. Council*[41]

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that the EU law, given its nature, does not represent the kind of *rules and principles of international law* covered by art.26 (6) ECT. The Claimant argues that, even if applicable, the EU law prevails on ECT, because art.16 ECT states that other international treaties between individual parties to the ECT can not derogate from the ECT if this were to create unfavorable effects on investors. The Claimant considers the Final Decision of the European Commission (2008) as a fact and not as a law (§ 4.30) and also states that the EU law is irrelevant to the interpretation of ECT (§ 4.31). The EU law proves not to live up to the expectations of the international public policy that would be achieved with the application of the ECT provisions (§ 4.32)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf> Accessed: 11.08.2018

38 KATONA, János. The Role of EU Law in 'Intra EU' ISDS Under the ECT. Some Thoughts on the Electrabel v. Hungary Award. *ELTE Law Journal,* 2015, no. 1, p. 63; VALENTINO, Luigi. Violazione di Situazioni Giuridiche Soggettive di Matrice Comunitaria: Decentrati Solo gli Obblighi o Anche le Garanzie? *Diritto Pubblico Comparato ed Europeo,* 2002, no. 1, pp. 192–199; TIETJE, Christian. Bilateral Investment Treaties Between EU Member States (Intra-EU-BITs) – Challenges In The Multilevel System of Law. *Transnational Dispute Management,* 2013, no. 2. [online]. Available at: <https://www.transnational-dispute-management.com/article.asp?key=1945> Accessed: 11.08.2018

39 Joined Cases 21 to 24/72 (According to art.117 of the EEC Treaty and any compatibility of Commission Regulations with art.XI of GATT, it is stated that, in order that the validity of a community act can be affected by its incompatibility with a rule of international law, it is necessary that this rule is binding on the Community (§ 2). Finally, in the ruling, the Court hereby rules that the validity, under art.117 of the EEC Treaty, of acts issued by the institutions can be affected by a rule of international law if that rule is binding on the Community and confers on individual citizens the right to demand judicially compliance (§ 1); moreover, since that art.XI GATT does not satisfy these conditions, it can not impair the validity of the Commission regulations nn.459 / 70, 565/70 and 686/70 (*GU n. L 57, p. 20; n. L 69, p. 33; n. L 84, p. 21*) (§ 2)). [online]. Available at: <http://campus.unibo.it/51173/1/sentenza_fruit_company_1972.htm#SM> Accessed: 11.08.2018

40 JENEY, Petra. Judicial Enforcement of WTO Rules Before the Court of Justice of the European Union. *ELTE Law Journal,* 2015, no. 1, pp. 83–84.

41 CJUE Case no. C-69/89, Award I – 2171, 2173, 2176–2178, 2181–2182, 2184–2185, 2188–2192, 2197, 2201–2203 (May 7, 1991) (By application initiating proceedings lodged at the Chancellory of the Court on 7th March 1989, *Nakajima All Precision Co. Ltd* brings a claim which have the purpose, on the one hand the inapplicability against it, under art.184 of the EEC Treaty, of artt.2(3)(b)(ii), and 19 of Council Regulation (EEC) of 11th July 1988, n. 2423 on protection against dumped imports or subsidies by States not members of the European Economic Community (*GU L 209, p. 1*); on the other hand, the annulment under art.173, second paragraph, of the Treaty, of Council Regulation (EEC) on November 23, 1988 , n. 3651, imposing a definitive anti-dumping duty on imports of serial-impact dot matrix printers originating in Japan (*GU L 317, p. 33*), in so far as that regulation concerns the applicant (§ 1). *Nakajima* considers the art.2 (3)(b)(ii) unlawful, of the new regulation

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has objected to the *Basic Regulation on anti-dumping* adopted by the EU because its application is considered as a violation of the Anti-Dumping Code adopted under the GATT; equally, in *Germany v. Council*[42], Germany has sought the annulment of the *Banana Regulation* for their incompatibility with GATT provisions[43]; *Portugal v. Council*[44], Portugal disputes the violation of fundamental principles of the WTO and

for lack of motivation (§ 12) and it rejected the first part of the means of lack of motivation of the same Article (§ 21). *Nakajima* argues that art.19 of the new basic regulation, is not motivated as it does not specify the reasons which would justify the retroactive application of that regulation (§ 22), and it is claimed that the second part of the plea, related to the absence of motivation of art.19 of the new basic regulation, is unfounded (§ 24). So it appears that the plea of illegality of the new basic regulation for breach of essential procedural must be dismissed (§ 25). *Nakajima* believes that art.2(3)(b)(ii) of the new basic regulation can not be applied in this case because it is inconsistent with certain provisions of the Anti-Dumping Code (§ 26). The Council considers that the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly effective in the Community (§ 27). So *Nakajima* can not challenge the validity of the new regulation attaching a violation of provisions of the Anti-Dumping Code which must be rejected as required by § 42). [online]. Available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96515&pageIndex=0&doclang=it&mode=req&dir=&occ=first&part=1&cid=3623> Accessed: 11.08.2018

42 CJUE Case no. C-280/93, Award I – 5044–5045, 5051, 5056, 5061, 5064, 5070–5071, 5074–5075 (Oct. 5, 1994) (By application initiating proceedings lodged at the chancellory on 14th May 1993, the Federal Republic of Germany, under art.173, first paragraph, of the EEC Treaty, asked the Court for the annulment of Title IV and art.21, n. 2 of Council Regulation (EEC) on February 13, 1993, n. 404, on the common organization of the market for what concerns the field of bananas (*GU L 47, p. 1*; hereinafter the 'Regulation') (§ 1). In accordance with the Protocol annexed to the implementing Convention on the association of the overseas countries and territories with the Community, provided at art.136 of the Treaty (hereinafter: the bananas protocol), the Federal Republic of Germany has participated in a particular regime allowing it to import an annual quota of bananas free of customs duty, and that with regard to the quantity imported in 1956 (§ 6). Under n. 4, third paragraph, of the Protocol bananas, on a proposal from the Commission, the Council, acting by a qualified majority, decides the abolition or amendment of the quota (§ 7). In accordance with art.21(2), the tariff quota provided for in the 1957 Protocol is deleted (§ 123). In support of its action, the Federal Republic of Germany relies on several pleas, alleging infringement of essential procedural requirements, substantive rules and fundamental principles of Community law, the Lomé Convention, the General Agreement on Tariffs and Trade (GATT) and the bananas Protocol (§ 26). It is confirmed that the Federal Republic of Germany can not invoke the provisions of GATT to challenge the lawfulness of certain provisions of Regulation (§ 112) and the plea of breach of the Bananas Protocol must be rejected (§ 118). It is concluded that since no plea has been upheld, the appeal of the Federal Republic of Germany must be dismissed in its entirety (§ 119)). [online]. Available at: <http://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61993CJ0280&from=EN> Accessed: 11.08.2018

43 JENEY (note 40) pp. 84–86.

44 CJUE Case no. C-149/96, Award I – 8427–8428, 8434, 8440–8441, 8446 (Nov. 23, 1999) (Portugal has presented an action under the first paragraph of art.173 of EC Treaty (after amendment, the first paragraph of art.230 of the EC) for the annulment of Council Decision 96/386 / EC of 26th February 1996, on the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between

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rules of the *Agreement on Textiles and Clothing* and *Agreement on Import Licensing*[45]; in *Eureko v. Slovakia*[46], the provisions of the BIT can not be applied because of the prevalence of European law[47]; in *Oostergetel v. Slovakia*[48], the Court, however, states

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the European Community and the Republic of India on arrangements in the area of market access for textile products (§ 1). The Portuguese Government denies the breach, considered unfounded, of certain rules and fundamental principles of WTO, in particular those of the GATT (1994), the ATC and the Agreement on Import Licensing Procedures (§ 25)). [online]. Available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=44858&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=73382> Accessed: 11.08.2018

45 JENEY (note 40) pp. 87–88. *See also* CHANDIRAMANI, Nilima M. *World Trade Organisation and Globalisation: An Indian Overview.* Navi Mumbai: Shroff Publishers & Distributors Pvt. Ltd., 1999.

46 UNCITRAL, PCA Case no. 2008–13, Award 2, 46–47 (Dec. 7, 2012) (The Claimant requests for arbitration whereas the Slovak Republic has violated the BIT of 1992 between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (§ 6), and noted that the various legislative measures introduced by the Respondent, after a change of government in July 2006, have constituted a systematic reversal of the liberalization of the Slovak market of health insurance that prompted *Eureko* to invest in Slovakia health insurance sector. For the Claimant, these actions have in fact worsened the investment value of *Eureko*. The Claimant shows the measures that constitute an illegal expropriation of their investment, in violation of art.5 of the BIT and the violation, by the Respondent, of the BIT standards of protection contained in the provisions on fair and equitable treatment (art.3(1) BIT), full protection and security (art.3 (2) BIT) and free transfer of profits and dividends (art.4 BIT)(§ 7). The Respondent raises a further objection to the jurisdiction of the Court, based on the interaction of the BIT with the fundamental provisions of European law, so that the art.3, 4 and 5 of the BIT have to be considered inapplicable, given the primacy of the European law (§ 147) . It is considered that the Court has no jurisdiction to decide on alleged breaches of European law (§ 148) and for the Claimant the Respondent has a wrong opinion about the relationship between European law and fundamental provisions of the BIT, for which the Court has jurisdiction to decide on claims submitted under the BIT. For the Claimant, the problem is not whether the European law coincides in part with the protection of the BIT, but if it is *incompatible* with the BIT in accordance with the Vienna Convention on the Law of Treaties. It is considered that, while the European law is superior to the national one, it is not superior to other instruments of international law (§ 150)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf> Accessed: 11.08.2018

47 The Court summarized as follows: *if the same subject is regulated by both EU law and national law (the BIT), EU law prevails. Therefore, the Tribunal would be actually deciding on a breach of EU law by the Slovak Republic. See* KRIEBAUM, Ursula. The Fate of Intra-EU BITs From an Investment Law and Public International Law Perspective. *ELTE Law Journal,* 2015, no. 1, p. 32.

48 UNCITRAL AD HOC, Award 19–21–27–37–79–80,81–90 (Apr. 23, 2012) (The case essentially revolves around the thesis that the BCT bankruptcy proceedings were conducted unlawfully (§ 88), in view of a breach of fair and equitable treatment and full protection and security guarantees, as required by the BIT, and a violation of the right to a fair trial as provided by the European Convention on Human Rights (ECHR), ratified by the Slovak Republic in 1992 (§ 95). The Supreme Court confirmed the decision of the Regional Court on bankruptcy adjudication such as to be considered properly adjudicated (§ 122), and the arbitral Tribunal considers that, under Slovak law, provisional and bankruptcy

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that the applicable law includes the national law, which in turn includes European law[49].

3. Nationality Investment

Nationality investment is an instrument of fundamental importance for the international jurisdiction[50]. In fact, while the nationality of an investor, natural person, is mainly determined by the law of the country of origin[51]; in the case of legal person, as a rule, the criteria adopted are the *incorporation* or principal *seat* of business[52] or both[53], although some treaties might accept *a preponderant*

trustees are not State bodies for which the State is responsible in accordance with art.4 of the ILC Articles (§ 155)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0933.pdf> Accessed: 11.08.2018

49 It is stated that, *if EU law must be applied, this Tribunal will seek to interpret both the BIT and applicable EU law in a manner that minimizes conflict and enhances consistency. See* KRIEBAUM (note 47) p. 32.

