



universität
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DISSERTATION

Titel der Dissertation

Full Protection and Security in International Law

Verfasser

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angestrebter akademischer Grad

Doktor der Rechtswissenschaften (Dr. iur)

Wien, 2012

Studienkennzahl lt. Studienblatt: A >783 101<

Dissertationsgebiet lt. Studienblatt: Rechtswissenschaften

Betreuer: Univ.-Prof. Mmag. Dr. August Reinisch LL.M. (NYU)

TABLE OF CONTENTS

ABBREVIATIONS.....	7
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PREFACE.....	9
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PART I

The Full Protection and Security Standard and its historical evolution

1. INTRODUCTION	17
1.1 Subject of the study and methodology	17
1.2 A summary of the substance and structure of the study.....	18
1.3 The use of categories.....	20
2. THE HISTORY OF THE STANDARD OF FULL PROTECTION AND SECURITY.....	21
2.1 Introduction.....	21
2.2 Protection of nationals abroad – the breakdown of consensus.....	22
2.3 Codification of Friendship, Commerce and Navigation treaties	27
2.4 The emergence of bilateral investment treaties	31
2.5 The success and failure of multilateral instruments.....	33
2.6 Regional instruments	36
2.7 Non-governmental initiatives.....	39
2.8 Conclusion	40

PART II

The sources and content of the Full Protection and Security Standard

3. SOURCES OF THE FULL PROTECTION AND SECURITY STANDARD ..	45
3.1 Introduction.....	45
3.2 Sources of international law	46
3.3 Sources of international investment law.....	48
3.3.1 General.....	48
3.3.2 International investment treaties	48

3.3.2.1	Structure of investment treaties and its implications	48
3.3.2.2	Bilateral investment treaties	49
3.3.2.2.1	The meaning of different parts and their structure	49
3.3.2.2.2	Overview of different formulations.....	53
3.3.2.3	Regional treaties.....	62
3.3.2.3.1	The meaning of different parts and their structure	62
3.3.2.3.2	Overview of different formulations.....	63
3.3.2.4	Multilateral treaties	69
3.3.2.4.1	The meaning of different parts and their structure	69
3.3.2.4.2	Overview of different formulations.....	70
3.3.2.5	The effect of different formulations.....	74
3.3.3	Customary international law	75
3.3.3.1	Customary international law and foreign investment	75
3.3.3.2	Customary international law as a minimum standard	75
3.3.3.3	The relationship between the treaty-based standard and the minimum standard of customary international law	78
3.3.3.4	Can a clear conclusion be drawn?	84
3.3.4	General principles of law recognized by civilized nations.....	86
3.3.5	Arbitral awards.....	91
3.3.6	Writings of highly qualified publicists	96
3.4	The status of international investment law within the sphere of public international law and municipal law.....	97
3.5	Conclusion	100
4.	INTERPRETATION OF THE STANDARD OF FULL PROTECTION AND SECURITY	103
4.1	Introduction.....	103
4.2	General considerations as regard interpretation.....	104
4.2.1	Vienna Convention on the Law of Treaties	104
4.2.2	The meaning of “protection”.....	107
4.2.3	The meaning of “security”	110
4.3	Interpretation in practice	114
4.3.1	Textual interpretation – ordinary meaning	114
4.3.2	Object and purpose.....	117
4.3.3	Contextual interpretation.....	118
4.3.4	Can the intention of the parties be ascertained?.....	123
4.4	Treaty interpretation and customary international law.....	127
4.5	Conclusion	131

5. THE CONTENT OF THE STANDARD OF FULL PROTECTION AND SECURITY	135
5.1 Introduction.....	135
5.2 Conceptual issues – substantive elements of the standard	136
5.2.1 The concepts of protection and security prior to the evolution of the BIT	136
5.2.2 The concept of a standard.....	139
5.2.2.1 Standards as non-sources of law	139
5.2.2.2 The usage of standards in national and international law.....	141
5.2.2.3 Does past doctrine apply to present problems?.....	146
5.2.3 The standard’s substantive elements and due diligence	147
5.3 The meaning of state actors and private actors.....	151
5.4 The due diligence principle and obligations of the host state	155
5.4.1 General.....	155
5.4.2 Negative and positive obligations of the host state	156
5.4.3 Elements important for discharging due diligence	163
5.4.3.1 The state of state responsibility in general.....	163
5.4.3.2 Elements of due diligence	164
5.4.4 Different levels of due diligence depending on the nature of disturbances.....	170
5.4.5 Does the standard entail an obligation of conduct or obligation of result?	171
5.5 The application of the standard.....	175
5.5.1 Introduction.....	175
5.5.2 Procedural and substantive requirements for protection	175
5.5.3 Protection of physical safety	179
5.5.4 Protection beyond physical safety	183
5.5.5 Conclusion concerning application.....	192
5.6 Does the host state’s level of development affect application?	194
5.6.1 Investors in less developed countries	194
5.6.2 Protection reasonable under the circumstances.....	195
5.6.3 How could development affect adjudication of investment disputes?	199
5.7 Does the standard overlap with other investment standards?	202
5.7.1 Fair and equitable treatment	203
5.7.2 Expropriation	207
5.7.3 Denial of justice	213
5.7.4 National treatment and most-favoured-nation treatment	219
5.8 Conclusion	230

PART III
Violations of the Full Protection and Security Standard
and their manifestations

6. VIOLATIONS OF THE STANDARD AND THEIR MANIFESTATIONS	235
6.1 Introduction.....	235
6.2 Disparate behaviour constituting a violation of the standard	236
6.3 Violations of the standard	238
6.3.1 Taking of investment or destruction of investment	238
6.3.1.1 Taking or destruction caused by state organs	238
6.3.1.2 Taking or destruction caused by private parties.....	241
6.3.2 Coercion and harassment of the investor and his personnel	243
6.3.2.1 Coercion and harassment caused by state organs.....	243
6.3.2.2 Coercion and harassment caused by private parties.....	245
6.3.3 Changes to the regulatory framework after an investment is made	248
6.3.3.1 Post-investment obligations of the host state not implemented....	250
6.3.3.2 Operating licenses revoked or restrictions imposed on the investment.....	253
6.3.3.3 Demands for the renegotiations of concession agreements	254
6.3.4 Failure to provide for legal system	255
6.4 Conclusion	258
7. SUMMARY OF FINDINGS AND CONCLUSIONARY REMARKS	261
BIBLIOGRAPHY	265
ARBITRAL CASES AND OTHER DECISIONS	279
ANNEXES.....	287
ANNEX I: BILATERAL INVESTMENT TREATIES.....	289
ANNEX II: REGIONAL TREATIES	331
ANNEX III: MULTILATERAL TREATIES	339
ANNEX IV: SELECTED AWARDS	347

ABBREVIATIONS

AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CUP	Cambridge University Press
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTC	Free Trade Commission
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ITO	International Trade Organization
LCIA	London Court of International Arbitration

MAI	Multilateral Agreement for Investment
MERCOSUR	Mercado Común del Sur (Common Market of the Southern Cone)
MFN	Most-Favoured-Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NYIL	Netherlands Yearbook of International Law
OECD	Organisation for Economic Co-operation and Development
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
RCADI	Recueil des Cours de l'Académie de droit international (Collected Courses of the Hague Academy of International Law)
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Code of Conduct for Transnational Corporations
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organisation
UNTS	United Nations Treaty Series
US	United States
WTO	World Trade Organization
YILC	Yearbook of the International Law Commission

PREFACE

This thesis is submitted to the Law Faculty of the University of Vienna as a thesis obtaining the degree of doctor iuris. The thesis deals with, as its title entails, one of the fundamental standards of international investment law: Full Protection and Security in International Law.

The idea of writing a thesis on the full protection and security standard came to me when I concluded a postgraduate program, LL.M. in International Legal Studies, at the University of Vienna in October 2008. Despite the temptation, I decided to focus my master's thesis on issues relating to the accountability of the United Nations' Security Council. Nevertheless, I did not forget the topic which covers one of the fundamental principles of international investment law. This principle, which has a long history, was considered dormant until recently. In the early 1990s, Ibrahim Shihata, then General Counsel and Senior Vice President of the World Bank, and Antonio Parra, ICSID Legal Advisor at the time, pointed out that there "was hardly any case law" on the full protection and security standard. It is safe to say that the standard is currently in the process of resurging as one of the most important standards of international investment law. Not only did the first investment treaty award rendered by an ICSID tribunal, namely *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, adjudicate a dispute concerning the standard twenty years ago, but around thirty awards dealing with the standard have been adjudicated during the last five years. Hence, the decision to write about the full protection and security standard was not difficult to make.

The idea of writing a doctoral thesis is an older one. In 2004, I assisted Dr. Pall Hreinsson, a judge at the EFTA Court, to prepare his doctoral thesis for publication in Iceland. During that time I witnessed, in part, the process of writing a doctoral thesis. That experience did not deter me from attempting to write a doctoral thesis myself, in a way, that experience resulted in the thesis that now follows.

However, this doctoral thesis could not have been written without the assistance and encouragement of Professor Dr. August Reinisch at the University of Vienna. I would like to thank Professor Reinisch for his support throughout this project. He has been a source of academic advice and provided support with his deep understanding of international law. I am not only thankful for the time he took in supervising this thesis, but also indebted to him for his guidance, questions and insightful comments, including constructive criticism, which enabled me to pursue a number of issues relating to the subject in greater detail.

During my research I talked with numerous individuals and scholars concerning the subject at hand. I am indebted to Professor Christoph Schreuer, who, during the initial phase of my research, provided me with valuable information concerning the topic and further research, in particular concerning arbitral awards. In addition, I would like to thank Professor Jan Wouters at the University of Leuven for assisting me in my research at Leuven during the latter half of my research.

While working on the thesis I received the Research Grant of the University of Vienna of 2011 (Forschungsstipendium 2011). I am thankful to the University of Vienna for providing financial assistance that enabled me to focus on various issues in a way that would not have been possible otherwise.

I would like to extend my thanks to Mag. Jur. Róbert Spanó (Oxford) and Dr. Aðalheiður Jóhannsdóttir (Uppsala), professors at the law faculty of the University of Iceland, for providing me with excellent facilities at the University of Iceland. Their help and generous support during the last phase of my studies provided me with a stimulating research environment.

This thesis was partly researched during two visits to institutions with excellent academic facilities. First, during winter 2009, I visited the Peace Palace Library in The Hague which enabled me to do in-depth analysis on various issues. The staff at the Peace Palace Library was most helpful with regard to my requests. Second, during autumn 2011, I was privileged to conduct my research as a Visiting Fellow at the Lauterpacht Centre for International Law at the University of Cambridge. While living there, I met an extraordinary group of individuals, many of whom assisted me in my research. I would like to thank, in particular, Professor James Crawford and Dr. Michael Waibel for their support and helpful comments during my stay in Cambridge. I also extend my thanks to a fellow scholar at the Lauterpacht Centre for International Law, Ms. Kathleen Claussen, Assistant Legal Counsel at the Permanent Court of Arbitration, for providing me with advice on the usage of the English language.

I would also like to extend my thanks to my colleagues in private practice. I am indebted, in particular, to my friend and colleague, Mr. Sigurbjörn Magnússon, Supreme Court Attorney, for his advice and support throughout this project and for welcoming me to law practice again following a three year period spent in Vienna, the Hague and Cambridge.

I did not write this thesis immediately after having concluded my studies as a lawyer, but after having worked as a lawyer and attorney for almost a decade. It does not take long for a lawyer, who has been given the opportunity to pursue his studies, to realize that such a position should never be taken for granted. Hence, the need to thank my parents, Magnus and Bryndis, especially for their support. Last but by no means least, I would like to thank my wife, Johanna, who has had to endure lengthy and in-depth discussions about the thesis's topic. I would also like to thank her especially for her support and patience shown to an often absent and an absent-minded husband. I dedicate this thesis to these three persons.

Even though I have received guidance and support from those already mentioned, this thesis is submitted in my name. Any errors or discrepancies are the sole responsibility of the author.

Finnur Magnusson

University of Vienna, Vienna
November 2012

Meinen Eltern, Magnus und Bryndis, und meiner Ehefrau,
Johanna Bryndis, von ganzem Herzen

PART I
**The Full Protection and Security Standard and its
historical evolution**

1. INTRODUCTION

1.1 Subject of the study and methodology

International investment law is in constant development. That situation is one of the defining characters of this specific field of international law. One of the many international investment standards, namely the standard of full protection and security in international law, is the subject of this thesis.