50 ANNONI, Alessandra, FORLATI, Serena (eds). *The Changing Role of Nationality in International Law.* Abingdon, USA, Canada: Routledge, 2013, p. 224; PATRIARCA, Camillo. Il trasferimento della sede all'estero. *Annali dell'Università del Molise,* 2005, 410 *et seq.*

51 A nationality certificate issued by the competent state authorities, is a great tool to prove the existence of the nationality of one State, but it is not necessarily sufficient. In *Soufraki v. United Arab Emirates* (ICSID Case no. ARB/02/7), despite the claimant had tried different Italian nationality certificates, the Court considered that the loss of Italian nationality has taken place with the acquisition of the Canadian one and therefore it can neither refer to the BIT between Italy and the UAE, nor even having recourse to ICSID jurisdiction, since Canada is not a member of the ICSID Convention. [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0799.pdf> Accessed: 20.08.2018. *See also* artt.1, 5, 7, 10 *Draft Articles on Diplomatic Protection (2006).* [online]. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> Accessed: 11.08.2018

52 In *Tokios Tokelės v. Ukraine*, the Claimant was a company constituted under the law of Lithuania and 99%-owned by Ukrainian nationals. The Respondent stated that the claimant was not an authentic Lithuanian entity because it was owned and controlled by nationals of Ukraine. The vast majority of Courts have held that the Claimant is an *investitor* of Lithuania, according to the BIT, and a *national of another Contracting State* according to art.25 of the ICSID Convention. [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0863.pdf> Accessed: 11.08.2018. *See also* art.1 (2)(b) India-Croatia BIT. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/861> Accessed: 11.08.2018; art. 1(a) India-Cyprus BIT [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/923> Accessed: 11.08.2018; art.1 (a)(ii) India-Czech Republic BIT. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/939> Accessed: 11.08.2018

53 *See, e.g.,* art.1 (2) of *ASEAN Agreement for the Promotion and Protection of Investments (1987),* implemented in *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case no. ARB/01/1*, states that *the term 'company' of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.* [online]. Available at: <http://asean.org/?static_post=the-1987-asean-agreement-for-the-promotion-and-protection-of-investments> Accessed: 11.08.2018

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interest of nationals in a company[54] or combine the seat with *a predominant interest of an investor*[55]. In *Tokios Tokelės*, Ukraine pleads the lack of jurisdiction on the Italian company *Tokios Tokelės*, which had started a ICSID arbitration under the BIT Ukraine-Lithuania[56]; in *Saluka v. Czech Republic*[57], the Court considered that it should adhere strictly to the definition of *investor* formulated in the treaty applicable generating the challenge by the Czech Republic of the status of real Dutch investor – under the BIT Netherlands-Czech Republic Countries – of the *Saluka* company duly incorporated in Netherlands but due to the Japanese financial group Nomura and made *shell company* with no substantial connection with the place of incorporation. Situation similar to *Tokios Tokelės* occurred in *Rompetrol v. Romania*[58], where a Dutch company, which is controlled by a Roma-

54 *See, e.g.,* art.1 (b)(aa) Switzerland-Bolivia BIT. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/461> Accessed: 11.08.2018

55 *See, e.g.,* art.1 (3)(b) Sweden-Lithuania BIT. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1924> Accessed: 11.08.2018

56 Among the reasons, it is disputed to this company, duly incorporated under the Lithuanian law, not to be a *genuine entity of Lithuania*, being 99%-owned by Ukrainian citizens. In particular, Ukraine argued that allowing Ukrainian citizens to start an international arbitration against their own State was contrary to the object and purpose of the ICSID Convention. *See* CASO ICSID n. ARB/12/22 –*Venoklim Holding B.V. v. República Bolivariana de Venezuela*. [online]. Available at: <https://docplayer.net/55790478-School-of-international-arbitration-queen-mary-university-of-london-international-arbitration-case-law.html> Accessed: 11.08.2018

57 UNCITRAL, PCA Award 33–34, 42, 46, 50 (Mar. 17, 2006) (The Claimant considers that the Czech Republic has acted in a discriminatory, unfair, inequitable and expropriatory way, thus in breach of its obligations under the BIT, and in particular art.3 and 5 (§ 164). It was considered that the investment has not been done legally (as it is generally required for the protection of investments), but it was part of a *dishonest scheme to make huge benefits* (§ 183 (a)(b)(d)). Moreover, it was considered that *Nomura* has not acted in good faith, so *Saluka* was prevented from accessing to an international arbitration process under the BIT. It was also considered that *Saluka* had not any real and continuous economic or social linkage *in fact* to the Netherlands, and therefore it would be disqualified from being considered as an investor and so unable to have recourse to arbitration (§ 167). One wonders if the holding of IPB of *Saluka* is an investment that, as defined in § 204, must be done *in accordance with the provisions of the host State's laws*, and the question arises if *Saluka* is to qualify as *investor* for the purposes of the Treaty (§ 222). So there is no doubt that *Saluka* respects only explicitly dictated requirements in art.1 of the Treaty for the definition of investor, that is, to be a *legal person*, and be *constituted under the law of the Netherlands* (§ 223). The Court considered the investment complying with the Treaty (§ 243) and considers its jurisdiction limited to *Saluka* and not even at *Nomura* (§ 244)). [online]. Available at: < http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> Accessed: 11.08.2018

58 ICSID Case no. ARB/06/3, Award 5–6, 22–23, 34, 78, 100 (May 6, 2013) (*Rompetrol Group n. V. (TRG)* has filed a request for arbitration against the Republic of Romania (§ 1) concerning an investment in the Romanian oil sector and, in particular, the purchase of shares in *Rompetrol Group Rafinare SA (RRC),* a privatized Romanian company that owns and operates an oil refinery and petrochemical complex. It is assumed that the Romanian Government has ordered an *extraordinary and unreasonable investigation* of RRC, as well as a further management *discriminatory and arbitrary* of the company for which the BIT

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nian national, had started an ICSID arbitration against Romania; so in *Yucos*[59], where it interpreted the definition of *investor* contained in the Energy Charter Treaty and in *KT Asia Investment Group v. Kazakhstan*[60], where the Court considers only the definition of investor agreed by the parties of the Kazakhstan-Netherlands BIT countries, according to which the nationality of a legal person is determined by the place of incorporation. In *Charanne and Construction v. Spain*[61], Spain considered that companies which are incorporated respectively

between the Kingdom of the Netherlands and Romania would have been violated. The Court notes that during the period 2007–2009, *Rompetrol Holding S.A.* has sold its shares in TRG to KaiMunaiGaz, a Kazakhstan energy company, so as to be wholly owned by TRG and that there is no reason why the transfer affects the right of TRG to proceed with the claims presented in the arbitration proceedings (§ 194)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1408.pdf> Accessed: 11.08.2018

59 UNCITRAL, PCA Case no. AA 227, Award 2, 14, 49, 578 (Jul. 19, 2014) (Reference is made to the notice of claim to the President of Russia with respect to the alleged violation of Russia's obligations under the ECT and an amicable dispute under art.26 (1) ECT (§ 9). The dispute concerns various measures taken against *Yukos* and associated companies in the period between July 2003 and November 2007, when *Yukos* emerged after the dissolution of the Soviet Union to become the largest oil company in the Russian Federation (§ 63). The procedural law applied by the Court consists of the ECT procedural provisions (particularly art.26), the UNCITRAL Rules of 1976, and since The Hague is the place of the arbitration, any mandatory provisions of Dutch arbitration law). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> Accessed: 11.08.2018

60 ICSID Case no. ARB/09/8, Award 2, 30–31, 57 (Oct. 17, 2013) (The core of the dispute concerns the allegations about a forced nationalization of Kazakhstan of its minority interest in BTA Bank (§ 6). The Court must determine whether KT Asia is an *investor* under the ICSID Convention and the BIT and then ascertain the Dutch nationality or Kazakh (§ 111). In accordance with the general method for determining corporate nationality in international law and in article 1(b)(ii) of the Treaty, the Contracting Parties agree that the place of incorporation define the nationality of legal person. So that, a legal person incorporated under the law of a Contracting Party is a national of that State. KT Asia is a legal person incorporated under the law of the Netherlands and, therefore, it is a Dutch national under the BIT nationality test (§ 116). Finally, the Court considers that the Claimant had failed to consider the investment covered by the definition under art.25(1) of the ICSID Convention and art.1(a) BIT and missing the jurisdiction *ratione materiae* (§ 222)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3006.pdf> Accessed: 11.08.2018

61 SCC Case no. 062/2012, Award 11,18, 47–48, 87, 125, 128 (Jan. 21, 2016) (the Claimants have submitted Notice of dispute to the Kingdom of Spain (§ 17) which dispute concerns the regulatory framework of the Kingdom of Spain concerning the generation of solar photovoltaic systems (§ 78). It is believed that the States whose nationality is challenged, Luxembourg and the Netherlands, as well as Spain itself, are EU members before they negotiate and ratify the ECT (§ 207). The intra-European investments are subject to a specific EU regulatory structure that absolutely consider all issues relating to investment treaties, including those protected by the ECT. So, ECT is not applicable to investments made in EU by nationals of the Member States, and it does not confer any right to such nationals, including in particular the right to resolve disputes through arbitration (§ 208). For ECT, an investor of one EU Member State is investor both of that State and EU, and in accord-

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in the Netherlands and Luxembourg, could not be considered *investors* under ECT because *cascarones vacíos* (*empty boxes*) controlled by Spanish citizens; in *TSA Spectrum de Argentina v. Argentina*[62], the Court denies its own jurisdiction over Argentine society, believing that they possess the nationality requirement on the basis of *foreign control* whose article 25 (2) (b) of the ICSID Convention, because the same, albeit directly controlled by one Dutch company, actually it resulted ultimately controlled by an Argentine citizen. Being nationality of an investor relevant for access to dispute settlement under the ICSID Convention, the investor is required to be a *national of another Contracting State*, for example of a State that is a party to the ICSID Convention and in the case of arbitration based on the BIT, the host State must be one of the BIT partners and the inves-

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ance with art.1(10) ECT, EU is a Regional Economic Integration Organisation (REIO), which includes the territory of Spain, as well as Luxembourg and the Netherlands: so the criterion of difference between the territory of an investor and the territory of the other Contracting party receiving the investment is absent. Thus, for the Respondent, the definition of the territory of States in paragraphs (a) and (b) in art.1(10) of ECT only applies to States which are not members of the REIO (§ 214). The Claimants require the arbitral Tribunal to declare that Spain has violated its international obligations under Part III of ECT. In particular, Spain would have expropriated investments without paying a prompt, fair, adequate and effective compensation, in violation to Article 13 ECT; moreover, it would have breached its obligation of fair and equitable treatment, in violation of art.10(1) and art.10(12) ECT (§ 392). The Court rejects the opinion of the Claimants that the immediate implementation of the 2010 norms would violate art.10(1) ECT (§ 549) in addition to the remaining claims (§ 573)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf> Accessed: 11.08.2018

62 ICSID Case no. ARB/05/5, Award 2, 11, 13–14, 19, 22, 30–31, 44–47 (Dec. 19, 2008) (*TSA* is a company incorporated in Argentina and is wholly owned by a subsidiary of *TSI*, a company registered in the Netherlands (§ 1). On the 20th of December, 2004, *TSA* requests for arbitration with the ICSID (§ 23). *TSA* disputes that the Argentine Republic, in violation of the BIT, international and Argentine law, has expropriated its investment and has not protected the investment in a fair and equitable way (§ 36). The Argentine Republic, in turn, argues that *TSA* have waived any international arbitration based on the BIT and therefore has started a ICSID arbitration without meeting the preconditions for such arbitration; it is considered that *TSA* is not a legal person who enjoys the protection of the investor under the BIT and that it is not in accordance with Argentine law and therefore not protected under the BIT (§ 39). *TSA* considers that its actions are fully owned by *TSI*, incorporated under the laws of the Netherlands, as well as to meet the criteria of the Protocol and also art.25(2)(b) of the Convention, since the parties have agreed in BIT that *TSA*, given the incorporation of TSI in the Netherlands and 100% participation in the equity of *TSA*, should be regarded as a national of the Netherlands (§ 158). The Court considers that it is necessary to establish whether the company was objectively under foreign control, according to the second part of art.25(2)(b) (§ 160). The interpretation given by the BIT between Argentina and the Netherlands, including the Protocol, *TSA* can not be considered, under art.25(2) (b) of the ICSID Convention, a national of the Netherlands, given the absence of *foreign control*, and therefore the Court has no jurisdiction to examine the claims of *TSA* (§ 162)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0874.pdf> Accessed: 11.08.2018

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tor must prove to be a national party[63]. In addition, to counteract the effects of *nationality planning* or *treaty shopping*[64] States have chosen two methods including a bond of economic substance between the corporation and the State or the *denial of benefits* clause, contained in several BITs, which reserves the right to deny the treaty benefits to a company that does not have a connection to the State from which the nationality depends, or in substantial business activities in that State. So the law in *Tokios Tokelės*, according to which the nationality of the legal person shall be determined solely based on the criterion of the Treaty applicable (which often coincides with the simple place of incorporation) obviously leaves much room for practices so-called *corporate nationality planning* or *treaty shopping* in the investment arbitration[65]. Investments often take place through participation in a company that has a different nationality from that of the investor: thus, in *Barcelona Traction*[66] it has been demonstrated the importance of

63 In this regard, it is interesting to recall the *essentialia negotii* of an arbitration agreement based on art.25(2)(b) of the ICSID Convention, which defines the *national of another Contracting State* and those provisions contained in investment treaties that define the purpose of the *consensus*, such as the definition of *investment* or the *nationality* of the claiming investor. The application of art.25(2)(b) of the ICSID Convention requires the existence of an agreement between the host State and the investor, an *actual foreign control* that should be exercised by a national of a State party of the ICSID Convention, in addition to the insertion of an ICSID arbitration clause in the agreement, in order to protect a local company as a foreign national. *See* DOLZER, Rudolf, SCHREUER, Christoph. *Principles of International Investment Law.* USA: Oxford University Press, 2008, pp. 236–237; STEINGRUBER, Andrea Marco. Some Remarks on Veijo Heiskanen's Note: 'Menage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration'. *ICSID REVIEW – Foreign Investment Law Journal*, 2014, vol. 29, no. 3, p. 638; SACERDOTI, Giorgio, ACCONCI, Pia, VALENTI, Mara, DE LUCA, Anna. *General Interests of Host States in International Investment Law.* USA: Cambridge University Press, 2014, p. 478.

64 *See generally* BAUMGARTNER, Jorun. *Treaty Shopping in International Investment Law.* USA: Oxford University Press, 2016.

65 For those who intend to invest in a given State – wanting to get the investment for international protection, or wanting to obtain a more favorable protection than any existing – will, in fact, be sufficient to organize (or reorganize) the investment through a special purpose vehicle incorporated in a State can provide a favorable investment treaty, which does not provide for the investor stringent requirements of *substantial connection* with the State of incorporation or denial of benefits for the case of external control as in *Aguas del Tunari SA v. Bolivia* (ICSID Case no. ARB/02/3) where this practice has been clearly recognized. [online]. Available at: <http://www.italaw.com/cases/57> Accessed: 11.08.2018

66 ICJ *Reports* 1970, Award 6–8, 30, 38, 52 (Feb. 5, 1970) (In 1958 the Belgian Government presented a claim at the ICJ against the Government of Spain, in order to obtain compensation for damage caused by the *Barcelona Traction Company, Light and Power Company, Limited,* due to an alleged violation of international law (§ 1) . The *Barcelona Traction, Light and Power Company, Limited*, is a holding company merged in 1911 in Toronto (Canada), where it has its head office (§ 8). According to the Belgian Government, the share capital of *Barcelona Traction* is widely owned by Belgian nationals. The fact that the shares have been held for some periods by Americans for protection in the event of invasion of Belgian territory during the Second World War, is for Belgium, of no importance, for which the Belgian nationals continued to be the real holders. In contrast, the Spanish Government

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protections of corporate nationality over effective nationality (seat) where the ownership actually lies. The case is also important as it demonstrates how the concept of diplomatic protection[67], under international law, can apply equally to corporations as to individuals and it also expanded the notion of obligations owned *erga omnes* (in relation to everyone) in the international community.

4. Fair and Equitable Treatment

Most BITs today shall contain provisions on *fair and equitable treatment (FET)*[68], the violation of which also represents a large part of international arbitration disputes[69], and attracted the attention of several NGOs that have expressed concern about *the increasing abuse of the FET clause in recent ISDS proceedings* granting of reducing *the scope of the clause via a closed list or reducing the items in the closed list*, while others considered that they were necessary for *clarifications*[70]. Thus, the Indian BITs have accorded to foreign investors fair and equita-

considered that the Belgian nationality of the shareholders could not be tested and that it is needed to refer to the actual shareholders (§ 9). Given that the Belgian Government has not *jus standi* in this case, both for the protection of the Canadian *Barcelona Traction company*, and for the protection of alleged Belgian shares of the company; considered that the exhaustion of local remedies rule requirements were not observed, and in view of other reasons, the Belgian claims are considered inadmissible or unfounded and then to archive. At the international level, the Belgian Government has proposed the unacceptability to deny shareholders a right to diplomatic protection simply because another State has a corresponding right with regard to the company itself. The Belgian government has repeatedly claimed that there is no rule of international law which would deny the diplomatic protection to seek compensation for unlawful acts committed by another State against the company in which they hold shares (§ 51)). [online]. Available at: <http://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-BI.pdf> Accessed: 11.08.2018

67 The Permanent Court of International Justice explained in the *Mavrommatis Palestine Concessions* ((1924) PCIJ Rep Series A, no. 2) that it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. *See* DOLZER, SCHREUER (note 63) pp. 211–213.

68 How Prosper Weil wrote in 2000, the standard of *fair and equitable treatment* is certainly no less operative than was the standard of *due process of law*, and it will be for future practice, jurisprudence and commentary to impart specific content to it. *See* WEIL, Prosper Weil. The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois. *ICSID REVIEW – Foreign Investment Law Journal*, 2000, vol. 15, no. 2, pp. 401, 415; DOLZER, SCHREUER (note 63) p. 148.

69 The cases *Metalclad v. Mexico* and *Maffezini v. Spain* (ICSID Case no. ARB / 97/7), dating back to 2000, are the most significant in this context. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0481.pdf> Accessed: 11.08.2018. *See also* DOLZER, SCHREUER (note 63) p. 119.

70 JENNINGS, Mark. The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy. *Business Law Internation-*

ble treatment[71] and not just a national treatment; ASEAN IGA prescribes the FET respectively in artt.III and VI (2) of *Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the promotion and protection of investments (1987)*[72]; in a similar way, all the BITs of Taiwan except Taiwan-Malaysia BIT. Equally, even if AIA does not contain such a clause, some provisions may nonetheless be inspired by the FET[73]. The question of whether the FET standards simply reflect international minimum standards, as governed by customary international law, or offer some additional autonomous standards of international law in general[74], the Notes and Comments to the *OECD Draft Convention on the Protection of Foreign Property of 1967* have indicated it as competing of customary international law whose interpretation has been followed by

al, 2016, vol. 17, no. 2, p. 136; VANDEVELDE, Kenneth J. A Unified Theory of Fair and Equitable Treatment. *New York University Journal of International Law and Politics,* 2010, vol. 43, no. 1, pp. 43, 46.

71 The FET is contained in 71 of the 73 Indian BITs, 66 of which do not define the normative content or a guide to their meaning, as to render them vague and expandable. ITA jurisprudence shows that the vague and expandable nature of the provision FET made it extremely popular among foreign investors to challenge host State regulatory measures such as privatization and monetary policy, or environmental protection. *See* Vodafone Serves Notice Against Indian Government Under International Bilateral Investment Treaty. [online]. Available at: <https://www.vodafone.com/content/index/media/vodafone-group-releases/2012/bit.html> Accessed: 05.08.2018. *See also* RANJAN, Prabhash. India and Bilateral Investment Treaties – A Changing Landscape. *ICSID REVIEW – Foreign Investment Law Journal*, 2014, vol. 29, no. 2, pp. 431–432; VANDEVELDE, Kenneth J. *Bilateral Investment Treaties: History, Policy, and Interpretation.* USA: Oxford University Press, 2010.

72 *See* Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments. [online]. Available at: <***http://asean.org/?static_post=agreement-among-the-government-of-brunei-darussalam-the-republic-of-indonesia-malaysia-the-republic-of-the-philippines-the-republic-of-singapore-and-the-kingdom-of-thailand-for-the-promotion-and-prote***> Accessed: 14.08.2018

73 *See, e.g.*, art.5 (a) AIA Framework Agreement that ensure that measures and programmes are undertaken on a fair and mutually beneficial basis. [online]. Available at: < http://www.asean.org/wp-content/uploads/images/archive/7994.pdf> Accessed: 14.08.2018. *See also* LIU, Han-Wei. A Missing Part in International Investment Law: The Effectiveness of Investment Protection of Taiwan's BITs Vis-À-Vis ASEAN States. *University of California Davis Journal of International Law & Policy,* 2010, vol. 16, pp. 156–157.

74 In only 5 Indian BITs of the first phase, the provision FET is connected to the minimum standard of treatment of foreigners under customary international law. For example, the India-Korea BIT provides that the FET does not require additional treatment or more as required by the customary international law minimum standard of treatment of foreigners. This means that the FET connected to the minimum standard of treatment of foreigners under customary international law increases the threshold for violation of the provision FET. *See* RANJAN (note 71) p. 432.

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BIT of the US[75] and Canada[76]. In *Azurix v. Argentina*[77], *Lemire v. Ukraine*[78], *Enron v. Argentina*[79], the Court interprets the art.II 2 (a) Argentina-US BIT[80] and art.

75 *See,* art.5(2) US Model BIT. [online]. Available at: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> Accessed: 14.08.2018

76 *See, e.g.,* art.1105 (1) NAFTA: *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."* [online]. Available at: <http://www.sice.oas.org/trade/nafta/chap-111.asp> Accessed: 14.08.2018. The art.8.10 CETA (§ 2) contains a list of measures that might violate the FET standard. Firstly it points out the causes of any breach of such treatment, found out in arbitrariness manifested in abusive treatment towards investors (such as, coercion, constraint or harassment), in the non-respect of the basic parameters of due process of law (including fundamental breach of the obligation of transparency) and discrimination on racial, religious or gender terms. [online]. Available at: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> Accessed: 14.08.2018. *See* REINISCH, August, STIFTER, Lukas. European Investment Policy and ISDS. *ELTE Law Journal,* 2015, no. 1, p. 19; KLÄGER, Roland. *'Fair and Equitable Treatment' in International Investment Law.* USA: Cambridge University Press, 2011, pp. 164 *et seq.*

77 ICSID Case no. ARB/01/12, Award 1, 2–109–158 (Jul. 14, 2006) (*Azurix Corp.,* is a corporation incorporated in the State of Delaware of the United States (§ 1). In 2001, *Azurix* requested arbitration against the Republic of Argentina, as the latter is believed to have breached the BIT, international law and Argentine law with respect to the investment of *Azurix* (§ 3). The Court does not consider that the BIT should be interpreted in favor or against the investor, since this is an international treaty to be interpreted in accordance with the Vienna Convention (§ 307) and no claim has been infringed the art.IV (1) BIT but, on the other hand, the art.II(2)(a)(b) BIT (§ 442)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> Accessed: 15.08.2018

78 ICSID Case no. ARB/06/18, Decision on Jurisdiction and Liability 12–13, 92 (Jan.14, 2010) (*Lemire* is a national of the United States residing in Ukraine and is the majority shareholder of *Radiocompany Gala* set up in 1995 under the Ukrainian law (§ 36). The dispute relates to alleged violations of the settlement agreement and alleged violations of the BIT (§ 38) and subsequently, the Court confirms that the allocation of frequencies is not compatible with the FET defined in the BIT (§ 451)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0453.pdf> Accessed: 15.08.2018

79 ICSID Case no. ARB/01/3, Award 80–83 (May 22, 2007) (It is considered that the FET has been breached in different points under art.II(2)(a) of the Treaty (§ 251). It is also considered that, where the international minimum standard is sufficiently clear, the FET may correspond, while in other more vague circumstances it might be more accurate of customary international law (§ 258). The Court is bound to interpret art.II(2)(a) of the Treaty *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose* as required by art.31 of the Vienna Convention (§ 259). Additionally, the Court concludes that a FET key element is the requirement of a *stable framework for the investment* since it has been interpreted as *an emerging standard of fair and equitable treatment in international law* (§ 260)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> Accessed: 15.08.2018

80 Argentina has argued that the FET standard does not differ from the customary minimum standard of treatment and that it depended on the note of the NAFTA Free Trade Commission regarding the art.1105 (1). The Court rejected Argentina's argument, concluding that *the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law. The very fact that*

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II 3 (a) US-Ukraine BIT, according to which an *investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security*[81] *and shall in no case be accorded treatment less than that required by international law*, such as to confirm the guarantee of the FET and the total protection and safety[82]; in *Saluka Investments v. Czech Republic*[83], the Court has interpreted art.3.1 of the Czech Republic – Netherlands BIT, which requires each State to provide *fair and equitable treatment* to investments of the other State[84], thus demonstrating the difference in relation to artt. II (2) and II 3 (a) which relate to the standard of treatment *required by international law*[85]; in *Eastern Sugar v. Czech Republic*[86], the Court held that the FET is not replicated from any provision of European law and that therefore the objection of the FET as a point of BITs conflict with European law would be correct[87]. An exception to the FET was made by the principle

recent FTC interpretations or investment treaties have purported to change the meaning or extent of the standard only confirms that those specific instruments aside, the standard is or might be a broader one. See JENNINGS (note 70) pp. 139–140.

81 The *full protection and security* is also a characteristic of 38 Indian BITs of the first phase. But none of them explains its meaning except India-Korea, India-Malaysia and India-Japan BITs that provide information on this. *See* RANJAN (note 71) pp. 432–433.

82 DOLZER, SCHREUER (note 63) pp. 124–126.

83 UNCITRAL, Partial Award 10, 100–103 (Mar. 17, 2006) (*Saluka* disputes that the Czech Republic has acted against it and of its investments in an inconsistent manner under the BIT between the Netherlands and Czech Republic. In particular, *Saluka* disputes that has been deprived of its investment contrary to art.5 of the BIT, and that, contrary to art.3, its investment has not been treated fairly and equitably (§ 26). The court, however, said that the FET has not been breached). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> Accessed: 15.08.2018

84 The Claimant states that the FET standard is not confined only to protect investors from a *egregiously unfair* behaviour, but must be interpreted as a tool to encourage investors to participate in the economy of the host State. The Court, on the basis of art.3.1, requires the Czech Republic *not to act in a way that is manifestly inconsistent, non-transparent, unreasonable or discriminatory*. *See* JENNINGS (note 70) p. 137.

85 *Id.*, p. 138.