The standard is in principle based upon a rather simple idea. In theory, a state is obliged to take active measures to protect a foreign investor and his property and other interests, including his investments, from adverse effects which may stem from activities of the host state itself or from third parties. However, in practice this obligation turns out to be a complex matter hedged in by limitations and caveats. As a standard with a long history, it has not only expanded in scope in line with the ever-growing fragmentation of international law, but its sources have also changed and affected its application. Furthermore, even though the standard has been applied for some time, its content is far from undisputed, particularly with respect to the degree of protection it affords to investors.¹

The main purpose of this study is to collect relevant legal sources and analyse and define the standard of full protection and security. The study will be based on a legal methodology to determine the substantive content of the standard and the protection it provides. The legal methodology will incorporate the main sources of international investment law – customary international law, bilateral investment treaties and arbitral awards – which greatly affect the application of the standard in practice. The analysis with regard to arbitral awards will not be limited to whether a consistent practice can be found, but will also seek to determine how arbitral tribunals approach legal disputes arising out of alleged breaches of the standard. The study will not differentiate between judgments and arbitral awards depending on which jurisdiction they stem from as long as they shed light on the substantive content of the standard. Hence, the study is not to be understood as a comparative study, even though it is based on judgments from the Permanent Court of International Justice, the International Court of Justice, the Iran-US Claims Tribunal and tribunals established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. These judgments and awards will, as other sources of law, be assessed to further understand the nature of the full

¹ UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development, UNCTAD/ITE/IIT/2005/4, p. 47.

protection and security standard and its content. Moreover, the importance of treaty practice cannot be underestimated as this standard has a longer history than other standards, such as the standard of fair and equitable treatment, as it was incorporated in many FCN treaties which predate bilateral investment treaties that today provide for the modern treaty framework used in applying the standard. It is also important to mention that, although the thesis will focus in particular on these sources of law, other sources will also be analyzed. Thus, scholarly writings will play a major role in analyzing the nature of the standard and its application in particular cases.

The overriding purpose when determining the scope of this study and the methodology to be applied is to establish not only an academic thesis, but also a thesis that can be used in a practical manner when assessing particular issues within the context of the full protection and security standard. To achieve this goal, the main judgments and arbitral awards of importance for this study are described either in individual chapters or in footnotes.

1.2 A summary of the substance and structure of the study

This study is divided into three parts and seven chapters.

In Part I, the study is introduced in terms of structure and substance. Chapter 1 provides a description of the scope of the research topic and a definition of its terms and structure. Chapter 2 covers the historical development of the full protection and security standard. A discussion about the reasons why the consensus, which had been reached amongst nations during the colonial expansion of Western Powers, came to an end; the codification of Friendship, Commerce and Navigation treaties; the emergence of bilateral investment treaties and the failure of multilateral attempts to codify an instrument providing for investment protection will be undertaken. The historical perspective is of considerable importance due to the fact that one of the defining differences between the standard of full protection and security *vis-à-vis* other standards, e.g. the standard of fair and equitable treatment, is their different historical origin. This issue is important as it could affect the substantive interpretation of the full protection and security standard.

Part II deals with three fundamental issues concerning the standard: sources, interpretation and content. Chapter 3 contains a discussion dealing with the various sources of the standard, such as international investment treaties, customary international law, general international law and arbitral awards. Each source will be studied independently. Various examples of different formulations of the standard in bilateral investment treaties, regional and multilateral treaties will be examined and discussed. In addition, state practice relevant within the context of customary

international law and various arbitral awards will be discussed and issues concerning the nature of each source addressed. Questions relating to the relationship between these sources of law and to what extent these sources have on the substantive content of the standard will be asked and answered. Chapter 4 will discuss general issues with regard to interpretation, such as to what extent the Vienna Convention on the Law of Treaties influences the process of interpretation. The chapter will address the substantive meaning of “protection” and “security”, not least because of the important role which the objective meaning of these concepts play when interpreted through the prism of “ordinary meaning” as prescribed by Article 31(1) of the Vienna Convention. In addition, the chapter will address the most relevant tools of interpretation, most notably textual interpretation, object and purpose, contextual interpretation and whether the intention of the parties can be ascertained. Finally, questions concerning the ever-present role and influence of customary international law during the process of interpretation will be discussed and issues dealing with the important role of customary international law despite the ever-growing number of BIT and other instruments addressed. Chapter 5 deals with the content of the standard of full protection and security, including conceptual issues relating to the substantive elements of which the standard consists. Moreover, the chapter will ask questions as to which underlying issues are needed to explore when a due diligence assessment is made in order to determine whether a state has fulfilled its obligations to provide protection and security. Furthermore, a discussion about the standard’s application will address whether and to what extent the standard provides for protection and security that goes beyond physical security. In addition, the study will focus on whether and to what extent a host state’s level of development can affect the application of the standard in individual cases. The possible overlap between the standard and other investment principles, in particular the standard of fair and equitable treatment, expropriation, denial of justice, national treatment and most-favoured-nation treatment, will also be addressed.

Part III deals with issues relating to the violations of the standard. In Chapter 6, the violations of the standard and their many manifestations will be addressed and analyzed. The chapter will address whether certain fact-based scenarios can be established in which the standard is most commonly violated. This is necessary due to the fact that a violation can take many forms. The identification of these forms and under what circumstances they might arise will provide for a clearer picture about the dangers which an investor is faced with after having made the investment. Finally, Chapter 7 contains a summary of findings and conclusionary remarks.

1.3 The use of categories

This dissertation is the result of research based on material, old and new, that consists of international instruments, customary international law derived from state practice, general principles of international law and principles extracted from various arbitral awards that further describe treaty law and customary international law. For the purpose of organizing material, I employ categories for different formulations of the standard in various international investment instruments,² relationship between the treaty-based standard of full protection and security and customary international law³, arguments and concepts found in numerous arbitral awards within the context of due diligence⁴ and fact-based scenarios where the standard is most frequently violated.⁵ It is important to stress that the purpose of such categorization is to provide a convenient vehicle for discussion. Therefore, too much technical significance should not be accorded to these categories, but emphasis should be on the issues discussed and their implications.

² See Chapter 3.3.2.

³ See Chapter 3.3.3.

⁴ See Chapter 5.4.

⁵ See Chapter 6.3.

2. THE HISTORY OF THE STANDARD OF FULL PROTECTION AND SECURITY

2.1 Introduction

The full protection and security standard originates from the treaty practice of the United States.⁶ The standard's origin is particularly interesting as it has a long history of providing protection and security for foreign investors and in that sense differentiates itself from another fundamental standard of international investment law, namely the standard of fair and equitable treatment.⁷ Before the standard evolved into its current form, some of its substantive elements provided protection for aliens as a principle of customary international law. After the materialization of Friendship, Commerce and Navigation treaties, which were stipulated by states to protect nationals travelling or residing abroad, the standard emerged as a principle which provided aliens with a more expanded protection for their person and property. Still, the growing number of bilateral investment treaties has further expanded the standard's protection from government interference and harassment and non-governmental entities. Even recent multilateral and regional instruments now incorporate the standard – some of which have entered into force whereas others have not.

This chapter will deal with the history of the standard of full protection and security. This aspect of the standard is very practical as it enables a lawyer to understand the nature of the standard when applying it in individual cases.⁸ The history of the standard is also important within the context of other sources of law. As will be explained, that history is closely linked to the evolution of international law in general, including the evolution of the standard within the realm of customary international law and the emergence of trade and investment treaties during the past two centuries.

⁶ See R. Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AJIL 83 (1951), p. 90-97, and same author, *The International Law Standard in Treaties of the United States*, Harvard University Press (1953), p. 92-93.

⁷ The standard of fair and equitable treatment first appeared in Article 11(2) of the Havana Charter for an International Trade Organization of 1948. The Charter never entered into force. See further R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 120.

⁸ That is not limited to the full protection and security standard but also applies to other standards. The historical evolution of investment standards, as manifested in treaty law, cannot but be taken into account when interpreting their substantive content. See *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), paras 116-117.

2.2 Protection of nationals abroad – the breakdown of consensus

Even though the standard of full protection and security currently has its primary source in bilateral investment treaties, one of its major substantive elements, namely the physical protection of an alien and his property, has been accepted among states for centuries. State practice reveals that states have accepted responsibility for the failure to protect aliens and their property within their jurisdiction, even though the main actors against the aliens are individuals. Many cases can be found which are concluded by diplomatic exchanges, state versus state arbitration and mixed arbitration.⁹

According to one of the fundamental principles of international law – often referred to as the minimum standard of international law – an alien is protected from unacceptable measures from the host state. As with the emergence of general principles of law in general, the emergence of the international minimum standard came as a result of grave infringements of the right to property of aliens which had occurred on a number of occasions prior to the principle's acceptance.

During the colonial expansion of the European states in the eighteenth and nineteenth century, the need for investment protection through international law principles was minimal. Investment was made with colonial expansion and the colonies' legal systems were integrated into the legal system of the imperial powers.¹⁰ Thus, the investors investing in the colonies were provided with investment protection by parliaments in the imperial capitals. This meant, in practice, that the standard of protection was understood to entail a principle of national treatment rather than an international law principle providing protection to an investor in the event that municipal law failed to do so. This period of colonial dominance was unique in terms of the almost universal acceptance of the principle of protection of property – almost all nations accepted the principle. The rather scarce literature on the subject during this time has led some commentators to argue that the reason why

⁹ Regarding diplomatic exchanges, see e.g. J.B. Moore, *A Digest of International Law*, Vol. VI, Government Printing Office (1906), p. 807 (a widow of an American missionary, who was murdered in Persia, offered compensation by the Persian government after diplomatic exchanges); regarding state versus state arbitration, see e.g. *Lusitania case*, VII RIAA 32 (1923) (damages were awarded to the United States which espoused the claims of its citizens as a result of the sinking of the *Lusitania* by Germany); regarding mixed arbitration, see e.g. *Lena Goldfields case*, reprinted in A. Nussbaum, *The Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 Cornell Law Quarterly 31 (1950-1951), p. 42 et seq (a British company, which was granted a mining concession by the Soviet government, instigated arbitral proceedings and was awarded damages).

¹⁰ See M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., CUP (2004), p. 19-20.

such little notice was given to it by commentators at the time was the general recognition of the inviolability of private property.¹¹

Following the end of colonialism the need for investment protection increased as investors experienced nationalistic and xenophobic tendencies of the newly independent states. The breakdown of the consensus, which had been universally accepted during colonial expansion and entailed broad protection for the investor, accelerated rapidly. Especially after the nationalizations in South America in the latter half of the nineteenth century, supported by the Calvo doctrine, and the Russian revolution in 1917, it became apparent that the principle of national treatment had become ineffective with regards to aliens.¹² This ineffectiveness led to the evolution of the international principle that aliens were protected by an international minimum standard. In the early 1900s there was general agreement amongst international lawyers that there existed a minimum standard concerning the treatment of foreigners. Elihu Root stated the following in 1910 on the protection of aliens:

“There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizen is that its system of law and administration shall conform to this general standard.”¹³

Moreover, a number of cases were arbitrated, either before mixed claims commissions or by ad hoc arbitration tribunals, in which states espoused the rights of their citizens. These tribunals further influenced the doctrine of the international minimum standard by referring on numerous occasions to “international standards” and “standards of civilization”.¹⁴ Thus, the protection of aliens went further than previously had been accepted. This led one commentator to link the protection of a country’s citizen domiciled in another country to the concept of the state itself – protection of nationals abroad became one of the characteristics of a state:

¹¹ J.P. Bullington, *Problems of International Law in the Mexican Constitution of 1917*, 21 AJIL 685 (1927), p. 695 and H. Neufeld, *The International Protection of Private Creditors from the Treaty of Westphalia to the Congress of Vienna*, A.W. Sijthoff (1971), p. 98.

¹² Many nationalization laws did not violate the principle of national treatment as they applied *de jure* to all individuals and entities in the host state regardless of their nationality. They did, however, entail *de facto* discrimination due to the fact that foreign entities owned the industries which were affected by the nationalization laws. A case in point is Mexico’s nationalization of the petroleum industry in the 1930s where only 1.1 per cent of the industry was owned by Mexican entities. See further J.P. Bullington, *Problems of International Law in the Mexican Constitution of 1917*, 21 AJIL 685 (1927), p. 703.

¹³ E. Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AJIL 517 (1910), p. 521-522.

¹⁴ See further A. Roth, *The Minimum Standard of International Law Applied to Aliens*, A.W. Sijthoff (1949), p. 97-99.

“States are legal persons and the direct subjects of international law. They are admitted into the international community on condition that they possess certain essential characteristics, such as a defined territory, independence, etc. In addition, they must manifest their power to exercise jurisdiction effectively and, as we shall see, to assure foreigners within it of a minimum of rights. This minimum standard below which a state can not fall without incurring responsibility to the other members of the international community has been shaped and established by the advance of civilization and the necessities of modern international intercourse on the part of individuals. The home state of the resident alien is concerned not with the legal legitimacy of a foreign government, but with its actual ability to fulfil the obligations which this international standard imposes upon it. The resident alien does not derive his rights directly from international law, but from the municipal law of the state of residence, though international law imposes upon that state certain obligations which under the sanction of responsibility to the other states of the international community, it is compelled to fulfill. When the local state fails to fulfill these duties, “when it is incapable of ruling, or rules with patent injustice,” the right of diplomatic protection insures to those states whose citizens have been injured by the governmental delinquency.”¹⁵

This situation led to numerous cases in which governments paid compensation due to the adverse effects of actions of government officials or private individuals and in some cases because of the inaction of government officials after nationals had taken matters into their own hands by killing aliens or destroying their property.¹⁶

This breakdown of the consensus continued as a result of the aftermath of the First and Second World Wars in forms of confiscation of property based upon political ideology and the growing number of newly independent states, particularly in Africa and Asia, that were eager to gain economic independence by taking control of their natural resources and thus depriving investors from capital-exporting (former imperial) countries of their investment.¹⁷

The position of new states in South America has been clear – they have opposed the principle of an international minimum standard. As previously mentioned, the Calvo doctrine, based upon a study by the Argentine jurist Carlos Calvo, emerged in South America during civil strife and attacks of revolutionary forces which followed the independence of the South American states. According to Calvo’s theory, aliens had, by investing in another country, subjected themselves to the same laws and

¹⁵ E.M. Borchard, *Basic Elements of Diplomatic Protection of Citizens Abroad*, 7 AJIL 497 (1913), p. 516-17.

¹⁶ The United States paid compensation to Italy after a mob in March 1871 lynched a number of Italians in New Orleans. The Italians, who were in custody of the government, were charged with the murder of a chief of police which was considered to be the “result of machinations of a secret society called the Mafia.” See further J.B. Moore, *A Digest of International Law*, Vol. VI, Government Printing Office (1906), p. 837. Similarly, China paid indemnities to the United States for injuries suffered by Americans during the Tientsin riot in June 1870 as it was considered that Chinese officials had not dispersed an angry crowd. See B.H. Williams, *The Protection of American Citizens in China: Cases of Lawlessness*, 17 AJIL 489 (1923), p. 492.

¹⁷ See R.D. Bishop, J. Crawford and W.M. Reisman, *Foreign Investment Disputes – Cases, Materials and Commentary*, Kluwer Law International (2005), p. 3-4.

regulations that applied to nationals. The host country could at its discretion – without being bound by an international standard – define the legal framework which applied to all individuals and entities under its jurisdiction. Hence, the state could guarantee the protection of aliens as long as the same protection applied to its nationals.¹⁸ However, the Calvo doctrine was unable to remain at the forefront of academic discussion as arbitral awards and decisions of claims commissions, which were established in order to adjudicate disputes following revolutionary times in Central and South America, came to the conclusion that compensation had to be paid to the parties affected.¹⁹

Following the aftermath of the two World Wars, newly independent states in Africa and Asia became fierce critics of the international minimum standard. Shortly prior to their emergence, the United Nations General Assembly, which at that time consisted almost only of former colonial powers, adopted Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources,²⁰ which stated:

“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law.*” [emphasis added]

Only twelve years later the General Assembly, whose composition had changed dramatically due to the emergence of new African and Asian member states, adopted Resolution 3281 (XXIX) of 12 December 1974, referred to as the Charter of Economic Rights and Duties of States.²¹ This resolution emphasized national sovereignty without mentioning state adherence to international law:

¹⁸ See generally concerning the Calvo doctrine, E. Borchard, *Diplomatic Protection of Citizens Abroad*, Banks Law Publishing (1915), p. 792 et seq and D. Shea, *The Calvo Clause, a Problem of Inter-American and International Law and Diplomacy*, Minneapolis (1955), p. 16-20.

¹⁹ See for arbitral awards e.g. *Delagoa Bay Railway Case*, J.B. Moore, *International Arbitrations*, Vol. II, Government Printing Office (1898), p. 1865, in which the United Kingdom and the United States instigated arbitral proceedings against Portugal because of its seizure of the Delagoa Bay Railway constructed under a concession agreement; but for claims commissions see e.g. the Mixed and Special Claims Commissions established between United States and Mexico in 1927, which dealt with cases arising out of civil strife in Mexico. See further 4 RIIA (1930), p. xiii. In the former case, Portugal was ordered to pay considerable compensation. In the latter cases, Mexico was ordered to pay compensation where US nationals had been killed and their property damaged.

²⁰ UNGA Resolution 1803 (XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources”.

²¹ UNGA Resolution 3281 (XXIX) of 12 December 1974, “Charter of Economic Rights and Duties of States”.

“To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it *shall be settled under the domestic law of the nationalizing State and by its tribunals*, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.” [emphasis added]

Resolutions of the UN General Assembly are non-binding instruments. However, when concerned with general norms of international law, they cannot be ignored as they reflect the official positions of states and can in that sense provide a basis for progressive development of law, especially in terms of influencing customary international law.²² This view was reflected by the umpire in *Texaco Overseas Petroleum v Libyan Arab Republic* where he came to the conclusion that Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources did reflect the majority view of states with regard to expropriation whereas Resolution 3281 (XXIX) of 12 December 1974 could only be understood as portraying *a de lege ferenda* aspect of international law for the states which adopted the resolution in the General Assembly. The rejection of the principles contained therein by states opposed to the resolution could only be understood as *contra legem*.²³

Foreign direct investment directed towards the developing world declined considerably in the 1970s and 1980s. This had a number of reasons – the three principal which have been mentioned in this context are, firstly, the protectionist position of the developing world towards foreign direct investment and their unwillingness to adhere to the international principles advocated by the capital-exporting countries by expropriating foreign owned businesses without compensation. Secondly, the developing countries implemented ambitious tax schemes that were intended to raise tax revenue. Thirdly, the economic downturn in the world economy strained the inward flow of investment and led to a decline in foreign direct investment for the developing countries. Even though the global flow of foreign direct investment increased far more than world trade and output in the early 1980s, the developing countries remained marginalized due to the fact that the bulk of foreign direct investment was directed towards other developed countries. This led to the situation that although foreign direct investment to developing

²² I. Brownlie, *Principles of Public International Law*, OUP (2008), p. 15.

²³ *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v Libya*, Award 19 January 1977, 17 ILM 389 (1979), p. 491-92.

countries increased between the periods 1980-1989, their share of total inflows of foreign direct investment fell from 25 per cent to 18 per cent.²⁴

The consequence of this development was that the pendulum began to swing in the other direction. After the developing countries had implemented structural changes increasing the role of the state, often by expropriating foreign direct investment projects and implementing various tax schemes, the same states were forced to reconsider their strategy in the face of disappointing operating results of state-owned enterprises and lesser tax revenue. Out of this necessity developing countries began to attract foreign investment and privatize state-owned enterprises. The effects of the “lost decade” in Latin America and Africa began to reverse as the developing countries embraced the principles of the Washington consensus.²⁵ This policy change affected the pattern of BITs which were at this point in time the most used instrument in terms of stipulating the substantive and procedural principles concerning investment protection. Historically, almost all BITs stipulated had one developed country as a contracting party. This led to the situation where developed countries accounted for 83 per cent of all BITs made at the end of the 1980s. After the emergence of developing countries as active participants in the sphere of bilateral investment schemes, the influence of developed countries became proportionally lower; as of 1996 the developing countries had concluded such a considerable number of BITs, that the developed countries accounted only for 62 per cent of the worldwide total of BITs.²⁶

2.3 Codification of Friendship, Commerce and Navigation treaties

Bilateral treaties concerning the friendly relations of nations have been in existence for over two centuries. The early bilateral treaties were the Friendship, Commerce and Navigation treaties which were concluded by states from the mid-eighteenth

²⁴ UNCTAD, *World Investment Report: The Triad of Foreign Direct Investment* (1991), p. 83. It is worth mentioning that the level of foreign direct investment has historically varied considerably between regions and countries. As an example, only ten developing countries received about seventy five per cent of total inflows of foreign direct investment throughout the 1980s, namely Singapore, Brazil, Mexico, China, Hong Kong, Malaysia, Egypt, Argentina, Thailand and Colombia. See further UNCTAD, *World Investment Report: The Triad of Foreign Direct Investment*, United Nations (1991), p. 10.

²⁵ The concept of the “Washington Consensus” was coined in a policy paper in 1989. It entailed ten principles concerning economic reform which were thought to be needed for the economic benefit of developing countries. See further J. Williamsson, ‘What Should the World Bank Think About the Washington Consensus?’, *World Bank Research Observer*, International Bank for Reconstruction and Development, Vol. 15, No. 2 (August 2000), p. 251-264.

²⁶ UNCTAD, *World Investment Report: Transnational Corporations, Market Structure and Competition Policy*, United Nations (1997), p. 19-20.

century onwards.²⁷ The United States made the first treaty with France shortly after having declared independence; the treaty with France was concluded in 1778.²⁸ The United States remained active and concluded a number of treaties with its allies, in particular with the Netherlands in 1782 and with Sweden in 1783, with the purpose of establishing alliances strengthening not only commerce but also military alliances, e.g. access to ports and navigation in internal waters.²⁹

In addition to stipulating principles applicable to commerce, these FCN treaties contained provisions relating to foreign property of individuals engaged in business activities in the other state, access to local courts, tax issues, customs treatments, etc. Even though the FCN treaties did later on cease to be made by states, they continued to influence their relations considerably, as can be seen in the *ELSI* case (and discussed in Chapters 5.4.5 and 5.5.4), in which the United States made use of many provisions in an US-Italy FCN treaty relating to the dispute in the case, including a provision providing most constant protection and security.³⁰

As discussed previously, the right to property and its inviolability was almost universally recognized among states and the responsibility of states to indemnify those affected in the event that foreign individuals or their property were damaged. This was reflected in the FCN treaties which did not at that time refer to an international standard, but incorporated the principle of national treatment. An example stating that aliens should receive national treatment is the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, Art. 2(3):

“In case of war or of expropriation for purposes of public utility, the citizens of one of the two countries residing or established in the other shall be placed upon an *equal footing with the citizens of the country in which they reside*, with respect to indemnities for damages they may have sustained.”³¹ [emphasis added]

²⁷ See H. Neufeld, *The International Protection of Private Creditors from the Treaty of Westphalia to the Congress of Vienna*, A.W. Sijthoff (1971), p. 97-98, and M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed., CUP (2010), p. 180.

²⁸ See Treaty of Amity and Commerce Between the United States and France, concluded on February 6, 1778. It is available at <http://avalon.law.yale.edu/18th_century/fr/788-1.asp>. It should be noted, in addition, that the Treaty of Amity and Commerce between the United States and France was made on the same day as the Treaty of Alliance with France which created a military alliance between these nations against the United Kingdom.

²⁹ See K.J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, p. 203, and M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., CUP (2004), p. 209.

³⁰ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989).

³¹ See Convention of Friendship, Commerce and Extradition between the United States and Switzerland concluded on November 25, 1850, Art. 2(3). The convention is available in its entirety at <http://avalon.law.yale.edu/19th_century/switzerland_001.asp>.

These early treaties did not address investments, as they are presently understood, but focused mainly on commerce. However, the treaties recognized the principle that citizens of the contracting parties were entitled to enjoy protection and security in their business operations in either country. The Treaty of Amity, Commerce and Navigation of 1825 between Great Britain, the world's greatest industrial and commercial nation at the time, and Colombia, a smaller, newly independent and emerging nation, stipulated that:

“...the merchants and traders of each nation, respectively, shall enjoy the *most complete protection and security* for their commerce; subject always to the laws and statutes of the two countries respectively.”³² [emphasis added]

However, it was not before long that the treaty provisions became wider in scope and was not longer limited to merchants and traders. The Treaty of Friendship, Commerce and Navigation between Argentina and the United States stipulated:

“There shall be between all the territories of the United States and all the territories of the Argentine Confederation a reciprocal freedom of commerce. The citizens of the two countries, respectively shall have [...] generally [...] enjoy, in all their business, the *most complete protection and security*, subject to the general laws and usages of the two countries respectively.”³³ [emphasis added]

The language used to describe the protection of aliens and their property was not uniform. In addition to “most complete protection and security”, other formulations were used, including “full and perfect protection”.³⁴ Another formulation can be found in Article 13 of the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela:

“Both the contracting parties, promise, and engage formally, to give their *special protection to the persons and property of the citizens of each other*, of all occupations, who may be in the territories subject to the jurisdiction of the each other [...]”³⁵ [emphasis added]

³² See Treaty of Amity, Commerce and Navigation between Great Britain and Colombia, April 18, 1825, Art. 2, reproduced in T.C. Hansard, *The Parliamentary History of England – The Parliamentary Debates*, Vol. XIV (1826), p. 111.