86 SCC Case no. 088/2004, Partial Award 42 (Mar. 27, 2007) (*Eastern Sugar* alleges that the Czech Republic breached the FET (§ 199) and is responsible for all acts and requests of all its officials, including the Government and the Constitutional Court, pursuant to art.3(1) BIT (§ 200)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf> Accessed: 15.08.2018

87 The FET in investment treaties has a meaning not contained in any national or European legislation. The fact that investors in certain countries may challenge through the FET and other not, however, is in conflict with the principle of non-discrimination of EU that could be infringed by each individual Member State invoking the FET. *See* MOSKVAN, Dominik. The Clash of Intra-EU Bilateral Investment Treaties with EU Law: a Bitter Pill to Swallow. *Columbia Journal of European Law,* 2015, vol. 22, no. 1, p. 117; WIERZBOWSKI, Marek, GUBRYNOWICZ, Aleksander. Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: some Remarks on Possible Solutions. In BINDER, Christina, KRIEBAUM, Ursula, REINISCH, August, WITTICH, Stephan (eds). *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer.* New York: Oxford University Press, 2009, pp. 544, 549.

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of *special and differential treatment* granted to Cambodia, Laos, Myanmar and Vietnam because of its political and economic needs so it was considered appropriate not to require reciprocal treatment[88].

4.1 Violation of the FET: Transparency, Fair Procedure, Good Faith, Legitimate Expectations

By FET further principles descend including transparency and other contractual obligations, such as procedural propriety, due process of law[89], legitimate expectations, good faith[90]. The transparency requirement is now firmly rooted in the arbitration practice, as it relates to issues of public policy, legislative regimes, state regulatory measures, as well as to the behavior of public officers and national Courts[91]. In 2015, the *Chronicle of Informal Sources of International Business Law* has focused on the notion of transparency in international financial institutions as well as in UNCITRAL and was established a register based on the UNCITRAL Rules on Transparency[92], which has given priority the ICC, too[93]. Thus, in

88 This principle is mentioned both in the Preamble that in art.8(3) CAFTA Framework Agreement. *See also* HUIPING, Chen. China-ASEAN Investment Agreement Negotiations. The Substantive Issues. *The Journal of World Investment and Trade,* 2006, vol. 7, p. 146.

89 DOLZER, SCHREUER (note 63) p. 163.

90 *Id.*, p. 133. For a discussion on the principle of good faith in the US, England and Wales, *see* PERRY, Christina. Good Faith in English and US Contract Law: Divergent Theories, Practical Similarities. *Business Law International,* 2016, vol. 17, pp. 27–40.

91 Another very discussed topic is the issue of the sufficient transparency of which CETA dealt through art.X.33 confirming the transparency of the proceedings in view of UNCITRAL Transparency Rules, given that the lack of transparency provisions in investor-state arbitration is contrary to the fundamental principles of good governance and human rights. The CETA approach on transparency, at least from an EU perspective, is quite revolutionary, as a vast majority of past IIAS concluded from its 28 Member States do not contain a provision requiring mandatory transparency in investor-state arbitration. *See* REINISCH, STIFTER (note 76) pp. 23–24.

92 The principle of transparency, as understood by UNCITRAL, is innovative because multifaceted, as well as two other tools that have been added to the Rules on Transparency, such as the Transparency Registry and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. In accordance with art.8 of the Rules on Transparency, information and documents made public by the Rules on Transparency will be stored electronically in a central repository (the Transparency Registry) administered by UNCITRAL Secretariat and freely available. The principle of transparency based on the UNCITRAL Rules was developed in an international convention adopted by General Assembly Resolution 69/116 of 2014 and signed by 11 States, including France and also ratified by the Republic of Mauritius. Where there is conflict between the Rules on Transparency and arbitration rules, the first will prevail and where there is conflict between the first and the treaty, will prevail those of the second. *See* RAVILLON, Laurence. La Transparence en Droit des Affaires Internationales. Transparency in International Business Law. *Revue de Droit des Affaires Internationales. International Business Law Journal,* 2015, no. 5, pp. 438–439, 443.

93 *Id.*, pp. 433–434.

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Metalclad v. Mexico, the Claimant alleges a lack of transparency of the process following the release by the Federal Government of Mexico and the State Government of a building permit refused by the municipality[94] and in *Maffezini v. Spain*, always criticizes lack of transparency for the transfer of a loan taken place without the consent of the investor[95]. The *fair procedure* is another vital element of the FET also expected from several Model BITs but its application results to be still very deficient, above all in reference to the *right to be heard in judicial or administrative proceedings* being able to lead to a violation of the FET standard. Again calling *Metalclad v. Mexico*, the Court found a violation of the standard FET (art.1105 NAFTA) for lack of *procedural propriety* for not having heard to the investor[96]. The principle of good faith is one of the foundations of international law in general and the law on foreign investment in particular[97]. In *MTD v. Chile*[98], the good faith is understood as a fundamental principle that determines the responsibility of the State, although it is not expressly determined by the

94 The Court, on that occasion, stated that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. Once the authorities of the central government of any Party become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws. It concluded that the acts of the State and the municipality were in violation of the fair and equitable treatment standard under the art.1105 of NAFTA. *See* DOLZER, SCHREUER (note 63) pp. 135–136.

95 The Court in this case believes that the lack of transparency associated with the transfer of the loan is incompatible with the fair and equitable treatment. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation… *See* DOLZER, SCHREUER (note 63) p. 136.

96 ICSID Case no. ARB(AF)/97/1, Award (Aug. 30, 2000) (Moreover, the permit was denied at a meeting of the Municipal Town Council of which *Metalclad* received no notice, to which it received no invitation, and at which it was given no opportunity to appear (§ 91)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf> Accessed: 16.08.2018

97 NOBLES, Kimberley, Chen. Emerging Issues and Trends in International Arbitration. *California Western International Law Journal,* 2012, vol. 43, no. 1, pp. 91–92.

98 ICSID Case no. ARB/01/7, Award 29–30 (May 25, 2004) (Croatia BIT provides that the FET should not be hindered (art.4 (1)). There is no dispute between the parties regarding this application but disagreement on key facts in order to determine if the FET has been infringed (§ 107). The parties also agreed with what defined by Judge Schwebel that the FET is a well-accepted standard which includes fundamental standards such as good faith, due process of law, non-discrimination and proportionality (§ 109). The Court notes that Chile does not discuss how the FET should be understood under the BIT and that there is no reference to customary international law in BIT (§ 111)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf> Accessed: 16.08.2018

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FET standard[99]; in *Phoenix Action, Ltd. v. The Czech Republic*[100], the Court has dedicated many of his arguments to the good faith of the investment protection system and in *Exxon Mobil v. Venezuela*[101], it discusses that Venezuela Holdings was formed for the sole purpose of accessing the ICSID[102]. The concept of legitimate expectations assumes an important role in the International investment law and although BITs generally do not include the protection of legitimate expectations of an investor, the investment Tribunals have shown good will to recognize the standard as a right operated in the BITs provisions, according to both the expropriation ban that the FET standard[103]. So in *Saluka v. Czech Republic*, the Court has described both the content of the legitimate expectations of the FET standard; in *International Thunderbird Gaming Corporation v. United Mexican States*[104], the Court has given its own definition of legitimate expectations clearly indicating the principle of good faith. That's the reason why the legitimate expectation has become the standard and most definite expression of the obligation of good faith by the host States.

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99 ĐAJIĆ, Sanja. Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value. *Zbornik Radova,* 2012, no. 46, pp. 211–216; YANNACA-SMALL, Katia. Fair and Equitable Treatment Standard: Recent Developments. In REINISCH, August (ed). *Standards of Investment Protection.* USA: Oxford University Press, 2008, p. 124.

100 ICSID Case no. ARB/06/5, Award 42 (Apr. 15, 2009) (For the Court, the State is not required to allow access to ICSID for investments not made in good faith. International arbitration can not be recognized if such protection is contrary to the general principles of international law, including the principle of good faith (§ 106). The principle of good faith was recognized in public international law, as well as in all national legal systems [...] and it is the basis of relations between States, including international claims (§ 107)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf> Accessed: 16.08.2018

101 ICSID Case no. ARB/07/27, Decision on Jurisdiction 46, 48 (Jun. 10, 2010) (The Court considers that the principle of good faith is recognized by the ICJ as one of the basic principles governing the creation and performance of legal obligations (§ 170). The Appellate Body of the World Trade Organisation ruled that the principle of good faith controls the exercise of the rights of States and an application of this general principle, widely known as the doctrine of *abuse of rights*, prohibits the abusive exercise of a right of the State (§ 175)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0538.pdf> Accessed: 16.08.2018

102 ĐAJIĆ (note 99) p. 224.

103 NEWCOMBE (note 1) p. 376.

104 UNCITRAL, Arbitral Award 46 (Jan. 26, 2006) (*Thunderbird* states that if an investor or investment reasonably depends on the representative of government officials and suffers damage as a result of this dependence, the responsibility of the State depends on international law, considered harmful addictive use of the general international law principle of good faith and the customary international standards of FET. Through the ratification of NAFTA, *Thunderbird* asserts that Mexico is the author of a repertoire of legitimate expectations which an investor or investment could reasonably depend on (§ 138). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf> Accessed: 16.08.2018

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5. National Treatment and Most Favoured Nation Principles

The most common problem when it comes to FDI is represented by the discriminatory actions that determine a violation of the FET represented mainly by concepts of *national treatment*[105] and *Most-Favoured-Nation (MFN) treatment*[106]. In *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*[107], the Court shall decline jurisdiction on the basis of BITs of Senegal with the Netherlands and the UK through the MFN clause as stated in art.II of the General Agreement on Trade in Services[108]; in *Lauder v. Czech Republic*[109], a discriminatory action occurs simply when it rejects a national treatment; while in *Thunderbird v. Mexico* it is established that a violation of the national treatment standard by NAFTA does not require the Claimant to show separately that a *less favorable treatment* is motivated by nationality since the mere existence of the same can be considered sufficient[110]. In the case of the *AIA Framework Agreement* it differs between ASEAN and non-ASEAN investors, with respect to national treatment, and only those qualified ASEAN are considered nationals of a Member State[111]. All Taiwan BITs contain the MFN clause and, except for the Taiwan-Indonesia BIT, BIT clause, pursu-

105 The clauses on national treatment are included in the standard repertoire of BITs that, in the European version, stipulate that a foreign investor can not be treated less favorably than the host State accords to its own investors. *See* DOLZER, SCHREUER (note 63) p. 178.

106 *Id.*, p. 176.

107 ICSID Case no. ARB/15/21, Award 21 (Aug. 5, 2016) (Senegal does not consider that the practice of some States to exclude arbitration clauses in BITs in the scope of the MFN clause is particularly revealing. This practice has been in the minority in the WTO at the point that only 14 of 162 members mentioned their BITs under the MFN clause and only 3 have indicated that they intended to specifically exclude arbitration procedures provided in their BITs (§ 78)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw7483.pdf> Accessed: 16.08.2018

108 HAMIDA, Walid, Ben, CABROL, Emanuelle. Chronique Droit et Pratique des Investissements Internationaux. *Revue de Droit des Affaires Internationales,* 2016, no. 6, pp. 653–658.

109 UNCITRAL, Final Award 4–40–56–58 (Sep. 3, 2001) (In 1999, *Lauder* requests for arbitration proceedings against the Czech Republic (§ 11) accused of violating, through the Media Council actions, some of BIT obligations, such as the prohibition against arbitrary and discriminatory measures; the obligation to provide the FET and full protection and security; the obligation to respect the general principles of international law and not to expropriate unlawfully (§ 193). The arbitration Tribunal believes that the administrative proceedings against CNTS does not constitute arbitrary and discriminatory measures (§ 248), since the same had happened to *Premiera TV*, which was controlled by a national investor. So *Lauder* foreign investment is not provided with a treatment less favorable than the domestic investment controlling *Premiera TV*, given that the discriminatory actions can only be there when the measures against foreign investment and the national one is of a different nature, for which the first is less advantageous than the latter (§ 257). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> Accessed: 16.08.2018

110 DOLZER, SCHREUER (note 63) p. 181; NEWCOMBE (note 1) p. 375.

111 HUIPING (note 88) pp. 153–154.

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ant to the other five BITs, imposes additional restrictions[112]. Both ASEAN IGA and AIA prescribe some MFN clauses, but their approach is different: ASEAN IGA is modeled on typical standards contained in BITs, while AIA grants the clause only to investors and investments of another Member State. While each of the six BITs Taiwan with ASEAN States recognize a fair and equitable treatment and MFN clauses, a national treatment, that can be a disadvantage towards their competitors, lacks, not only ASEAN but also with States whose national BITs prescribe a national treatment[113]. The major emerging economies like China and India do not initially recognize a national treatment to foreign investors to protect certain strategic economic sectors as well as their population at the individual and company level[114]. Thus, China, has had very progressive integration of national treatment, before recognizing it with reservations and exceptions to the developed countries and then to the developing countries[115]. The application of national treatment rights in a *pre-establishment* phase is an uncommon practice and only the US and Canada require such provisions in their BITs, as well as being contained in the context of regional trade agreements, such as NAFTA, OECD's Code of Liberalization of Capital Movements and Current Invis-

112 The MFN treatment should be excluded if such benefits or privileges result from any existing or future regional or multilateral agreement, as a customs union, free trade agreement or common market. Despite this exception, Taiwan could nevertheless invoke the provisions by virtue of those BITs concluded between Taiwan and any ASEAN State, or an ASEAN State and a third State on the ground that the BITs are neither *regional* or *multilateral*, nor customs union, free trade agreement or even common market. This raises the question of whether Taiwan could, by virtue of the MFN clause, take advantage of the MFN clause of the ASEAN IGA o AIA , if they grant favorable treatment to investors of each ASEAN State. At first, Taiwan would be unable, since ASEAN IGA is a *multilateral* agreement, and AIA is not only multilateral but also a programmatic agreement that can be considered as part of a free trade agreement. Nevertheless, the Taiwan-Indonesia BIT appears to provide a legal basis for Taiwan to invoke the provisions included in the ASEAN IGA and AIA (art. IV). Notwithstanding the foregoing, the question of whether Taiwan can become a free rider and enjoy privileges, if any, resulting from AIA and ASEAN IGA is far from clear in reality. *See* LIU (note 73) pp. 157–158; MAVROIDIS, Petros C. *Trade in Goods: the GATT and the Other Agreements Regulating Trade in Goods.* USA: Oxford University Press, 2007, pp. 148–179.