³³ See Convention of Friendship, Commerce and Extradition between the Argentina and the United States of July 27, 1853, Art. 2, at <http://avalon.law.yale.edu/19th_century/argen02.asp>.

³⁴ See Treaty of Friendship, Commerce and Navigation between the United States and Paraguay of February 4, 1859, Art. IX and Treaty of Friendship, Commerce and Navigation between the United States and Costa Rica concluded on July 10, 1851, Art. VII, as cited in K.J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, p. 204-5.

³⁵ See Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela of May 31, 1836, at <http://avalon.law.yale.edu/19th_century/venez_001.asp>.

The interesting aspect of these last two formulations is that they were not limited to merchants or alien traders, but concerned aliens who were subjected to the jurisdiction of the contracting parties regardless of their occupation. Despite the last provision cited, the Venezuelan government implemented the following decree to counter the vast amount of claims presented by aliens and their governments due to mob violence and property damage resulting from the revolution of 1873:

“[...] neither domiciled foreigners nor wayfarers have the right to resort to diplomatic channels, unless when, having exhausted legal resources before the competent authorities, it may clearly appear there has been a denial of justice or notorious injustice.”³⁶

This decree and similar statutory provisions were used by the Venezuelan government and other Latin American countries to denounce responsibility. Venezuela implemented a law in 1903 in which the aforementioned principle was reiterated. Despite that provision, most European states, most notably the United Kingdom, Germany and Italy, continued to make claims against Venezuela. The dispute resulted in the severance of diplomatic relations followed by a seizure of Venezuelan gunboats and a blockade of the Venezuelan coast resulting in the country’s capitulation and acknowledgement of all claims presented by the European powers.³⁷ This development led – needless to say – to the stipulation of the Drago-Porter Convention according to which states agreed not to take recourse to armed force for the recovery of contract debts claimed from one state by another state as being due to its nationals.³⁸

Despite different positions as to what extent states were responsible for aliens and their property – a situation which was not clarified by numerous FCN treaties – states continued to enter into FCN treaties, predominantly with the United States. These FCN treaties continued to focus mainly on commercial matters up until World War II, but after that FCN treaties were directed more toward investment protection as matters relating to trade were dealt with in separate treaties, in particular the General Agreement on Tariffs and Trade.³⁹ However, these new FCN treaties lost momentum, in particular with regard to the United States, as developing countries,

³⁶ See J. Goebel Jr., *The International Responsibility of States for Injuries sustained by Aliens on account of Mob Violence, Insurrections and Civil Wars*, 8 AJIL 802 (1914), p. 834.

³⁷ See J. Goebel Jr., *The International Responsibility of States for Injuries sustained by Aliens on account of Mob Violence, Insurrections and Civil Wars*, 8 AJIL 802 (1914), p. 837 and 848-49.

³⁸ See Drago-Porter Convention on the Limitation of Employment of Force for Recovery of Contract Debts of October 18, 1907 and A. Cassese, *International Law*, 2nd ed., OUP (2005), p. 32-34.

³⁹ See R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 17, and K.J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int’l L.J. 201, p. 203-207.

which had grown increasingly sceptical of the benefits derived from foreign investment, became reluctant to commit themselves to the standards of protection stipulated in the treaties.⁴⁰ Moreover, another development began to affect treaty practice, namely the emergence of a new category of treaties that further accelerated the demise of FCN treaties. Bilateral Investment Treaties (BITs) emerged in the early 1960s where more emphasis was put on investment protection.⁴¹

2.4 The emergence of bilateral investment treaties

Modern BITs are, in their current version, a European invention. The first BIT was concluded between Germany and Pakistan in 1959.⁴² The overriding purpose for the conclusion of the treaty was the protection of foreign investment. Germany lost almost all of its pre-war foreign investments after the Second World War as these investments were confiscated by host states demanding compensation from Germany for damage caused as a result of the war – a war started by Germany in violation of international law. After having negotiated extensively with various countries and failed to protect its investments, the German government began a program of stipulating bilateral investment agreements.⁴³

The Germany-Pakistan BIT included various substantive provisions on investment protection, such as a provision describing protection and security. Article 3(1) of the treaty stipulated the following:

“Investments by nationals or companies of either party shall enjoy *protection and security* in the territory of the other Party.”⁴⁴ [emphasis added]

Thus, the first BIT contained a principle prescribing the standard of full protection and security and by doing so continued to provide a source to the standard in treaty law as had been done previously by FCN treaties. In contrast, the terms “equitable” and “fair and equitable” did not appear until the 1948 Havana Charter. Subsequently, the term “equitable” began to appear in FCN treaties of the United States, such as with Ireland (1950), Greece (1954), France (1960), Pakistan (1961), Belgium (1963) and Luxembourg (1963). Other countries, in particular Germany and the

⁴⁰ J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *International Lawyer* 655 (1990), p. 656-57.

⁴¹ R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, p. 10-11 (1995), reprinted in R. D. Bishop, J. Crawford and W. M. Reisman, *Foreign Investment Disputes – Cases, Materials and Commentary*, Kluwer Law International (2005), p. 47.

⁴² See Treaty between Germany and Pakistan of November 25, 1959, 457 UNTS 23.

⁴³ See R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 18.

⁴⁴ See Treaty between Germany and Pakistan of November 25, 1959, 457 UNTS 23.

Netherlands, used “fair and equitable treatment” when stipulating investment protection in their BITs.⁴⁵

Other countries followed suit and established their own programs concerning the protection of foreign investment. Shortly after Germany’s treaty with Pakistan, other European countries, such as Switzerland, France, Italy, the United Kingdom, the Netherlands and Belgium, entered into numerous BITs, many of which with their former colonies. Encouraged by the European experience the United States established a program in 1981 which filled the vacuum left by the discontinued FCN program. Still, the United States did not enter into as many BITs as the European countries. It is not clear why this program was not as successful as the FCN program and many reasons have been attributed to the greater success of the European programs. Firstly, the United States did not exert pressure to start negotiations with individual states as it did not want the BIT to be an instrument for changing existing policy, but rather to reflect a country’s previously held position towards foreign investment; if a country was not receptive to the US Model BIT, the United States would not pursue the matter.⁴⁶ Secondly, the European countries were open to making concession with regard to the scope of protection of the investment, e.g. free convertibility of local currency, protection against expropriation, etc. Thirdly, in many cases the European countries entered into BITs with their former colonies; it could be argued that the newly independent states were predisposed to strengthen the existing relationship with their former colonial powers.⁴⁷

It is safe to say that the number of BITs increased steadily since the completion of the Germany-Pakistan BIT. The number of BITs doubled every ten years from the 1960s until the 1990s. However, the number of BITs exploded in the 1990s when 1330 BITs were made. At the end of 2010, the number of BITs had reached 2,807.⁴⁸

As we shall see in Chapter 3, the structure and substantive provisions of BITs are generally similar. Surprisingly, they almost always address similar issues concerning the rights and obligations of the host state and an investor. After a generally stipulated preamble, a BIT would address particular issues, namely: (1) admission of investment, (2) substantive provisions concerning expropriation, fair

⁴⁵ See further C. Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, OECD 2005, p. 76-77.

⁴⁶ K.J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int’l L.J. 201, p. 211.

⁴⁷ J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 International Lawyer 655 (1990), p. 656-57.

⁴⁸ UNCTAD, *World Investment Report - Transnational Corporations, Market Structure and Competition Policy*, United Nations (1997), p. 19, UNCTAD, *World Investment Report – Transnational Corporations and the Infrastructure Challenge*, United Nations (2008), p. 14, and UNCTAD, *World Investment Report – Non-Equity Modes of International Production and Development*, United Nations (2011), p. 100.

and equitable treatment, full protection and security, (3) compensation and (4) dispute settlement.⁴⁹ Individual components have evolved considerably since the first BITs were made. An example are clauses of dispute settlement which stipulate the choices available to parties if a legal dispute arises. The first generation of BITs presupposed that if the dispute could not be settled through diplomatic negotiations, it would be settled through state-state ad hoc arbitration tribunal.⁵⁰ Later BITs have kept the state-state arbitration option in the event that a dispute would arise between the contracting parties, but with regard to dispute related to a particular investment the BITs have included an additional provision establishing an investor-state arbitration. This latter option has in most cases enabled investors to instigate arbitral proceedings by referring to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).⁵¹ This development is interesting taking into account the criticism which the former option received, namely that only states could be parties to disputes before the International Court of Justice and the need for a forum in which investors had the possibility of resolving their disputes with the investment's host state.⁵²

2.5 The success and failure of multilateral instruments

The stipulation of the standard of full protection and security has not been limited to the bilateral sphere alone. As the capital exporting countries, many of which were colonial powers, began to lose control of their colonies due to their struggle for self-determination in the 1950s, an evolution began which had the purpose of countering the popular notion of developing states pertaining to the inviolability of property. A number of instruments were drafted, almost all of which have not entered into force. However, despite the fact that these multilateral instruments were not implemented, some of them have affected considerably the substantive provisions and structure of other treaties negotiated between states because of cross-pollination of various provisions from multilateral instruments to BITs.⁵³

⁴⁹ See A.F. Lowenfeld, *International Economic Law*, 2nd ed., OUP (2008), p. 555-72, concerning the structure and substantive provisions of BITs.

⁵⁰ By referring the dispute to the International Court of Justice the matter would only be dealt with on the state level because only states can be parties to cases before the Court. See Article 34 of the Court's statute and J.G. Merrills, *International Dispute Settlement*, CUP (2005), p. 127-8.

⁵¹ See J. Tobin and S. Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, Yale Law School, Center for Law, Economics and Public Policy, p. 8, available at the following homepage: <http://papers.ssrn.com/sol3/_papers.cfm?abstract_id=557121>.

⁵² L. Shawcross, *The Problems of Foreign Investment in International Law*, *Académie De Droit International – collected courses of the Hague Academy of International law*, Vol. 102 (1961), p. 361-363.

⁵³ K.J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AJIL 621 (1998), p. 628.

The multilateral and regional instruments which have been researched for the purposes of this study differ considerably in nature with regard to investment protection. These instruments are very different in substance. Some instruments are meant to deal specifically with investment and provide an overall general framework for FDI covering many parts of investment operations, including general provisions on the promotion and protection of investment, investment liberalization, etc. Others are more general and cover the balance that needs to be struck between the investor and the interests of the host state, including a state's right to guard cultural rights and consumer protection.⁵⁴

Surprisingly, the Havana Charter, one of the major multilateral instruments drafted after the Second World War, did not contain a provision prescribing the standard of full protection and security. However, the Charter clearly recognized and emphasized the importance that nationals of other countries be afforded opportunities for investment and security of existing and future investments.⁵⁵ Therefore, the parties to the Charter undertook, having recognized the need for investments to be afforded security, to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments.⁵⁶ Because of this fact, the meaning of the Charter with regard to the evolution of the standard of full protection and security is limited.⁵⁷ The Charter never entered into force mainly because of the reluctance of the United States Congress to ratify it and also because of objections of business groups to provisions concerning foreign investment.⁵⁸

One of the most significant efforts to facilitate a multilateral approach to investment protection was an effort launched by groups of European business people and lawyers, under the leadership of Hermann Abs, the chairperson of

⁵⁴ For an example of the former, see Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference of 1981 and ASEAN Agreement for the Promotion and Protection of Investments of 1987. For an example of the latter, see International Agreement on Investment prepared by Consumer Unity & Trust in association with the United Nations Non-governmental Liaison Service in 1998.

⁵⁵ Article 12(1)(b) of the Havana Charter stated: "The international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments."

⁵⁶ Article 12(2)(a)(i) of the Havana Charter stated that Members were: "to provide reasonable opportunities for investment acceptable to them and adequate security for existing and future investments...".

⁵⁷ The Havana Charter had more influence on the evolution of the FET standard. See note 6.

⁵⁸ See A.F. Lowenfeld, *International Economic Law*, 2nd ed., OUP (2008), p. 27-28, and M. Sornarajah, *The International Law on Foreign Investment*, 1st ed., CUP (1995), p. 187.

Deutsche Bank, and Lord Shawcross, former Attorney-General of the United Kingdom. In 1959, the Abs-Shawcross Draft Convention on the Protection of Foreign Property was introduced dealing with investments abroad.⁵⁹ According to Article I of the Draft Convention the contracting parties proclaimed that property should be accorded protection and security. Hence, this was the first multilateral document which produced the concept of “constant protection and security”. However, it was also remarkable for the simple reason that it was the first instrument that provided for an investor-state approach to investment disputes.

The Organisation for Economic Co-operation and Development in Europe (OECD) took the Abs-Shawcross Draft Convention and adopted it in its efforts to produce a convention on the protection of foreign property.⁶⁰ The attempt of the OECD to stipulate an instrument was published in its 1962 Draft Convention on the Protection of Foreign Property.⁶¹ Despite considerable discussions within the organisation a consensus could not be reached. In 1967, another attempt was made with the reissuance of the convention. The Council Resolution that adopted the new draft stated in its preamble:

“Observing that the Draft Convention embodies recognised principles relating to the protection of foreign property combined with rules to render more effective the application of these principles.”⁶²

It is surprising that the organization could not, despite being composed mainly of capital-exporting states, reach a compromise in adopting it as a multilateral convention. The Draft Convention included a reference to the full protection and security standard.

In 1992, the Guidelines on the Treatment of Foreign Direct Investment were adopted by the Development Committee of the Board of Governors of the

⁵⁹ The Abs-Shawcross Draft Convention was partly based on the Köln Draft Convention, or International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, which was a draft convention published by a German business group in 1957. See F. Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 7 ICSID Review (1992), p. 389.

⁶⁰ Germany introduced the draft as a proposal for a multilateral treaty. For the reasons leading up to that submission and what the proposal sought to achieve see L. Shawcross, *The Problems of Foreign Investment in International Law*, *Académie De Droit International – collected courses of the Hague Academy of International law*, Vol. 102 (1961), p. 361-363.

⁶¹ Draft Convention on the Protection of Foreign Property, 2 ILM (1963) 241.

⁶² Draft Convention on the Protection of Foreign Property, reprinted in 7 ILM (1968) 117 with Resolution C(67)102 of the Council on the Draft Convention adopted on 12 October 1967.

International Monetary Fund and the World Bank.⁶³ In Section III, the Guidelines stated, after having dealt with the fair and equitable treatment standard and other principles, that in all cases “...full protection and security will be accorded to the investor’s rights regarding ownership, control and substantial benefits over his property, including intellectual property.”

The OECD continued its efforts to draft a text concerning investments and their protection. In 1998, the organisation concluded its Draft Negotiating Text for a Multilateral Agreement on Investment (MAI) where the full protection and security standard was included with other absolute standards. However, this effort by the OECD did not succeed despite intensive negotiations. Further negotiations were abandoned by the OECD as individual member states decided to pursue further negotiations pertaining to a multilateral investment regime under the auspices of the WTO.⁶⁴ Again, the efforts of the member states of the WTO came to an end in 2004.

Even though none of the previously mentioned multilateral instruments have entered into force, examples can be found to the contrary. A number of investment instruments deal directly or indirectly with the protection of investments. One of these instruments is the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention). According to the Convention, a number of preconditions have to be met before insurance coverage can be extended to an investment. According to Article 12(d)(iv) of the MIGA Convention, which deals with eligible investments, the MIGA Agency has to satisfy itself as to “the investment conditions in the host country, including the availability of fair and equitable treatment and *legal protection* for the investment.”⁶⁵

2.6 Regional instruments

Efforts to formulate investment protection provisions concerning foreign investment developed much later at the regional level compared to earlier attempts within the multilateral sphere. These regional agreements have not always been limited to investment alone, but have focused both on trade and investment. These regional initiatives are of importance as there might be a certain spill-over effect from regional

⁶³ World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in 31 ILM 1379 (1992).

⁶⁴ For reasons why the initiative was discontinued see R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 26.

⁶⁵ See Convention Establishing the Multilateral Investment Guarantee Agency, 27 ILM 1288 (1988).

cooperation to bilateral treaty practice of member states. Needless to say, regional cooperation is often influenced by the bilateral treaty practice of its member states.

The North American Free Trade Agreement (NAFTA) between Canada, the United States of America and Mexico entered into force in 1994.⁶⁶ The agreement's objectives were *inter alia* to establish a free trade area in which barriers to trade were eliminated and cross-border movement of goods and services facilitated. In addition, the agreement was intended to increase investment opportunities and provide for investment protection. The agreement contains in its Article 1105 a clause stipulating that member states should accord treatment in accordance with international law, including full protection and security. As will be discussed in Chapter 3.3.2.3.2, this provision has become topical due to its formulation, how various arbitral tribunals have interpreted it and how members of NAFTA have attempted to influence the process of interpretation.

Another regional instrument, which could be taken as an example, is the agreement stipulated under the auspices of the Organisation of the Islamic Conference, an international organisation of 57 Muslim states. The Agreement on Promotion, Protection and Guarantee of Investments among Members States of the Organisation of the Islamic Conference includes reference to the full protection and security standard that obliges states to provide adequate protection and security. This agreement, which was originally stipulated in 1981, can be considered a part of an initiative taken by a number of Arab countries in order to facilitate the flow of investment between Arab capital-exporting and Arab capital-importing countries. Other initiatives were also taken in order to achieve that objective, e.g. the establishment of the Inter-Arab Investment Guarantee Corporation.⁶⁷

The Energy Charter Treaty was signed in 1994 and entered into force in 1998. The treaty is intended to establish a multilateral framework for energy cooperation and promote energy security through competitive energy markets. The treaty focuses on the protection of foreign investments, non-discriminatory conditions for trade, resolution of disputes between contracting parties or investors and host states and the promotion of energy efficiency. In the event that a dispute arises an investor can in accordance with Article 26 of the treaty instigate arbitral proceedings under the ICSID Convention, an arbitral tribunal established under the UNCITRAL Arbitration Rules, before the Arbitration Institute of the Stockholm Chamber of Commerce or before courts or administrative tribunals of the contracting party to the dispute. As a list of the 51 member states reveals – a list which includes Finland

⁶⁶ North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States, 32 ILM (1993) 605.

⁶⁷ UNCTAD, *Investment Provisions in Economic Intergration Agreements*, United Nations (2006), p. 14-15.

in Western Europe and Japan in Southeast Asia – the treaty can be considered a sectoral instrument rather than a regional one. In addition, 22 states have observer status to the treaty. The treaty describes in Article 10(1) that investments shall enjoy full protection and security, but includes also a description of state action from which contracting parties are to refrain.⁶⁸

Some regional instruments provide for protection, but also include references to national treatment or include requirements linked to the investment's admission to the host state. Examples of the former are the Colonia and Buenos Aires Investment Protocols of MERCOSUR. Both protocols provide for “full protection” but refer also to national treatment and most-favoured-nation treatment.⁶⁹ An example of the latter is the Agreement for the Promotion and Protection of Investments made under the auspices of the Association of Southeast Asian States (ASEAN), an organisation established in 1967 with ten Southeast Asian countries. In 1987, ASEAN adopted the agreement clearly stating that its contracting parties should ensure full protection of investments made within the territory of that contracting party.⁷⁰ However, while including such a provision, it also included numerous restrictive requirements. Pursuant to Article II of the agreement, investments are to be approved in writing and registered with the authorities in the host country. In 2009, the ASEAN member states adopted the ASEAN Comprehensive Investment Agreement in which the substantive standard of full protection and security was addressed in greater detail.⁷¹ However, this new agreement does not eliminate the restrictive requirements contained in the Agreement for the Promotion and Protection of Investment of 1987. According to Article 4(a), the ASEAN Comprehensive Investment Agreement of 2009 defines “covered investments” as an investment of an investor in the territory of any other member state that has been admitted and specifically approved in writing by a competent authority.

⁶⁸ The Energy Charter Treaty, signed on 17 December 1994, reprinted in 34 ILM 360 (1995).

⁶⁹ See Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR (“Colonia Protocol”), 17 January 1994. This protocol covers investments that are made by investors coming from states that are parties to MERCOSUR. See also Protocol for the Promotion and Protection of Investments coming from States not Parties to MERCOSUR (“Buenos Aires Protocol”), 5 August 1994. This protocol covers, as its name suggests, investments made by investors that come from states that are not parties to MERCOSUR.

⁷⁰ ASEAN Agreement signed on 15 December 1987 by Brunei Darussalem, Indonesia, Malaysia, the Philippines, Singapore and Thailand and later acceded to by Vietnam, Myanmar, Laos and Cambodia, available at <<http://www.asean.org/6464.htm>>.

⁷¹ ASEAN Comprehensive Investment Agreement signed 26 February 2009 by Brunei Darussalem, Cambodia, Indonesia, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam, available at <<http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf>>.

2.7 Non-governmental initiatives

A number of non-governmental initiatives have been undertaken by organizations concerning the protection of investments. The overall effects of these initiatives, with the exception of the Abs-Shawcross Draft Convention on Investments Abroad, are uncertain. Still, a general description of these attempts is necessary for the purposes of this study.

The International Code for Fair Treatment for Foreign Investments was prepared by two committees of the International Chamber of Commerce (ICC) and published by the organisation in 1949. Article 5 of the Code is based upon the principle of national treatment, but with the caveat of international law, in the event that municipal law does not suffice, with regard to civil rights recognized by the other contracting party or international law.⁷² Again, in another attempt, in 1972, the ICC adopted the Guidelines for International Investment. According to Article V(3)(a) the host country's government "[s]hould respect the recognized principles of international law, reflected in many international treaties regarding the treatment of foreign property [...]." It must come as a surprise that the standard of full protection and security is not described whereas the fair and equitable standard is mentioned.

In 1998, a non-governmental organization, Consumer Unity & Trust Society – Centre for International Trade, Economics and Environment, prepared a draft on an international investment agreement. Pursuant to Article IX, paragraph 1.1, a contracting party was to accord full protection and security to investments in its territory:

“(a) Each Contracting Party shall accord, to investments (in its territory) of investors of another Contracting State, fair and equitable treatment and *full and constant protection and security*, including such treatment, *protection and security* in respect of the operation, management, maintenance, use enjoyment or disposal of such investments.

⁷² Article 5 of the ICC Code states: “In the territories of each of the High Contracting Parties, the treatment extended to the nationals of the other High Contracting Parties shall be not less favourable than that applied to their own nationals, in respect of the *legal and judicial protection* of their person, property, rights and interests, and in respect of the acquisition, purchase, sale and assignment of moveable and immoveable property of any kind. Should the nationals of one of the High Contracting Parties *not enjoy the full benefit of the civil rights generally recognized by the other High Contracting Parties or by international law*, the nationals of the other High Contracting Parties shall be entitled to such rights and this protection.”

(b) In no such case shall a Contacting Party accord, to such investments, treatment or *protection* that is less favourable than that required by customary international law.⁷³ [emphasis added]

The document is an attempt to lay out an equitable alternative international agreement on investment that would promote social justice, equity, transparency and accountability. It serves as an example where civil society is engaged as a stakeholder in addressing issues dealing with investment and development.⁷⁴

2.8 Conclusion

This chapter examined the history of the standard of full protection and security. As this chapter has revealed, the standard rests upon an old principle of international law, in particular the principle that a state must protect foreigners and their property within its borders. This fundamental principle has been so well recognized that individual states have adhered to it in many cases since the 1800s. Examples can be found where states have without any particular pressure being asserted against them paid compensation because of damage caused to aliens or, in some cases, individuals that would according to the current legal framework governing foreign investment be considered investors.

However, the consensus, which formed a customary principle of international law, could not be maintained, especially after the newly independent African states began to assert themselves in the international arena demanding control of their natural resources following their struggle for independence. This shift was met with an initiative of capital-exporting states that produced numerous BITs. In parallel, capital-exporting states led multilateral efforts – efforts that have been unsuccessful in terms of adopting a multilateral instrument, but successful in influencing the content of the many BITs entered into among states.

Therefore, the current situation seems to be that the full protection and security standard does not differ from other standards in international investment law, e.g. the standard of fair and equitable treatment, in the sense that its main foundation seems at present to rest upon international investment treaties. It is stipulated in numerous treaties, although the provisions found in BITs, multilateral or regional

⁷³ Consumer Unity & Trust Society, *International Agreement on Investment*, first draft prepared in 1998, reprinted in UNCTAD, *International Investment Instruments: A Compendium*, Vol. V (Regional Integration, Bilateral and Non-governmental Instruments, United Nations (2000), p. 364.

⁷⁴ UNCTAD has worked with various partners in this field. They include The World Association of Investment Promotion Agencies (WAIPA), the World Bank Group, OECD, UNIDO, ICC, NGOs and national, subregional and institutions of higher learning. See further Annex to the Sao Paulo Consensus dealing with UNCTAD XI Multi-Stakeholder Partnerships, 25 June 2004, TD/410, p. 25 et seq.

instruments are not uniform. However, there is a difference in the way these standards came to be, or from where they originated. As discussed in this chapter, the standard of full protection and security has a strong relationship with an existing principle of international law, whereas the standard of fair and equitable treatment does not. The first time a reference was made to the fair and equitable treatment standard was in the Havana Charter of 1948. After having being included in that instrument, which never entered into force, it began to be used in the numerous US FCN treaties concluded thereafter. Eventually, this wording was adopted by the German and Swiss BITs that followed. So, when these two standards are compared, one can fully state that the full protection and security has a longer history in international law.