113 *See* LIU (note 73) p. 159.

114 The Sino-African BITs include a paragraph which allows a national treatment, but in a separate Protocol China reserves the right to maintain laws and regulations to foreign investors that are inconsistent with the national treatment. Only the BIT with the Seychelles in fact recognizes full national treatment without any further restriction. *See* ELKEMANN, Catherine, RUPPEL, Oliver C. Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties. *Richmond Journal of Global Law & Business,* 2015, vol. 13, pp. 607, 610.

115 *See, e.g.,* art.4 China-India BIT. [online] Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/742> Accessed: 16.08.2018. Instead, the China-Australia BIT 2015 offers a renewed vision of national treatment with the well-known reference to the term *in the like circumstances* (art.9.3) and finally the article on national treatment of 2015 draft Indian BIT model showed disassociation to general expression and highlighted the possibility of exceptions. *See* CHOUKROUNE (note 7) pp. 113–115.

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ible Operations and AIA Framework Agreement. The *pre-establishment* national treatment agreements grant rights to foreign investors, although they are still not citizens of the host State, except for developing countries. While APEC has agreed a *post-establishment* national treatment, in ASEAN countries there is a multilateral context which highlights the need to make the national treatment flexible in multilateral investment agreements, granting the *pre-establishment*; and in AIA Framework Agreement it is stated that the national treatment applies both the *pre-establishment* that the *post-establishment*. An exception to the conditions of *pre-establishment* and *post-establishment*, the Sino-African BITs that adopt an admissions model allowing them to have a protection only after it has been permitted FDI project[116]. For China, granting national treatment to foreign investors is a huge problem – considering that in the past it has not been applied[117] – but also a fundamental change in the foreign trade policy of the country that also facilitates compliance with major standards of international law[118]. It can also be said that there is no consensus on whether and when an MFN clause in a BIT recognizes direct access to an arbitration clause as in *Teinver SA, Transportes Urbanos de Cercanías SA and Autobuses del Sur SA v. Argen-*

116 The admission model is opposed to the *pre-establishment* model (the power of screening by the State is already limited in the *pre-establishment* phase) that is applied in the arbitration practice of the USA, Canada and Japan. When we consider the investment policies in China, it should always be remembered that the Chinese State started as a capital-importing State in order to strive for the protection of their sovereign right to regulate FDI. With the rapid growth of OFDI, China has begun to adopt a more liberal approach to enhance the legal protection of their investments influencing even Sino-African investments. *See* ELKEMANN, RUPPEL (note 114) p. 608; CAI, Congyan. Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice. *The Journal of World Investment & Trade,* 2006, vol. 7, no. 5, pp. 621, 626.

117 HUIPING (note 88) pp. 159–161.

118 In the initial phase, the first China BIT with Sweden (1982) was largely characterized by a cautious, whether not reluctant approach to internationalization legislation, with national treatment rarely recognized and the international dispute settlement limited to the determination of the amount of compensation for expropriation. Subsequently, with the China-Barbados BIT (1998) it was given the opportunity to foreign investors to access without restriction to international arbitration. China takes part in a new phase of BIT inspired by the European treaties and formulating the national treatment in a less restrictive and in some way personalized manner, distinguishing between developed or developing nation. The last phase, which began with the China-Korea BIT (2007), is generally described as the most liberal, in part inspired by NAFTA in the sense that it is guaranteed the FET *in de facto* accepting some characteristics of customary international law. *See* CHOUKROUNE (note 7) p. 109; CHANDLER, Aaron M., BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice. *The International Lawyer,* 2009, vol. 43, no. 3, p. 1308; BERGER, Axel. *China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making.* Paper prepared for the American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", (Nov. 14–15, 2008). [online]. Available at: <https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf> Accessed: 17.08.2018

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tine Republic[119] or *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*[120] in which foreign investors, on the basis of the MFN clause, they tried to avoid the *18-month period*[121], previously only granted in judgments as *Emilio Agustín Maffezini v. Spain* and *Gas Natural SDG, SA v. Argentine Republic*[122]. In Russia, the arbitration practice has different interpretations on the MFN clause, as demonstrated in *Vladimir Berschader and Moïse Berschader v. The Russian Federation*[123] in which the Court, dealing with a relatively broad MFN clause, which applies an MFN treatment in all matters

119 ICSID Case no. ARB/09/1, Decision on Jurisdiction 37 (Dec. 21, 2012) (In several cases, the Claimant has requested, pursuant to the dispute settlement provisions of their respective BITs, to remedy a host State national court before resorting to arbitration. In this case it is tried to adopt its MFN clause of the BIT to take advantage of a dispute settlement provision of another treaty that does not contain a requirement of the national Court as a precondition for arbitration (§ 170)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1090.pdf> Accessed: 17.08.2018

120 ICSID Case no. ARB/07/26, Decision on Jurisdiction 31, 34, 41, 68 (Dec. 19, 2012) (The parties expressed divergent views on the importance and purpose of the 18-month rule (§ 106). In this case the Court will refer to the principle content in the art.31 of the Vienna Convention, according to which a treaty shall be interpreted in good faith and to the light of its object and purpose and that such interpretation should be in accordance with the terms of the treaty in their context (§ 107). The Court does not express the reasons why the rule of 18 months constitutes an eligibility issue (§ 113). In BITs signed by the Republic of Argentina and submitted to the Court, it is noted that there is no BIT concluded, after that of Spain, which contains a comparable rule of 18 months (§ 132) and an investor-state dispute before the Argentine Courts would exceed the far the 18 months fixed by the art.X(3) of the BIT in order to reach a *decision on the substance*. A process not able to achieve this target is considered unless and unfair to the investor (§ 202)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1324.pdf> Accessed: 17.08.2018

121 The Argentina-Spain BIT art.X (3) states that a dispute may be submitted to an international arbitral Tribunal…when no decision has been reached on the substance 18 months after the judicial proceeding began. The MFN clause based on the Argentina-Spain BIT states that *in all matters governed by this Agreement, such tratment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country. See* CHENG, Tai-Heng, TRISOTTO, Robert. Urbaser SA and others v Argentine Republic and Teinver SA and others v Argentine Republic. A Workaround to the Most-Favoured-Nation Clause Dispute. *ICSID REVIEW – Foreign Investment Law Journal,* 2014, vol. 29, no. 2, pp. 290–293.

122 ICSID Case no. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction 26 (Jun. 17, 2005) (In this case it was initiated an arbitration under the ICSID Arbitration Rules without invoking the national jurisdiction of Spain or waiting for 18 months (§ 45)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0354.pdf> Accessed: 17.08.2018

123 SCC Case no. V080/2004, Award 59 (Apr. 21, 2006) (The Court considered that the basic prerequisite for arbitration is an agreement of the parties clear and unambiguous, and whether it is decided to refer to an MFN clause, the intention to merge dispute settlement provisions must be expressed clearly and unequivocally (§ 172)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf> Accessed: 18.08.2018

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concerning the agreement between Belgium and Luxembourg and the Soviet Union on the Reciprocal Promotion and Protection of Investments, considers the unequivocal nature of MFN clause; in *RosInvestCo UK Ltd v. The Russian Federation*[124] interprets the MFN clause in the UK-Soviet BIT so as to allow access to international arbitration[125]. It remains that, despite the *Most-Favoured-Nation treatment* is not required by the customary law, the simple purpose of integrating it into the treaties is to ensure that interested parties treat each other in a manner at least as favorable as the third parties[126]. Thus, in *MTD v. Chile*, the MFN clause has been combined with the requirement to recognize a *fair and equitable treatment* in the same provision of the BIT between Chile and Malaysia and addressing other fundamental obligations contained in other BITs concluded by Chile with Denmark and Croatia[127].

6. The Duty of States to Ensure Sustainable Development

In compliance with international law, all States have the sovereign right to exploit their natural resources, pursuant to their own environmental and developmental policies, besides the responsibility to ensure that activities within their jurisdiction or control do not cause significant damages to the environment of

124 SCC Case no. V079/2005, Award on Jurisdiction 71–72, 78–80 (Oct. 1, 2007) (The Court is primarily driven by the art.31.1 provisions of the Vienna Convention and concludes that, based on the MFN clause (art.3(2)) of the UK-Soviet BIT, together with art.8 of the Denmark-Russia BIT , it has jurisdiction beyond what recognized by art.8 of the UK-Soviet BIT (§ 133)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0719.pdf> Accessed: 18.08.2018

125 BOUTE, Anatole. The Protection of Russian Investments in the EU Energy Market: A Case in Support of Russia's Ratification of the Energy Charter Treaty. *ICSID REVIEW – Foreign Investment Law Journal*, 2014, vol. 29, no. 3, p. 532; HOBÉR, Kaj. MFN Clauses and Dispute Resolution in Investment Treaties: Have We Reached the End of the Road? In BINDER, Christina, KRIEBAUM, Ursula, REINISCH, August, WITTICH, Stephan (eds). *International Investment Law for the Twenty-First Century: Essays in Honor of Christoph Schreuer.* Canada: Oxford University Press, 2009, p. 31.

126 *See, e.g.*, the art.3 of the German model treaty combines the MFN standard with the national treatment standard: (1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State; (2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State. [online]. Available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> Accessed: 18.08.2018

127 The question for the Court is whether the provisions of the Croatia BIT and the Denmark BIT facing the obligation to grant permits subsequent approval of an investment and the fulfillment of contractual obligations may be considered part of the fair and equitable treatment [...] The Tribunal holds that, according to the BIT, the fair and equitable treatment should be interpreted in a favorable manner in order to realize the goal of BIT to protect and create favorable conditions for investments. *See* DOLZER, SCHREUER (note 63) pp. 189–190.

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other States beyond the limits of national jurisdiction. Recent BITs, all-embracing free trade agreements and multilateral agreements contain provisions on protection of investments with greater reference to sustainable development, as the Preamble to the 2005 *India-Singapore Comprehensive Economic Cooperation Agreement* (India-Singapore CECA), Chapter 19 (*Environment*) of the US / Australia FTA[128] and the Canada-China BIT[129], which also contains a long list of exceptions that covers a wide variety of areas from cultural industries to environmental, financial and transparency issues[130]. As just mentioned, it is related to the first principle of the *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*[131] to which the IIAs refer, even not defining what the criteria to distinguish between sustainable or unsustainable investment, and not imposing obligations on States to manage their natural resources in a *rational, sustainable and safe way for contributing to the development of their populations.* The second principle of the *Declaration* focuses on equity and poverty reduction and international political consensus, as expressed in the *WSSD Plan of Implementation and the Monterrey Consensus*[132]: it says that foreign investment plays a crucial role in the sustainable development process and in creating economic opportunities for the reduction of poverty, on the premise that a stable and predictable framework will promote investment which, in turn, contribute to economic development[133]. The third principle of the *Declaration* highlights the

128 NEWCOMBE (note 1) p. 400; BOULLE, Laurance. Balancing Competing Interests in FDI Policy – A Developing Country Perspective. *Asian Journal of WTO and International Health Law and Policy,* 2012, no. 7, p. 334; BUONO, Enrico. The Anachronism of Junking: the Retrograde Motion of the Italian Legislator and the American Experience. *Rivista Notarile,* 2015, no. 2, pp. 106–117.