Despite the fact that the standard is also mentioned in multilateral and regional instruments, its effects are very different in scope. Some regional instruments, e.g. NAFTA, have wide ranging consequences due to numerous arbitral awards, whereas others, e.g. ASEAN, are of limited use due to restrictive requirements which subject investments to the regulatory authority of the host state.

It is also worth noting that the multilateral instruments described above have not been adopted despite repeated attempts by nations and international organizations. These instruments have been, needless to say, in favour of protection for foreign direct investment and have therefore marked a stark difference to the instruments passed in the UN General Assembly that have emphasized the control of nations over their natural resources.

However, when discussing the full protection and security standard, it is not sufficient to look only at the evolution of the principles governing the protection of aliens, but also to recognize and assess the impact of the numerous legal instruments that have been stipulated and provide for full protection and security to investors and their investments. It is this issue that will be discussed in the next chapter.

PART II
**The sources and content of the Full Protection
and Security Standard**

3. SOURCES OF THE FULL PROTECTION AND SECURITY STANDARD

3.1 Introduction

As the preceding chapter has revealed, a principle pertaining to the protection of aliens has had a long history in international law. However, that protection – including its scope and nature – has changed considerably as the sources of international law have evolved depending on the ever-changing content of customary international law, the emergence of FCN treaties and bilateral investment treaties. Taking into account this fact, it is necessary to take a closer look at the sources of the full protection and security standard.

A number of issues need to be addressed when discussing the sources of the standard of full protection and security. The standard has, as other parts of international law, been affected by the increasing fragmentation of international law.⁷⁵ Therefore, different approaches can be taken depending on whether the standard should be approached through international law in a classical way or whether it should be described through the viewpoint of international investment law.

This chapter will cover both approaches for a number of reasons. First, it is necessary to explore the sources of international law in general due to the fact that the protection of aliens and their property – the predecessor of the current standard of full protection and security – evolved at a point in time when the current sources of international investment law were not available. Second, in order to obtain the most accurate picture of the current sources of international investment law, its preceding sources need to be explored, not only for historical purposes, but also because it serves the purpose of this study to ascertain the substantive content and scope of the standard. A more complete picture will be obtained of the standard and its ramifications as a result.

⁷⁵ See International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. A/CN.4/L.682 of 13 April 2006, p. 11.

3.2 Sources of international law

The system of sources of law in international law varies considerably from any municipal law system. One of the most important differences is that international law is non-hierarchical.⁷⁶ Hence, the two-pronged approach in municipal law in which a distinction is made between formal sources of law and material sources of law does not apply in international law.⁷⁷ Despite the lack of constitutional machinery of law-making, the sources of international law are generally thought to be found in Article 38(1) of the Statute of the International Court of Justice.⁷⁸ It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷⁹

One of the questions which has been raised with regard to Article 38(1) concerns the significance of the sequence in the enumeration of sources. After having discussed the non-constitutional nature of international law, as opposed to municipal law, one might think that the sequence of (i) international conventions, (ii) international custom and (iii) general principles of law do not have any meaning in practice. However, that is not the case as can be seen when the sources are applied in practice. The sequence in the enumeration of sources follows a logical structure, namely that it proceeds from more special to the more general rules or principles, from bilateral agreements between two states to the general principles of law.⁸⁰

⁷⁶ See H. L. A. Hart, *The Concept of Law*, 2nd ed., Clarendon Press (1994), p. 213-237.

⁷⁷ Formal sources are legal procedures and methods which acknowledge the creation of rules generally applicable and legally binding for the entities which are subjected to them. Material sources provide an approach which verifies substantively the rules which have been correctly adopted. See further I. Brownlie, *Principles of Public International Law*, 6th ed., OUP (2003), p. 3 et seq.

⁷⁸ For a critical view concerning Article 38 and its status as stipulating the sources of international law, see L. Oppenheim, *International Law*, 9th ed., Harlow – Longman (1992), p. 24, where the author argues that Article 38 cannot itself create the legal validity of the sources of international law as the article itself belongs to one of the sources which it describes, namely an ‘international convention’.

⁷⁹ International Court of Justice, *Statute of the International Court of Justice* (1945), available at <<http://www.icj-cij.org>>.

⁸⁰ See M. Akehurst, *The Hierarchy of the Sources of International Law*, 47 BYIL (1974-1975), p. 273-285, and K. Zemanek, *The Legal Foundations of the International System*, *Académie De Droit International – collected courses of the Hague Academy of International law*, Vol. 266 (1997), p. 131-133.

Still, an umpire cannot but be bound of the statutory principle articulated in Article 38(1) subpara. (d), in which a distinction is made between the first three sources and the last two sources, i.e. treaty law, customary international law and general principles of law, on one hand, and judicial decisions and scholarly writing, on the other. This division of main sources and subsidiary sources of international law must be considered to be indicative of the interpretation and application of the three main sources in Article 38(1).⁸¹

The continued fragmentation of international law has ignited the debate whether individual parts of international law, such as specialized parts of international economic law (WTO law, investment law), have become self-contained regimes.⁸² Such fragmentation often leads to the usage of the “principles of international investment law” or “principles of international human rights law” – usage that often assumes that the principles referred to differ from what the general principles of international law provide in similar situations. But regardless of whether this distinction has any practical relevance in individual cases, it has become clear that international investment law is at present considered a specific field of law in terms of having evolved to the extent that it is considered to possess such terminology as to be examined as a distinct field of law.⁸³ This is not to say that international investment law is an autonomous legal subsystem – it is more a specific field of law that at present forms an integral part of general international law. Such consensus is supported by practical examples found in individual sources of international law. The full protection and security standard is referred to in numerous investment instruments, as mentioned in Chapter 2, judgments of the ICJ and awards of arbitral tribunals. As will be discussed in greater detail in this Chapter, the standard is also found in customary international law and general principles of international law. This inter-relationship is in constant development due to the growth of this genre of law, in particular through the increasing number of BITs, state practice as it contributes to customary international law and an upsurge in arbitral awards.

⁸¹ See H. Mosler and K. Oellers-Frahm ‘On Art. 92’ in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, OUP (2002), p. 1159-1160. See also International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. A/CN.4/L.682 of 13 April 2006, p. 65.

⁸² For a discussion on the concept of ‘self-contained regimes’, see B. Simma, *Self-Contained Regimes*, 16 NYIL (1985) 111-36 and B. Simma and D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, EJIL (2006), Vol. 17, No. 3, p. 483. For a discussion on the concept itself within the context of investment law, see M. Hirsch, ‘Interactions between Investment and Non-Investment Obligations in International Investment Law’ in C. Schreuer, P. Muchlinski and F. Ortino (eds.), *Oxford Handbook of International Investment Law*, OUP (2008), p. 154 et seq.

⁸³ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 2.

3.3 Sources of international investment law

3.3.1 General

The sources of international investment law, in their present form, stem from the sources of international law.⁸⁴ The increase in economic activity, including foreign investment, which has been coupled with the conclusion of numerous BITs, has increased the distinctive characteristics of this field of law. Furthermore, an upsurge in arbitral awards has added extensively to the substantive principles of investment law regardless of which source of law they are based upon: investment treaties, customary international law or general principles of law. In addition, academic publications have grown significantly in number. Hence, the need to address the sources of international investment law independently.

3.3.2 International investment treaties

3.3.2.1 Structure of investment treaties and its implications

The international investment treaty is one of the most important instruments in any investor-state relationship as it provides for the substantive provisions regulating that relationship. Moreover, the instrument is of particular importance due to the fact that a state, which subjects itself to such an instrument, relinquishes a part of its sovereignty in an agreement with another state, i.e. the investor's home state, in order to establish an investor-friendly framework designed to attract foreign investment. Therefore, an investment treaty will contain a balance between the state's interest in attracting foreign investment while not being subjected to absolute investments standards *vis-à-vis* the interest of the investor to be able to invest believing that the investment will be protected from adverse effects.

The structure of an investment treaty is of general importance with regard to the interpretation of particular provisions of the treaty. Two provisions are relevant for this discussion: the introductory provisions concerning the object and purpose of the treaty and the substantive provisions containing the protection of the investment from adverse effect. The relationship between these types of provisions will become apparent, in particular after a dispute has arisen, due to the fact that the former emphasizes the purpose accepting foreign investment and its positive effects, whereas the latter articulates in greater detail the international standards which protect the investment from actions of the state or third parties.

⁸⁴ As discussed in Chapter 2, earlier increases in economic activity were governed by national laws through the principle of national treatment. See also R. Baldwin and P. Martin, *Two Waves of Globalization: Superficial Similarities, Fundamental Differences*, in H. Siebert (ed.), *Globalization and Labour* (1999), p. 3-4.

This is particularly evident when a treaty is interpreted according to Article 31 of the Vienna Convention on the Law of Treaties that includes many of the tools used by tribunals to apply the often vague substantive elements of investment standards in contentious proceedings.⁸⁵ As will be discussed later in Chapter 4, it is due to, *inter alia*, the vague substantive content of the full protection and security standard that arbitral tribunals have referred to customary international law when interpreting substantive provisions in individual cases.

3.3.2.2 Bilateral investment treaties

3.3.2.2.1 The meaning of different parts and their structure

BITs currently are the most commonly used instrument providing for protection to investors and their investments. Their structure is somewhat uniform although differences between the early BITs and the later ones can be seen – the latter group contains investment protection which is wider in scope compared to the former group.⁸⁶

The BITs researched for the purposes of this study contain numerous versions of the full protection and security standard.⁸⁷ The words “protection” and “security” form the substantive elements of the standard and can be found in various parts of a BIT. The former word is unique in the sense that it appears in every title of every BIT researched for this paper. That is the case even though a BIT does not mention the full protection and security standard in its substantive part. The word also appears quite frequently in a BIT’s preamble where the parties recognize that the encouragement and protection of investments will be conducive to the stimulation of business initiative and increase prosperity between the contracting parties. And finally, the word will usually appear in the substantive part of the treaty where the contracting states commit themselves to providing full protection and security. In short, the word “protection” will appear in the title of a BIT, its preamble and substantive parts. The word “security” appears usually only in the substantive part of a BIT – in the part which deals with full protection and security and the part which focuses on security interests of a state.

⁸⁵ See Article 31(1) of the Vienna Convention on the Law of Treaties, 1155 UNTS, p. 331. Article 31(1) is reproduced in Chapter 4.

⁸⁶ An example of this evolution is the definition of investment. Earlier BITs contain a general definition of investment whereas later editions contain a detailed definition covering intangible parts of the investment, e.g. trademarks and intellectual property rights. See Chapter 5.5.5.

⁸⁷ A study of 550 BITs was undertaken in order to analyze their structure and content within the context of the full protection and security standard. These BITs are available at UNCTAD’s website <http://www.unctadxi.org/templates/DocSearch____779.aspx>. Examples can be found in Annex I.

The BITs researched for this study reveal that states take different approaches with regard to how the BITs, as legal instruments, provide investment protection. Three main categories can be found: (1) Agreements which differentiate between investment promotion and investment protection; (2) Agreements which address jointly investment promotion and investment protection; and (3) Agreements which do neither; the agreements of this last category provide for formal protection but their substantive provisions either provide incomplete protection or no protection at all. It is necessary to explore this categorization in greater detail.

(1) Agreements which differentiate between investment promotion and investment protection

The first group contains instruments that feature, like all other BITs researched for this study, the concept of “protection” in their titles. These treaties also include the concept in its preamble. Typically, this type of instrument will describe in a separate article or a paragraph a state’s obligation to promote investments which are made in accordance with its laws. Subsequently, the instruments will address the investment protection itself, often in another article or paragraph.

An example of this approach can be found in the United Kingdom-Argentina BIT. There, the word “protection” appears in the title and preamble of the treaty. Subsequent articles presuppose a distinction between promotion and protection. Article 2 deals with investment promotion and investment protection. Article 2(1) of the BIT, which deals with promotion, states:

“Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.”

The obligation to provide protection is to be found in Article 2(2) of the same BIT:

“Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy *protection and constant security* in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” [emphasis added]

Here, substantive investment standards are not mentioned in the paragraph dealing with investment promotion, but are included in a special paragraph dealing with investment protection. Examples can be found whereby a distinction between investment promotion and protection is made, but protection is a substantive

element in both fields. The Netherlands-Bahrain BIT prescribes in Article 2, which deals with investment promotion, the following:

“Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the *protection* in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.” [emphasis added]

The obligation to provide protection is to be found in Article 3(1) of the same BIT:

“Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments *full security and protection*.” [emphasis added]

Therefore, while emphasizing protection during the investment’s promotion and its subsequent treatment, a distinction between investment promotion and investment protection is made. Scholars have advocated for this distinction between promotion and protection.⁸⁸

(2) Agreements which address jointly investment promotion and investment protection

The second category includes instruments that mention investment protection in their respective titles. However, the instruments’ substantive articles contain a more mixed approach to the two concepts of promotion and protection of investments. Another consequence of this approach is that emphasis of the full protection and security in the instrument’s preamble diminishes. Rather, greater emphasis is put on the fair and equitable treatment standard. A case in point is the Denmark-India BIT. Here, the preamble of the treaty does not mention protection, but prescribes the following:

“Recognizing that a fair and equitable treatment of investments on a reciprocal basis will serve this aim.”

Article 2(2), which deals both with promotion and protection, states:

⁸⁸ See P. Juillard, ‘L’évolution des sources du droit des investissements’, 250 RCADI 13 (1994), p. 28. See also UNCTAD, *Investment Promotion Provisions in International Investment Agreements*, UNCTAD Series on International Investment Policies for Development, United Nations (2008), which focuses on investment promotion and the role international investment agreements play when countries have decided to apply investment promotion measures.

“Investments of investors of each Contracting Party shall at all times enjoy *full protection and security* in the territory of the other Contracting Party and shall not be subject to unreasonable or discriminatory measures.”

This mixed approach also often entails that the treatment of the investments is dealt with in a separate article. The Denmark-India BIT stipulates in Article 3 how the investment should be treated. There emphasis is put on fair and equitable treatment not only as such but also coupled with a description which is specifically targeted. In addition, both of these formulations of the standard are stipulated with the standards of national treatment and most-favoured-nation.⁸⁹

3) *Agreements provide for limited protection or no protection*

The BITs found in this third group have an approach not based upon the two previously mentioned. These BITs are not structured but tend to mix together different structures. As will be discussed later, this approach can have grave consequences to the detriment of the investment protection.

A clear example of this approach is the Russian-Moldovan BIT. This instrument obliges the state concerned to provide investment protection. According to Article 2(2), the investment’s host country obliges itself to guarantee, *in accordance with its own legislation*, full and unconditional legal protection of the investment. This provision led the umpire in the *Bogdanov case* – a case concerning an investment dispute between a Russian investor and the state of Moldova, to conclude:

“The wording of article 2(2) of the BIT makes clear that the full protection principle is not to be considered as a corrective of the host country’s legislation, but has to be applied in accordance with the host country’s law. As long as the restrictions [...] are in accordance with Moldovan law, therefore, the full protection standard of the BIT may not be deemed violated.”⁹⁰

⁸⁹ Article 3 in the Denmark-India BIT states the following:

(1) Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to the investments of its own investors or to investors of any third state, whichever is the more favourable from the point of view of the investor.

(2) Each Contracting Party shall in its territory accord to investments of investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to investments of its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

(3) In addition each Contracting Party shall accord to investors of the other Contracting Party treatment which shall not be less favourable than that accorded to investors of any third state.

⁹⁰ *Bogdanov v Republic of Moldova*, Award 22 September 2005, SCC, para 4.2.3.

Here, two parts are mixed together, namely “in accordance with its own laws” and “full protection and security”. The former provision is usually used when dealing with investment promotion – a state is to admit investments that are made in accordance with its own laws. The latter provision is a traditional provision providing for protection with regard to the investment itself. It is safe to say, regardless of whether that conclusion is correct or not, that such a provision renders the investment protection, which the BIT was supposed to guarantee, useless for the investor. In addition, a provision of this nature goes against the aim of the BIT, i.e. to provide investment protection in cases when action or inaction of the state, which might be based on national laws, turns out to damage the investment. The protection provided for by the full protection and security standard becomes void.

A similar example can be found in the Thailand-India BIT whereby substantive investment standards are subjected to the host state’s law. Article 3(2) of the agreement prescribes:

“Investments and returns of investors of each Contracting Party in the territory of the other Contracting Party, shall at all times be accorded fair and equitable treatment including *protection and security under the laws of the other Contracting Party.*” [emphasis added]

Needless to say, this formulation might provide an opportunity for the host state, if a dispute would arise, to argue that the protection and security owed to the investor should not go further than the host state’s law prescribed. That, in effect, would add an extra requirement for the investor to show that the host state’s action or inaction had violated its laws. It is likely that such an additional requirement would render the investment protection insufficient.⁹¹

3.3.2.2.2 Overview of different formulations

In order to get an overview of the many formulations contained in various BITs and to be able to analyse them for the purpose of this study, criteria had to be selected to limit their number. The combination of countries is based upon a selection for the purpose of providing a list of treaties that could be considered representative of the main variations of the full protection and security standard. Therefore, the BITs researched came from both developing and developed countries:

⁹¹ It must be noted that examples can be found in Swedish BITs where a distinction was made between investment promotion and investment protection. Despite that distinction, these BITs did not provide for protection and security, or at least did so in a limited way. See e.g. the Sweden-Russia BIT in Annex I. The BIT makes the distinction between promotion and protection, but does not mention the full protection and security standard. The treaty only states that “the investments made by investors of one contracting party in the territory of the other contracting party enjoy *full protection* in accordance with the provisions of this Agreement”.

Developing countries

1. Argentina
2. China
3. Czech Republic
4. Egypt
5. India
6. Indonesia
7. Thailand
8. Turkey

Developed countries

1. Belgium-Luxembourg
2. Finland
3. Germany
4. Netherlands
5. Sweden
6. Switzerland
7. United Kingdom
8. United States of America

In addition to these countries, the BITs of other countries will be addressed indirectly, especially in the event that a provision has been interpreted by an arbitral tribunal in investor-state arbitration.

The clauses used by states in describing the full protection and security standard vary considerably. The most common construction is “full protection and security”. That is, however, by no means the only formulation. Other versions include “full protection,”⁹² “protection and security,”⁹³ “adequate protection and security,”⁹⁴ “full physical security and protection,”⁹⁵ “full and constant protection and security,”⁹⁶ “constant protection and security,”⁹⁷ and “most constant protection and security.”⁹⁸ A number of treaties go further when prescribing that investment should be accorded “full legal protection and security”⁹⁹ or “full legal protection and legal security”.¹⁰⁰

The different variations of the full protection and security standard can be divided into the following six categories: (a) The standard appears without any reference to other terms; (b) The standard appears with fair and equitable treatment; (c) The standard appears with expropriation; (d) The standard appears with relative standards; (e) The standard appears with reference to international law; and (f) The standard appears within the context of other special obligations. It is necessary to look at this more closely, in particular to establish within what context the full protection and security standard appears, before analyzing what the legal effects of these variations might be in practice.

⁹² Art. 2(3) Germany-Thailand BIT.

⁹³ Art. II(4) US-Zaire BIT.

⁹⁴ Art. 2(2) Indonesia-Korea BIT.

⁹⁵ Art. 3(2) Netherlands-Venezuela BIT.

⁹⁶ Art. 10(1) Japan-Korea BIT and Art. 2(2) China-Djibouti BIT.

⁹⁷ Art. 2(2) Finland-China BIT.

⁹⁸ Art. 3(2) Thailand-Peru BIT.

⁹⁹ Art. 4(2) Australia-Argentina BIT.

¹⁰⁰ Art. 4(1) Germany-Argentina BIT.

(a) The standard appears without any reference to other terms

The full protection and security standard often appears as an independent stand-alone standard. The Austria-Saudi Arabia BIT contains the following clause in Article 4(1):

“Investments by investors of either contracting party shall enjoy *full protection and security* in the territory of the other contracting party.” [emphasis added]

This is clearly the simplest version of the standard in treaty practice. Other variations can be found, such as the Finland-Brazil BIT, which emphasizes that investments are to be protected at all times:

“Investments by investors of either contracting party shall at all times enjoy *full protection and security* in the territory of the other contracting party.” [emphasis added]

However, such additions will generally not lead to any difference in protection, not unless additional substantive elements are added to the standard. The Belgium-Korea BIT attaches an element of *de jure* and *de facto* discrimination in Article 1(2):

“Such investments, goods, rights and interests shall also enjoy *continuous protection and security*, excluding all unjustified or discriminatory measures which would “de jure” or “de facto” hinder their management, maintenance, utilization, enjoyment, or liquidation.” [emphasis added]

Thus, additional substantive elements are attached to the standard that formulate in greater detail what the host state is to refrain from doing.

(b) The standard appears with the fair and equitable treatment standard

The standard is frequently formulated with the fair and equitable treatment standard. Article 2(2) of the Czech-South Africa BIT states:

“Investments of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy *full protection and security* in the territory of the other Party.” [emphasis added]

Some countries not only include the two standards in the same sentence, but also include with them a description of actions that are particularly targeted. This approach is frequently used in the treaty practice of the United Kingdom. Article 2(2) of the United Kingdom-Kenya BIT states:

“Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy *full protection and security* in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” [emphasis added]

Thus, the substantive standards are formulated with a description of actions that the host state should refrain from doing and then followed by an “umbrella clause” that states that any obligations should be observed.

The relationship between the two standards is a complex one and often directly affected because of the particular formulation of the standards’ relationship in treaty law. The France-Argentina BIT notes in Article 5.1 that the full protection and security standard should be considered a part of the fair and equitable treatment standard:

“Investments made by investors of either Contracting Party shall enjoy in the territory and the maritime zone of the other Contracting Party, *full protection and security*, pursuant to the principle of fair and equitable treatment mentioned in Article 3 of this Agreement.” [emphasis added]

This version of the standard is not common in treaty practice. Usually the standards of fair and equitable treatment and full protection and security are formulated independently. However, this formulation became topical in the *Vivendi v Argentina case*. Despite acknowledging its “specific wording”, the tribunal did not limit the scope of the standard. In contrast, the tribunal stated, when dealing with whether the standard was limited to the protection of physical security or not, that such limitation could not be found in the way in which the standard was formulated. If the parties to the treaty had intended to limit the scope of the standard, they could have done so in the treaty itself. Therefore, the tribunal concluded that the standard should be thought to cover any act that deprived an investor, on one hand, of protection and security and, on the other hand, fair and equitable treatment.¹⁰¹

¹⁰¹ *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 22 May 2007, para 7.4.15.

(c) The standard appears with expropriation

Some countries prefer to include the standard within the context of expropriation. This is particularly the case in German treaty practice. An example is Article 4 of the Germany-Philippines BIT which bears the heading “Expropriation and Compensation”, but includes a provision that states that investments made by investors shall enjoy full protection and security.¹⁰² In the recently re-negotiated Germany-Venezuela BIT,¹⁰³ reference to the full protection and security standard appears both in Article 2(2), which deals with promotion and protection, and in Article 4(1), which covers expropriation and compensation:

“Investments of the investors of either Contracting Party shall enjoy *constant protection and security* in the territory of the other Contracting Party.” [emphasis added]

“Investments by investors of either Contracting Party shall enjoy *full protection and security* in the territory of the other Contracting Party.” [emphasis added]

This structure and formulation seem to emphasize, therefore, that a higher level of protection is provided for on more than one occasion concerning the protection of investments.

(d) The standard appears with relative standards

In contrast to formulating the full protection and security standard with absolute standards, e.g. fair and equitable treatment, the standard appears on numerous occasions with relative standards, in particular the national treatment standard and the most-favoured-nation standard. An example of this kind of formulation can be found in the Egypt-Nigeria BIT which states:

“[...] each Contracting Party shall accord to such investments *full security and protection* which in any case shall not be less than that accorded either to investments of its own nationals and companies or to investments of nationals and companies of any third state, whichever is more favourable to the nationals and companies concerned.” [emphasis added]

¹⁰² Article 4(1) of the Germany-Philippines BIT. This provisions can be found in Annex I.

¹⁰³ The Germany-China BIT was signed on 1 December 2003 and replaced the Agreement of 7 October 1983 between the Federal Republic of Germany and the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments. The change of BIT serves as an example that countries may change their BIT taking into account their level of development and the fact that a country that once was a capital importing country may amend its investment policy when it starts to export capital to other countries. See further N. Gallagher and W. Shan, *Chinese Investment Treaties: Policies and Practice*, OUP (2009), 3.45 et seq.