129 *See* Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476> Accessed: 18.08.2018

130 Even in the US-Oman FTA wide importance is given to environmental protection, so the art.10.10 provides a strong protection of the right of each State Party to adopt, maintain or enforce any measure to ensure that the investment is made in a sensitive manner to environmental concerns. *See* CHOUKROUNE (note 7) p. 103. *See also* Adel Hamdi El Tamini v. Sultanate of Oman (ICSID Case no. ARB/11/33 Award (Oct. 27, 2015)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf> Accessed: 18.08.2018

131 *See* SCHRIJVER, Nico. ILA New Dehli Declaration of Principles of International Law Relating to Sustainable Development. *Netherlands International Law Review,* 2002, vol. 49, no. 2, pp. 299–305; FERONI, Ginevra, Cerrina. Contesto e prospettive delle energie rinnovabili in Italia: tra diritto e politica. *Federalismi.it,* 2014, pp. 1–18; AMIRANTE, Domenico, VIOLA, Pasquale. The Growing Role of Expert Members in Environmental Adjudication: The Case of the Indian National Green Tribunal. *Transnational Dispute Management,* 2017, no. 2. [online]. Available at: <https://www.transnational-dispute-management.com/article.asp?key=2460> Accessed: 26.08.2018

132 *See* Plan of Implementation of the World Summit on Sustainable Development. [online]. Available at: <http://www.un-documents.net/jburgpln.htm> Accessed: 18.08.2018

133 NEWCOMBE (note 1) p. 371; CAMORRINO, Antonio. Bella, buona, autentica e incor-

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common but differentiated responsibilities of States which are missing in IIAs regimes, unlike the WTO regime[134]. This principle also refers to the responsibility of developed States to contribute to the development of the developing countries, despite the IIAs have no specific provisions regarding the cooperation[135]. The fourth principle is the precautionary principle[136], central to sustainable development[137], in regard to the human health, environmental protection and sustainable use of natural resources. The IIAs do not express themselves specifically on this principle or as the scientific uncertainty problems should be addressed when the regulatory activities of the State could affect investments[138]. Nevertheless, two NAFTA investor state arbitrations, *Myers v. Canada*[139] and *Methanex v. United States*[140], affecting the regulation of chemicals, provide insights on wheth-

rotta. La natura nell'immaginario postmoderno. In LIMONE, Giuseppe (ed). *Kalos Kai Agathos. Il bello e il buono come crocevia di civiltà.* Milan: FrancoAngeli, 2018, pp. 167–177.

134 *Id.*, p. 375.

135 *Id.*, p. 376.

136 AMIRANTE, Domenico. Il Principio Precauzionale Fra Scienza e Diritto. *Diritto e Gestione dell'Ambiente,* 2001, no. 2, *passim*; DE FALCO, Vincenzo. Principio Precauzionale, Incertezze Giuridiche ed Inquinamento Elettromagnetico: la Problematica Gestione del Rischio nell'Analisi Comparata. In LIMONE, Giuseppe (ed). *Il Certo alla Prova del Vero, il Vero alla Prova del Certo. Certezza E Diritto in Discussione.* Milan: FrancoAngeli, 2008, p. 118 *et seq.*; ZINZI, Maddalena. L*a Charte de l'Environnement Francese tra Principi e Valori Costituzionali.* Naples: Edizioni Scientifiche Italiane, 2011, p. 69–74.

137 PEPE, Vincenzo. *Pensare il Futuro. Dare vita a un nuovo modello di ambientalismo.* Milan: Cairo Editore, 2018; PETTERUTI, Carmine. Le Energie Rinnovabili in Cina, tra Tutela dell'Ambiente, Governance Energetica e Crescita Economica. In FERRARI, Giuseppe, Franco (ed). *Energie rinnovabili e Finanza Locale.* Roma: Carrocci Editore, 2014; LUCARELLI, Alberto. Environmental Protection (art.37 Charter of Fundamental Rights of the European Union). In MOCK, William B.T., DEMURO, Gianmario (eds). *Human Rights in Europe. Commentary on the Charter of Fundamental Rights of the European Union.* Durham: Carolina Academic Press, 2010, pp. 229–236.

138 SCIALLA, Laura, Assunta. L'Accesso alla Giustizia in Materia Ambientale tra Potere Discrezionale del Giudice ed Incertezza Normativa: l'Esperienza del Regno Unito. *Diritto Pubblico Comparato ed Europeo,* 2014, no. 2, pp. 975–978; DI GREGORIO, Angela. L'attuale situazione della legislazione ambientale in Russia. In CORDINI, Giovanni, POSTIGLIONE, Amedeo. *Ambiente e cultura. Patrimonio comune dell'umanità.* Naples: Edizioni Scientifiche Italiane, 1999, pp. 239–281; GUASTAFERRO, Barbara, BRIGANTI, Renato. Ambiente e rifiuti: le fonti normative. In LUCARELLI, Alberto, PIEROBON, Alberto. *Governo e gestione dei rifiuti. Idee, percorsi, proposte*. Naples: Edizioni Scientifiche Italiane, 2009, pp. 25–52.

139 UNCITRAL, Award 15, 17, 28–31 (Nov. 13, 2000) (In 1973 the OECD, of which Canada is a member, adopted a Council Decision which urges member States to limit the use of PCBs to reduce the risk to human health and the environment. Later, along with other nations, the US and Canada have banned the production of PCBs and join the international community to resolve in the best way the main environmental problems caused by the existence of PCBs (§ 99)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf> Accessed: 18.08.2018

140 UNCITRAL, Award 1 (Aug. 3, 2005) (*Methanex* began an arbitration proceeding against the United States under Chapter 11 of NAFTA, contesting the compensation for the losses caused by the State of California which prohibited the sale and the use of gasoline additive

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er the investment obligations are inconsistent with the precautionary principle. The reasoning in these two cases suggests that a State may regulate, in view of the precautionary principle, as long as it does not act arbitrarily or in bad faith and is not lacking the due process of law[141]. Fifth principle of the *Declaration*, just as important, it is public participation in sustainable development, and *good governance* as a condition for careful, transparent and accountable governments, as well as being an active state of engagement equal attention, transparency and accountability of civil society[142]. In *Methanex v. United States* for the first time the NAFTA Tribunal has allowed the participation of non-disputing parties (*amici curiae)*[143] in the proceedings, considered as possible in accordance with article 15 (1) of the UNCITRAL Arbitration Rules; so in *United Parcel Service v. Canada*[144] where the Court has allowed the union representing postal workers or in *Glamis Gold Ltd. v. United States*[145], where, as required by Statement issued by the NAFTA Free Trade Commission in 2003, it was respected the discretion of the Court to accept a natural person or entity as non-disputing parties[146]. Provi-

known as MTBE (§ 1)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> Accessed: 18.08.2018

141 NEWCOMBE (note 1) pp. 377–378.

142 *Id.*, p. 383. *See also* COLELLA, Luigi. *La Democrazia Nucleare e la Partecipazione Ambientale in Francia e in Italia.* In *Id.* (ed). *Il Diritto dell'Energia Nucleare in Italia e in Francia. Profili Comparati della Governance dei Rifiuti Radioattivi tra Ambiente, Democrazia e Partecipazione.* Roma: Aracne editrice, 2017, pp. 317–390; IANNELLO, Carlo. Lo sviluppo sostenibile. In LUCARELLI, Alberto, PATRONI, GRIFFI, Andrea (eds). *Rassegna di Diritto Pubblico Europeo. Dal trattato costituzionale al trattato di Lisbona. Nuovi studi sulla costituzione europea*, 2009, pp. 353 *et seq.*; FROSINI, Tommaso, Edoardo. Sul "nuovo" diritto all'informazione ambientale. *Giurisprudenza costituzionale,* 1992, n. 6; ABBONDANTE, Fulvia. L'ambiente fra diritto comunitario e diritto interno dopo la riforma del Titolo V della Costituzione italiana. *Rassegna di Diritto Pubblico Europeo,* 2006, no. 1, pp. 109–146.

143 *See generally* PRISCO, Salvatore. Quando una telefonata (intercettata) non allunga la vita. Contributo al dibattito di Amicus Curiae sul Presidente intercettato. *Forum di Quaderni Costituzionali,* 2012, pp. 1–21.

144 UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* 8, 28 (Oct. 17, 2001) (The US, along with Canada, consider that the arbitration Courts are not authorized, under the NAFTA, to recognize third parties who may be involved in Chapter 11 of the arbitration proceedings, contrary to what regulated by the UNCITRAL Arbitration Rules (§ 9). Consequently, the Court declares to have power to accept the condition *amici curiae*). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0883.pdf> Accessed: 19.08.2018

145 UNCITRAL, Award 129 (Jun. 8, 2009) (The Court notes that the FTC states that nothing in the NAFTA imposes a general duty of confidentiality, and that it can make available to the public all the documents submitted in a Chapter 11 dispute – including documents from non-disputing parties). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> Accessed: 19.08.2018

146 The position adopted by the NAFTA Tribunal applying the UNCITRAL Rules can be compared with other realities of Courts operating under the ICSID Arbitration Rules (ICSID Rules) as in *Aguas del Tunari, S.A. v. Bolivia* (ICSID Case no. ARB / 02/3), in which the Court considered not necessary the participation of non-disputing parties under the ICSID Rules because the arbitrators had signed a declaration to maintain the *confidentiality* of the

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sions for non-disputing parties submissions are also reflected in the new US and Canadian Model BITs, adopted in most recent US and Canadian BITs – US / Uruguay (2005) and Canada / Peru (2006)[147]. The principle of *good governance* is essential for the progressive development and codification of international law in relation to sustainable development, and the IIAS can be seen as the enforcers of this principle of the States through the observation of such standards, the rule of law[148], due process of law, non-discrimination, prohibition on arbitrary conduct, the protection of legitimate expectations and rights of property[149]. Finally, the principle of integration reflects the interdependence of social, economic, financial, environmental and human rights principles and rules of international law relating to sustainable development, which historically have been little mentioned in the IIAS, whose preambles were almost universally focused on the goal of promoting and protecting investment[150].

7. Expropriation and Fair Market Value

Customary international law recognizes the right of the state to expropriate the property of foreigners, provided that a number of preconditions are met, so that the expropriation is legal, such as the obligation to pay compensation the amount of which has been heavily debated[151]. In fact, while developed countries

proceedings, always in accordance with art.6(2) of the ICSID Rules. [online]. Available at: <http://www.italaw.com/cases/57> Accessed: 19.08.2018. Subsequently, the Courts operating under the ICSID Rules have accepted the power to recognize *amici* submission in *Suez Sociedad General de Aguas de Barcelona, SA. and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case no. ARB/03/19), in which the Court has reserved the right to accept an *amici* submission. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> Accessed: 19.08.2018. *See also* NEWCOMBE (note 1) pp. 386–387.

147 *Id.*, p. 388.

148 Ron Daniels believes that the *BIT regime constitutes an urgent priority for those who believe that rule of law reform is one of the most effective ways in which developing countries can achieve the freedom, prosperity and dignity enjoyed by citizens in the West. See* NEWCOMBE (note 1) p. 394.

149 *Id.*, pp. 392–393.

150 These references regularly occur in older IIAS as well as in the current practice, an example of which is the preamble of the China-Germany BIT 2003 which quotes: *Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party, recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States, desiring to intensify the economic cooperation of both States*. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/736> Accessed: 19.08.2018

151 SOHN, Louis B., BAXTER, Richard. Draft Convention on the International Responsability of States for Injuries to Aliens. *American Journal of International Law,* 1961, vol. 55, no. 3, p. 556; REINISCH, August. Legality of Expropriation. In *Id.* (ed). *Standards of Investment Protection.* Oxford: Oxford University Press, 2008, pp. 171–178, 186, 191–193; DOLZER, Rudolf, SCHREUER, Christoph. *Principles of International Investment Law.* USA: Oxford University Press, 2012.

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have mostly shared the vision of the United States, according to which expropriation is lawful if there is a *prompt, adequate and effective* compensation[152] , while developing countries consider a compensation that is *appropriate*[153], the International Investment Treaties introduce a provision requiring the payment of *just compensation, fair compensation* or *adequate compensation*. All these formulas are anchored to compensation based on the fair market value of the investment and requires the State to pay promptly and in an effective manner[154]. The IIAS reflect customary international law in recognizing that States may nationalize or expropriate, but only by recognizing that compensation should be equivalent to the market value, such as to resolve the historical dispute on the standard of compensation[155]. Given that the international authorities consider that the forms of taxation may amount to expropriation, in *Link-Trading v. Moldova*[156], the Court found that the tax measures become expropriatory when equivalent to an *abusive taking*, understood in terms of unfairness, arbitrariness and discrimination or violation of a State commitment. In principle, this represents a balanced approach, in the sense that a State may not arbitrarily transfer resources through expropriation or nationalization without compensation, but may tax foreign investment subject to certain IIAs commitments. In view of a potential violation of national treatment and FET[157], the BIT between Ukraine and the USA in 1994, for example, has requested the parties to pay a *prompt, adequate and effective compensation*[158]; on the contrary, in India-Colombia BIT

152 SCHWEBEL, Stephen M. The Reshaping of the International Law of Foreign Investment by Concordant Bilateral Investment Treaties. In CHARNOVITZ, Steve, STEGER, Debra p., VAN DEN BOSSCHE, Peter (eds). *Law in the Service of Human Dignity – Essays in Honour of Florentino Feliciano.* USA: Cambridge University Press, 2005, p. 242.

153 GAZZINI, Tarcisio. The Role of Customary International Law in the Field of Foreign Investment. *The Journal of World Investment & Trade,* 2007, vol. 8, no. 5, pp. 691, 701–715; CARREAU, Dominique, JUILLARDI, Patrick. *Droit International Economique.* Paris: Dalloz, 2013.

154 WALDE, Thomas W., SABAHI, Borzu. Compensation, Damages, and Valuation. In MUCHLINSKI, Peter, ORTINO, Federico, SCHREUER, Christoph (eds). *The Oxford Handbook of International Investment Law.* USA: Oxford University Press, 2008, p. 1069; REINISCH (note 150) p. 195.

155 NEWCOMBE (note 1) p. 73.

156 UNCITRAL, Award 20–21 (Apr. 18, 2002) (§ 64). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0468_0.pdf> Accessed: 19.08.2018

157 The provisions of non-discrimination in the IIAS mean that there must be *equality of tax treatment* between nationals and foreign investors. It is impossible to recognize a higher tax on foreign investors simply because foreigners. The IIAS requirements of non-discrimination, due process of law and compensation in case of expropriation are not inconsistent with the principle of fairness, or with the State's role in eradicating poverty. On the contrary, the international policy consensus is that these protections play an important role in economic development. *See* NEWCOMBE (note 1) pp. 373–374.

158 Under the art.III (1): *[…]Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a*

is cited that *a fair and equitable compensation that is equivalent to the fair market value of the investment expropriated [...] Shall include interests [...] Shall be made without unreasonable delay, be effectively realizable and freely transferable*[159]; the BIT between the Czech Republic and the Netherlands requires payment of a *just compensation*, to represent *the genuine value of the investment affected*, and shall *be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible accepted by the claimants*[160]. The investor-State Tribunals almost unanimously assess the amount of compensation in consideration of the fair market value, even where the treaty does not explicitly confirm it, as in the Netherlands-Czech BIT. In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*[161] and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*[162], it has been recognized a market value to the expropriated property to which the parties have not objected to the payment of fair market value of the investment; in *CME Czech Republic BV v. The Czech Republic*[163], however, playing the *just compensation* standards, required by the Treaty in the event of expropriation, it was noted that in 1991, the year of conclusion of the BIT between the Czech Republic and the Netherlands, the customary law standards required to pay an *appropriate compensation*, by granting a *full market value*, which implies that compensation depends on the fair value of the investment market and a subjection to the actual conditions and the legitimate expectations of the parties. As stated above, it appears that the investment treaties do not prevent the host State to expropriate the property of foreign investors: rather the conditions and measures to be applied have been

commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; and be freely transferable. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2366> Accessed: 19.08.2018

159 *See* art.6(1)(3) India-Colombia BIT. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/796> Accessed: 19.08.2018

160 *See* art.5 Netherlands–Czech and Slovak Republic. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/968> Accessed: 19.08.2018

161 ICSID Case no. ARB/05/22, Award 220–221 (Jul. 24, 2008) (The *genuine value of the investment*, in accordance with article 5(1), intends the fair market value of the investment expropriated legally as determined by the application of appropriate evaluation methodology (§ 742) that depends on the nature of investment and the period of expropriation (§ 749)). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf> Accessed: 19.08.2018

162 ICSID Case no. ARB (AF)/00/2, Award 76–77 (May 29, 2003) (The Arbitral Tribunal considers that the compensation to be paid should correspond to the total compensation for any violation of the agreement under market value (§ 188) and considers that the existence of a market supported by a sufficient number of similar transactions could be a guide to determine the market value of Landfill (§ 191)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> Accessed: 19.08.2018

163 UNCITRAL, Award 114 (Mar. 14, 2003) (For the Court, the fair market value corresponds to just compensation representing the genuine value of the property in question (§ 493)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0180.pdf> Accessed: 19.08.2018

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dictated[164]. Some treaties include only the requirement of public interest and the obligation to pay a compensation, as in Germany-China BIT of 2003[165]; others add additional conditions to assess the legality of an expropriation, as in United States-Bangladesh BIT of 1986[166]; while the Netherlands-Oman BIT of 2009[167] recalls the principle of non-discrimination[168]. Given that international law recognizes the State to govern in the public interest, Courts have often reiterated this principle whereas non-discriminatory measures, in view of the public interest and in accordance with the due process of law, do not raise the duty to pay a compensation, as in *Marvin Roy Feldman Karpa v. United Mexican States*[169], *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, and more recently in *El Paso Energy International Company v. The Argentine Republic*[170]. It remains, however, that the line between the non recoverability and measures *tantamount to expropriation*, has yet to be defined and the Courts proceed case by case basis taking into account the different characteristics. In both cases of lawful and unlawful expropriation, the fair market value is the cornerstone of

164 RUBINS, Noah, KINSELLA, Stephan. *International Investment, Political Risk and Dispute Resolution: a Practitioner's Guide.* Dobbs Ferry: Oceana Publications, 2005, pp. 200–245.

165 *See, e.g.,* art.4(2): *Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation.* [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/736> Accessed: 19.08.2018

166 *See, e.g.,* art.3(1)(d): *does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation.* [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/278> Accessed: 19.08.2018

167 *See* art.4(b): *the measures are not discriminatory or contrary to any specific undertaking which the former Contracting Party may have given*. [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2068> Accessed: 19.08.2018

168 The Convention for Human Rights (1950), considered by many to support investor-State Tribunals for the interpretation of the Treaties and having a great importance for the protection of investments, introduces the *right to property* by establishing rules for the protection against expropriation and other interferences of the State (art.1 additional Protocol). *See also* KINGSBURY, Benedict, SCHILL, Stephan W. Public Law Concepts to Balance Investor's Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionally. In SCHILL, Stephan W. (ed). *International Investment Law and Comparative Public Law.* USA: Oxford University Press, 2010, pp. 75–106.

169 ICSID Case no. ARB (AF)/99/1, Award 54 (Dec. 16, 2002) (In the absence of a finding of expropriation, the Court will be reluctant to give excessive weight to the public purpose, non-discrimination and due process criteria (§ 135)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf> Accessed: 19.08.2018

170 ICSID Case no. ARB/03/15, Award 75 (Oct. 31, 2011) (A general regulation is a lawful act rather than an expropriation if it is not discriminatory, done for public purpose and adopted in accordance with due process of law. This means that non-discriminatory regulatory measures, adopted in compliance with the rules of good faith and due process of law, do not provide for fee compensation (§ 240)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> Accessed: 19.08.2018

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the evaluation process and the difference from a monetary point of view between compensation and damages will depend on additional factors including the loss of future profits, legal fees of Claimant, etc[171]. Thus, in *Amoco International Finance Corp. v. the Government of the Islamic Republic of Iran*[172]*, Shahine Shaine Ebrahimi v. the Islamic Republic of Iran*[173], the Court considered that in case of unlawful expropriation, the compensation for damages would include *dannum emergens* and the *lucrum cessans*; while in the case of lawful expropriation, the compensation would be a *just compensation* as determined by the United States-Iran BIT[174] which refers only to the fair market value. Interesting in CETA was the theme of expropriation because it recognizes the Respondent, if done in an illegal manner, to choose between restitution of property or the payment of fair market value as compensation. In contrast, according to general international law, the compensation of a fair market value is generally required for the legality of an expropriation, while the unlawful triggers the obligation to pay the damages[175]. Indian BITs also contain provisions on expropriation very clearly stating that investments should not be nationalized or expropriated (direct expropriation) or subjected to measures having an *effect* equivalent to expropriation (indirect expropriation), unless or until there is a public interest, and further in such cases, a fair and equitable compensation would be promptly paid to foreign investors and some of them do not provide the arbitors much guidance on how to identify the indirect expropriation unless define the effect on investment[176].

171 *See generally* BORZU, Sabahi. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice.* Oxford: Oxford University Press, 2011.

172 15 IRAN-U.S. C.T.R., Award 223 (Jul. 14, 1987) (The Treaty considers that an expropriation occurred for public interest is lawful (§ 115) also considering a prompt payment of just compensation (§ 116)). [online]. Available at: <https://www.trans-lex.org/231900/_/iran-us-claims-tribunal-amoco-int-l-finance-corp-v-iran-15-iran-us-ctr-at-189-et-seq/> Accessed: 19.08.2018

173 HIGHET, Keith, KAHALE III, George, BLAKESLEE, Merritt R. Shahin Shane Ebrahimi v. Government of the Islamic Republic of Iran. *The American Journal of International Law,* 1995, vol. 89, no. 2, pp. 385–389.

174 *See* art.IV (2): *Compensation shall be prompt, effective and appropriate. The amount of compensation shall be equivalent to the fair market value of the investment immediately before the nationalization, confiscation or expropriation has been taken, announced or made public.* [online]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3201> Accessed: 19.08.2018

175 The *Chorzów*-principle would apply: *An expropriating but non-compensating state would have to eliminate all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed.* Pursuant to art.X.36, a lawful expropriation and an unlawful expropriation will arguably have the same consequence: *Eventually, both conducts require the payment of the fair market value if restitution in kind is not chosen. See* REINISCH, STIFTER (note 76) p. 21; REINISCH (note 150) pp. 171–204. *See also* Chorzow Factory Case (Germany v. Poland), 1928 PCIJ (Ser. A) no. 17 (Sept. 13, 1928). [online]. Available at: <http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm> Accessed: 19.08.2018

176 RANJAN (note 71) p. 434.

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8. The Effects of the *condicio sine qua non* of Arbitration Clauses

Nearly all BITs contain arbitration clauses, defined as a *condicio sine qua non*[177], that allow access to dispute settlement such as arbitration between investor and host State[178] or between Contracting Parties to the Treaty[179]. In the absence of an agreement, on the contrary, an investment dispute between a State and a foreign investor normally become the responsibility of the host State Courts, so they can also represent for investors reason to impartiality[180]. Hence the important role played by the *umbrella clause*[181], contained in many BITs[182], which allows to internationalize the national law obligations[183]. So in *Noble Ventures v.*

177 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration.* USA: Cambridge University Press, 2012; BANDINI, Andrea. Regole di concorrenza, arbitrato e norme di procedura nazionale. *Temi Romana,* 1999, no. 3, p. 1171; CARRARA, Cecilia. *Italian Supreme Court Decides Important Issues Regarding International Arbitration Agreement.* Practical Law, 2017.

178 In 2014 the EU–Canada Comprehensive Trade Agreement (CETA) test was implemented, including a chapter ISDS prompting some criticism including the idea of a genuine threat to State measures relating to the public interest. *See* HAMIDA, CABROL (note 108) pp. 658, 660.

179 TANZI, Attila, CRISTIANI, Federica (eds). *International Investment Law and Arbitration. An Introduction Casebook.* Padua: CEDAM, 2013, p. 470; PIETROBON, Alessandra. *Il Giudizio nell'Arbitrato fra Stati.* Naples: Editoriale Scientifica, 2016, p. 380; ZARRA, Giovanni. *Parallel Proceedings Investment Arbitration.* Turin, The Netherlands: Giappichelli, Eleven, 2016, p. 254.

180 *See* GIARDINA, Andrea. State Contracts: National Versus International Law? *The Italian Yearbook of International Law,* 1980, vol. 5, no. 1, p. 162; CHESSA, Valentina, MIGLIORINI, Sara. Arbitrato e Concorrenza: Limiti e Prospettive di una Convivenza. *Bocconi Legal Papers,* 2014, no. 3, p. 91.

181 Between 1959 and 2003, despite the umbrella clause has received little attention in the academic field and in the arbitration practice, those few authors who have dealt with it have shared the German point of view that the clause allows to raise the violation of investment contracts to the level of international law. *See* REINISCH, STIFTER (note 76) pp. 12–13; SASSON, Monique. *Substantive Law in Investment Treaty Arbitration: the Unsettled Relationship Between International and Municipal Law.* The Netherlands: Kluwer Law International, 2010, pp. 180 *et seq.*; LÉVESQUE, Céline, NEWCOMBE, Andrew. Canada. In BROWN, Chester (ed). *Commentaries on Selected Model Investment Treaties.* Oxford: Oxford University Press, 2013.

182 2004 US Model Treaty and the French Model Treaty do not contain an umbrella clause, contrary to a previous practice of both States. The umbrella clause was already contained in the BIT between Germany and Pakistan in 1959, in addition to the current German Model Treaty. In 1959, the German government, by informing the Parliament about the effect of an umbrella clause, held that: *the violation of such an obligation [of an investment agreement] accordingly will also amount to a violation of the international legal obligation contained in the present Treaty. See* DOLZER, SCHREUER (note 150) p. 154.

183 ANTONY, Jude. Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus. *Arbitration International,* 2013, vol. 29, no. 4, p. 617; COPPO, Benedetta. Comparing Institutional Arbitration Rules: Differences and Similarities in a Developing International Practice. *International Arbitration Law Review,* 2010, vol. 13, no. 3, pp. 100–110.

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Romania[184], the Court interpreted and applied the following clause in the treaty between the US and Romania[185]; as well as in *SGS v. Philippines*[186] found that, in the presence of an umbrella clause, an investment violation involves a violation of the investment treaty[187]. Otherwise, arbitration in Russia has some peculiarities that make it different from other countries and, while in recent years there have been tremendous advances in the adoption of modern standards in the International commercial arbitration, the Russian legal system has not yet been recognized as arbitration-friendly State[188]. The arbitration practice has provided, then, divergent interpretations. In *Vladimir Berschader and Moïse Berschader v. The Russian Federation* and *RosInvestCo UK Ltd v. The Russian Federation*, the Court has adopted a restrictive interpretation of art.10 of the Belgium / Luxembourg-Soviet BIT asserting that such a provision excluded from the scope of the arbitration clause; while in *Renta 4 SVSA and Others v. The Russian Federation*[189] was adopted a broader approach to the applicable dispute resolution clause[190]. In China, international arbitrations are subject to a variety of obstacles, which deter the adoption of arbitration practices by foreigners, such as applying onerous arbitration clauses, and at the same time encourage domestic arbitration institutions to meet the expectations of both national and foreigners[191]; contrary to what happened in Latin America in which there has been a rapid growth of international arbitration[192]. The BITs concluded between Taiwan and ASEAN countries (Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam)

184 ICSID Case no. ARB/01/11, Award 64 (Oct. 12, 2005) (Considering that an umbrella clause is generally seen to transform the national law obligations directly identifiable in international law, it could also be said that a violation of the national contract creates at the same time the violation of one of the principles existing both in international law and in the treaty between the host State and State of nationality of the investor (§ 53)). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf> Accessed: 19.08.2018

185 *See* DOLZER, SCHREUER (note 150) pp. 155–156.

186 ICSID Case no. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction 113–129 (Jan. 29, 2004). [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0782.pdf> Accessed: 19.08.2018

187 *See* DOLZER, SCHREUER (note 150) p. 156.

188 GORBYLEV, Sergei. Arbitration in Russia: Are There Any Local Differences? *Revue de Droit des Affaires Internationales. International Business Law Journal,* 2015, no. 5, pp. 475–476.

189 SCC Case no. 24/2007, Award 3–96 (Jul. 20, 2012). [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf> Accessed: 19.08.2018

190 BOUTE (note 125) pp. 530–531; DRALLE, Tilman. A Glance into the Future: The Prospective Investment Law Regime Between the European Union and the Russian Federation. In RENSMANN, Thilo (ed). *Dresden Research Papers on International Economic Law*, 2013; ERSHOVA, Inna. Sistema Pravovogo Regulirovaniia Rossiiskikh Investitsii Za Rubezhom. *Biznes i pravo v Rossi i za Rubezhom*, 2012, no. 4, p. 16.

191 NOBLES (note 97) pp. 99–100; CHEN, Helena H.C. China: Surprise to the Parties-Unanticipated Application of PRC Law in the Determination of the Effectiveness of an Arbitration Clause. *International Arbitration Law Review,* 2010, vol. 13, pp. 42–43.

192 NOBLES, (note 97) p. 100.

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do not contain the umbrella clause for two reasons: the conclusion of BITs has happened through unofficial or semi-official entities and given the lack of Taiwan's UN membership and Taiwan ineligibility to access the ICJ[193]. According to traditional international law, in proceedings it may be required the exhaustion of domestic remedies of national Courts of the host State[194] and through the so-called *fork in the road provision*, the investor may choose, definitively, between national Courts of the host State or international arbitration[195]. Many questions were raised about the public participation, access to justice and to information in the investor-state treaty arbitrations[196], so the choice of the International Chamber of Commerce to adopt a series of measures that are expected to contribute to the development of arbitration and to meet the requirements of transparency, legal certainty and predictability, which has been long advocated both the parties and the arbitrators, invigorate the general *favor arbitrati* which from the beginning has characterized the forum choices in the community of international traders[197]. Although the ICSID has become the main forum for the settlement of disputes between foreign investors and host State not all States have joined[198]it and, moreover, many BITs allow investors the choice between ICSID and other arbitrations[199]. Much is being debated on the interference and balanc-

193 LIU (note 73) pp. 140–141.

194 Chapter Eleven of NAFTA breaks new ground in allowing foreign investors to be able to address both the national Court and, subsequently, to an international arbitration Tribunal. This is the only aspect of the Chapter Eleven that raises new and difficult questions about the proper relationship between domestic and international arbitration Tribunals. Chapter Eleven must, of course, be read in contrast to the scenario of the rules of customary international law about the exhaustion of remedies and *res judicata*, but in doing so it must also attend carefully to the language of Chapter Eleven and be consistent to the possibility that it may require adjustments, or it could at least require a different justification, inserted in NAFTA. *See* DODGE, William S. National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA. *Hastings International and Comparative Law Review,* 2000, vol. 23, p. 383.

195 *See, e.g.,* the Argentina-France BIT art.8(2) states that *once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final. See also* ATTERITANO, Andrea. L'*Enforcement delle Sentenze Arbitrali del Commercio Internazionale. Il Rispetto della Volontà delle Parti.* Milan: Giuffrè, 2009.

196 NEWCOMBE (note 1) p. 384.

197 MINUTO, Giovanni, BERTINETTO, Serena. Le Nuove Misure Adottate dalla CCI a Favore di una Maggiore Efficienza e Trasparenza dei Procedimenti Arbitrali. *Diritto del Commercio Internazionale*, 2016, no. 2, p. 557; Veijo Heiskanen's Note: 'Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration'. *ICSID REVIEW – Foreign Investment Law Journal,* 2014, vol. 29, no. 1, pp. 685–687; DOLZER, SCHREUER (note 150) p. 186.

198 *See* HAMIDA, CABROL (note 108) p. 659.

199 Despite clear differences between classical commercial arbitration and investment arbitration, institutions dealing primarily with commercial arbitration, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), do not exclude investor-state arbitration. This includes also the Regional Arbitration Cen-

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ing of States Parties with the rights of investors in view of the public interest that has rarely been considered explicitly by arbitration Courts[200]. So, in *Lone Pine Resources v. Government of Canada*[201], the American investor starts a proceedings against the Canadian State that has placed a moratorium on the extraction of shale gas with a withdrawal of all mining rights previously recognized to the investor; in *Vattenfall AB and others v. Federal Republic of Germany*[202], the decision of the German government to abandon the use of nuclear energy by 2022 has been questioned by several investors including the Swedish energy company Vattenfall[203]. Most disputes of African countries[204] concern Europe and the USA,

tres in Cairo, Kuala Lumpur, and Hong Kong, or the China International Economic and Trade Arbitration Commission (CIETAC). In current practice such arbitrations are most commonly conducted under the UNCITRAL Arbitration Rules of 1976 and under the ICC Arbitration Rules of 1998. *See* DOLZER, SCHREUER (note 150) pp. 225–226; DE LUCA, Anna. *La Competenza dell'Unione Europea sugli Investimenti Esteri.* Turin: Giappichelli, 2012, p. 150.

200 KULICK, Andreas. Sneaking Through the Backdoor – Reflections on Public Interest in International Investment Arbitration. *Arbitration International,* 2013, vol. 29, no. 3, p. 436.

201 ICSID Case no. UNCT/15/2 – Procedural Order on Witheld and Redacted Documentation Feb. 24, 2017. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw8513.pdf> Accessed: 19.08.2018

202 ICSID Case no. ARB/12/12. [online]. Available at: <http://investmentpolicyhub.unctad.org/ISDS/Details/467> Accessed: 19.08.2018

203 DOLZER, SCHREUER (note 150) p. 238; VAN DEN BERG, Albert, Jan. *50 Years of the New York Convention: ICCA International Arbitration Conference*. The Netherlands: Kluwer Law International, 2009, pp. 318–324.

204 Characteristic of the Africans arbitration is the choice of non-African arbitrators and lawyers, or mixed Tribunals with African and non-African arbitrators, and non-African President. So, in *M.Meerapfel Söhne AG v. Central African Republic* (ICSID Case no. ARB/07/10), the Court is composed of judges of Morocco, Gabon and Belgium with President Moroccan. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1193_0.pdf> Accessed: 19.08.2018; in *RSM Production Corp. v. Central African Republic* (ICSID Case no. ARB/07/2), the Tribunal shall consist of a Chairman and two French Moroccan arbitrators. [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8032.pdf> Accessed: 19.08.2018; while in *Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea* (CIADI Case no. ARB(AF)/12/2), lawyers are Spanish and American. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw7119.pdf> Accessed: 19.08.2018; in *International Quantum Resources Ltd. v. Democratic Republic of Algeria* (ICSID Case no. ARB/10/21), Canadian and French. [online]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0428.pdf> Accessed: 19.08.2018; in *Mærsk Olie, Algeriet A/S v. The Peoples' Democratic Republic of Algeria* (ICSID Case no. ARB/09/14), Bangladeshi and New Zealand. [online]. Available at: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/09/14>. Accessed: 19.08.2018. The Courts may also be composed of foreign lawyers and the host State as *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Ltd.* (ICSID Case no. ARB/10/20), where the government is represented by lawyers from the UK as well as from Tanzania. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw7602.pdf> Accessed: 19.08.2018. In a similar manner, in *Millicom International Operations B.V. v. Republic of*

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while any arbitration involved an African State and a Chinese investor, because in the latter case, under the previous article 25(4) of the Convention could resort to such technique only in the event of expropriation or nationalization[205]. This restriction was, however, surpassed by the new generation of Chinese BITs that recognize all disputes to arbitration even if, for cultural reasons, it is preferred to resolve disputes in a friendly way without resorting to formal processes. Instead, the Taiwan BITs lack any ICSID arbitration provision, simply because Taiwan is not a contracting State under art.25 ICSID Convention[206].

9. Conclusion

Until now, there has been an activism of foreign investors who leads the investment law to be part of the legal structure that supports economic globalization[207] and, therefore, constantly changing. The stakes are high when it comes to negotiations on investment and could pose a threat to those States which have their own conception of a different idea of democracy and the rule of law and undermine the sovereign right of States and their institutions[208]. This paper, therefore, wanted to deal with the different dynamics that have prompted several States, on the basis of their internal experiences and international relations, to adhere to these models of international agreements, others to get out of it and others to revision it in some aspects, in order to conform to changes in a globalized world that no longer grants a State to govern themselves but to adapt to what are the standards of the international rule of law. Any investor looks for maximum protection and requires minimal risk for their investments in the host State. That's why a State that wants to attract investments must ensure the maximum protection to the contracting Party and the same treatment that receives a national, since even forms of discrimination not manifestly obvious, can lead an investor to invest elsewhere, where it will also be possible to have a greater guarantee in case of dispute. This raises the importance of States to recognize

Senegal (ICSID Case no. ARB/08/20), where Senegal is represented by two French lawyers and one Senegalese. [online]. Available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1247.pdf> Accessed: 19.08.2018

205 In South Africa, in 2016, it was published an explanatory summary of an International Arbitration Bill to incorporate to the UNCITRAL Model Law on International Commercial Arbitration as to be able to allow South Africa to position itself in international arbitration and comply with UNCITRAL Model Law. *See* SCHLEMMER, Engela C. The Interaction Between Public Policy, Constitutional Rights and Public-private Arbitration. *Journal of South African Law/Tydskrif Vir Die Suid-Afrikaanse Reg,* 2016, no. 3, p. 513.

206 LIU (note 73) p. 143.

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within their arbitration clauses agreements which allow investors to access international arbitration that compared to a national jurisdiction guarantee parts against favoritism that could instead be applied by national Courts. The novelty to consider fundamental, compared with earlier agreements, is the reference to environmental protection that have been started to dedicate part of the preambles of international agreements. This is because although it is true that investments contribute to the growth of a country, at the same time should be geared to sustainable development. Member States are far from being able to think of a single model of BIT, which as similar show their diversity to cultural and economic issues, at the base of each Contracting State. Although much has already been done, just think of the current number of existing BITs than in the past, globalization pushes to reshape, re-think and revolutionize. A revolution from which can not be excluded agreements between States, especially in the commercial, and where strict protectionist policies have now become a distant memory for some States which are now fully integrated in international relations, while others have become more flexible to surrounding world. The evolution is ongoing and many barriers knocked down. It remains, nonetheless, a certain reluctance of the Eastern countries to confront the Western world for cultural issues that they do not see a potential integration as a source of economic growth but as a threat that could alter their traditions. This shows how ideological barriers can still also undermine the economic and financial aspect of a State, so underestimating the potential benefits of trade with other cultures that do not necessarily have to be seen as a threat but no reason to open and intercultural exchange. For developing countries the promotion of foreign investment needs to be balanced with the protection of constitutional foundations and the ability of the national policy of pursuing development goals through legislative, regulations and state interventions[209]. Aspects of fairness such as due process of law, equal treatment, and standards related to action of the government, are necessary both for managing market mechanisms and for the prevention of bureaucratic excesses.

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