Here, full protection and security, an absolute standard, is coupled with two relative standards. This formulation is interesting as it establishes a close connection between the full protection and security standard and two other standards that depend on the treatment of the parties' own nationals or nationals of third states. Thus, a legal assessment needs to be implemented taking into account different *tertium comparationis* that will eventually determine the level of investment protection depending on the protection which the relative standards provide for. This connection of the full protection and security standard with, e.g., the standard of national treatment serves as an example that the treaty in question is a bilateral treaty. It shows that a country is at times only willing to accord protection to foreign investors on the basis of reciprocity.¹⁰⁴

(e) The standard appears with reference to international law

The investment treaties reviewed reveal that the standard seldom appears with reference to international law. Such a formulation is most frequently used by the United States. Article 3(1) of the United States-Mexican BIT prescribes:

“Each Contracting Party shall accord *full protection and security* to the investment made by the other Contracting Party’s investors, in accordance with International Law and shall not, through legally groundless actions or discriminatory measures, hinder the management, maintenance, development, usage, enjoyment, expansion, sale, or where applicable, disposition of such investments.” [emphasis added]

However, reference to international law was more often used where the full protection and security standard was formulated in the same sentence as the fair and equitable treatment standard. Again, the treaty practice of the United States serves as an example – the United States-Estonia BIT states in Article 3(a):

“Investments shall at all times be accorded fair and equitable treatment, shall enjoy *full protection and security* and shall in no case be accorded treatment less than required by international law.” [emphasis added]

¹⁰⁴ Reciprocity has been an important element in various standards of international economic law. Examples of this can be found as far as the Magna Carta of 1215, Article 41, which provides that foreign merchants shall be “safe and secure” when entering or leaving England. In times of war, foreign merchants could only be safe in England if English merchants were safe in enemy country. See further G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RCADI 5 (1966), p. 22, and Article 41 of the Magna Carta, reprinted in J.C. Holt, *Magna Carta*, 2nd ed., CUP (1992), p. 461-463.

The effect of such a formulation is a complicated matter and has varied in practice. While formulations of this kind have at times played a role in some cases, they have not played a part in other cases.¹⁰⁵ The relationship between the treaty-based standard and international law will be discussed separately in Chapter 3.3.3.3.

(f) The standard appears in addition to provisions covering war, revolution and mob violence

A number of BITs contain provisions describing the right of an investor to be compensated due to losses as a result of war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection or riots. The Australia-India BIT states:

“Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to *war or other armed conflict, a state of national emergency or civil disturbances* shall be accorded by the latter Contracting party treatment, as regards compensation, restitution, indemnification or other forms of settlement, no less favourable than that which the latter Contracting Party accords to its own investors or investors of any third state.”¹⁰⁶ [emphasis added]

Some BITs go even further with regard to events from which the investor suffers. The Austria-Mexico BIT states:

“An investor of a Contracting Party which has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or *acts of God or force majeure*, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.”¹⁰⁷ [emphasis added]

Thus, if a government would provide its own investors or investors of any third state with compensation resulting from an act of God or force majeure, such a measure

¹⁰⁵ See e.g. *AMT v Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, 36 ILM 1531 (1997), para 6.06, and *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, para 164. In both cases the relevant BIT contained a clause referring to international law by stating that the investment should in no case be accorded treatment less than that required by international law. That formulation was considered to be of “fundamental” importance in the former case, whereas as in the latter case the tribunal stated that it was doubtful whether the treaty provision of full protection and security could be understood as being wider in scope than the duty to protect and secure aliens according to customary international law.

¹⁰⁶ Australia-India BIT, Article 8.

¹⁰⁷ Austria-Mexico BIT, Article 6.

would go further than the protection the investor is entitled according to customary international law.

Such formulations entail some overlap with customary international law. The international minimum standard has historically included protection covering revolution, insurrection, mob violence and civil disturbance. In the *Youmans case*, the US-Mexican Claims Commission referred to the argument in the *Jeannotat case* when deciding upon whether Mexico should compensate a son of an American citizen who was killed as a result of an attack orchestrated by armed officials and a mob:

“It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore, of opinion that compensation is due to the claimants from the Mexican Government.”¹⁰⁸

In a situation where there is overlap between the protection provided for according to the BIT and the protection according to customary international law, the question arises how that might affect the position of an investor in a legal dispute. Should the investor rely upon the BIT or is it sufficient to rely on the principle derived from customary international law?

An answer to the question can only depend on an analysis of recent arbitral awards dealing with events that are stipulated in the relevant investment treaty, namely armed conflict, revolution, insurrection, civil disturbance, etc. Here, the first investor-state investment dispute provides guidance. In *AAPL v Sri Lanka* the investment was damaged during armed conflict between the Sri Lankan army and revolutionary forces.¹⁰⁹ The tribunal recognized that the United Kingdom-Sri Lanka BIT prescribed that an investment should be accorded full protection and security. Despite that a treaty provision prescribing the standard was obviously applicable to the dispute in question, the tribunal entered into a detailed discussion on the obligation of the state according to customary international law. In *Pantechniki v Albania* the investor suffered damage following civil unrest of such magnitude that the state’s police were unable to provide protection and security. The tribunal analyzed the treaty-based standard and obligations of the state according to

¹⁰⁸ *Thomas H. Youmans (USA) v United Mexican States*, IV RIAA (1926), p. 115.

¹⁰⁹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) paras 67-69.

customary international law.¹¹⁰ Therefore, a tribunal's approach can only be based upon an assessment taking all factors into account based on the investor's interests. Given the common approach taken by tribunals of applying both the treaty-based standard and customary international law, most tribunals will be likely to include both the protection provided by the BIT and customary international law.

(g) The standard is not included in the treaty

Finally, there are BITs that do not contain any reference to the full protection and security standard. These agreements often omit any reference to substantive standards, but focus more on the relative standards of most-favoured-nation and national treatment.

The China-Turkey BIT provides an example. It, needless to say, contains the concept of "protection" in its title and emphasizes that the agreement is concluded concerning the reciprocal promotion and "protection of investments".¹¹¹ However, no article on full protection and security is incorporated in its substantive part. In a similar way the Italy-Bangladesh BIT also omits any reference to the full protection and security standard. The treaty's title includes reference to "protection" and the preamble acknowledges that offering encouragement and "mutual protection" to investments will contribute to stimulating business. However, a substantive article on full protection and security is not to be found.¹¹²

Various trends could be seen flowing from BITs made by both capital importing and exporting countries. In general the full protection and security standard was more frequently omitted in older agreements compared to agreements made in recent years. It was to be expected that capital exporting countries, such as Germany, the United Kingdom and United States, have for decades consistently included the full protection and security standard in their BITs. But surprisingly, other capital exporting countries, such as Sweden, have not included any reference to the standard.

¹¹⁰ *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 81.

¹¹¹ The China-Turkey BIT was entered into on 13 November 1990. The Chinese BIT program did not provide for a wide investment protection during its early years. That has, however, changed as a result of the fact that the country is not only importing capital but also exporting capital. China is currently the second largest recipient of foreign direct investment in the world, but finds itself ever more often in the position of a capital exporting country. Whereas the early Chinese Model BITs did not contain a reference to full protection and security, the current Chinese Model BIT contains a full protection and security clause. See further N. Gallagher and W. Shan, *Chinese Investment Treaties: Policies and Practice*, OUP (2009), para 3.45 et seq.

¹¹² This is also the case in the Egypt-Botswana BIT, India-Indonesia BIT, Sweden-Mexico BIT and Australia-Philippines BIT. See further Annex I.

Another trend is that capital importing countries have not included the standard in their BITs, but have rather included the relative standards of most-favoured-nation and national treatment when dealing with investment promotion, treatment and protection issues. However, that practice has in individual cases changed following an upsurge in economic activity. When the economies of these countries expand, often resulting in a higher level of development, a change follows, leading to increasing outflows of capital. That leads later to more frequent use of the full protection and security standard in the BIT practice of these states. Two examples illustrating this development are China and Turkey. These countries' early BITs did not include the standard, but their later treaties have done so.¹¹³

3.3.2.3 Regional treaties

3.3.2.3.1 The meaning of different parts and their structure

The full protection and security standard did not enjoy a prominent role in regional treaties as in the FCN treaties prior to the Second World War and the bilateral treaties of the post war era. The parties to the Economic Agreement of Bogotá of 1948 – a treaty that did not enter into force – did not include the standard in the treaty. However, state parties proclaimed their intention to stimulate the flow of private capital “...to the extent that nationals of other countries are afforded opportunities for investments and security for existing and future investments”.¹¹⁴ More recent regional agreements frequently include the standard.

Regional treaties researched for this thesis reveal a more diverse group of investment instruments compared to BITs. In contrast to the many BITs covered, regional agreements do not exclusively deal with investment, but cover free trade or other types of economic activity.

This affects the role that the substantive concepts of the full protection and security standard play in regional treaties. Therefore, the concept of “protection”, which appears repeatedly in the title, preamble and individual articles of BITs, does not appear as frequently in the title and preamble of regional treaties. Two treaties

¹¹³ See, for comparison, on one hand, the Turkey-Bangladesh BIT of 1987 and the Turkey-Portugal BIT of 2001 and, on the other, the China-Germany BIT of 1981 and China-Germany BIT of 2003. The older treaties did not include any reference to the full protection and security standard, but the younger treaties do. The model BITs for both countries include a reference to the full protection and security standard. See Turkey Model BIT (2000) in UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/3, Vol. VIII, United Nations (2000), p. 281, and Chinese Model BIT (2003), reprinted in R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 352.

¹¹⁴ Economic Agreement of Bogotá, Article 22(2). See Annex II.

serve as an example in this regard, namely the North American Free Trade Agreement and the Energy Charter Treaty.

The divergence between regional agreements and BITs leads also to a different situation with regard to the structure of these agreements. Structures describing the difference between investment promotion and investment protection are non-existent in free trade agreements, whereas they can be found in regional investment agreements or sectoral agreements.

3.3.2.3.2 Overview of different formulations

Regional treaties vary considerably with regard to what kind of formulations are used to prescribe investment protection when compared to stipulations contained in BITs. An example of a stipulation of the full protection and security standard can be found in the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Islamic Conference. The agreement states the following in Chapter 2:

“The contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws. The invested capital shall enjoy *adequate protection and security* and the host state shall give the necessary facilities and incentives to the investors engaged in activities therein.”¹¹⁵ [emphasis added]

Here, the full protection and security standard is included in an article dealing with transfer of capital and investment incentives. These two latter concepts are frequently addressed in independent articles in various BITs.¹¹⁶ But, interestingly, the standard is referred to within the context of the host state’s obligation to provide necessary facilities and incentives to investors. In addition, Chapter 3, which bears the heading “Investment Guarantees”, contains provisions that formulate the right to expropriate, to adopt preventive measures from a competent legal authority and executive measures of judicial institutions. Other regional investment instruments

¹¹⁵ Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Islamic Conference, Article 2.

¹¹⁶ See e.g. Switzerland-Thailand BIT and Netherlands-Chile BIT; in the former treaty Article 3 deals with admission and encouragement of investments, Article 4 addresses investment protection and Article 6 covers transfer of payments connected to the investment. In the latter treaty Article 2 deals with admission, Article 3 with investment protection and Article 4 with free transfer of payments related to the investment.

describe the standard in a similar manner, such as the ECOWAS Energy Protocol that promises “most constant protection and security”.¹¹⁷

In 1987, the Association of Southeast Asian States (ASEAN) adopted an Agreement for the Promotion and Protection of Investments, which mentions that standard within the context of arbitrary and discriminatory measures. It states in Article 4(1):

“Each Contracting Party shall, within its territory ensure *full protection* of the investments made in accordance with legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments.”¹¹⁸ [emphasis added]

In February 2009, the ASEAN member states adopted the ASEAN Comprehensive Investment Agreement in which the substantive standard of full protection and security was addressed in greater detail. Article 11 of the agreement states:

- “1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and *full protection and security*.
2. For greater certainty:
 - (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
 - (b) *full protection and security* requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”¹¹⁹ [emphasis added]

This formulation is more descriptive but does not necessarily entail a higher level of protection, especially when the caveat “reasonably necessary” is taken into account. Even though a strict textual interpretation of this formulation would not lead to such a conclusion, it could be argued that this formulation is influenced by the due diligence principle of customary international law.¹²⁰

¹¹⁷ ECOWAS Energy Protocol was signed on 31 January 2003. ECOWAS comprises of Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. The Protocol is reprinted in UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/4, Vol. XIII, (2005), p. 7.

¹¹⁸ The ASEAN Agreement was signed 15 December 1987 by Brunei Darussalem, Indonesia, Malaysia, the Philippines, Singapore and Thailand and later acceded to by Vietnam, Myanmar, Laos and Cambodia, available at <<http://www.asean.org/6464.htm>>.

¹¹⁹ The ASEAN Comprehensive Investment Agreement was signed 26 February 2009 by Brunei Darussalem, Cambodia, Indonesia, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam, available at <<http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf>>.

¹²⁰ The concept of due diligence will be discussed in Chapter 5.4.

Other agreements include language that might lead to a higher level of protection. The Agreement between the Caribbean Community (CARICOM) and Costa Rica on trade and investment includes the following clause in Article X.04(1):

“Investments of either Party shall at all times be accorded fair and equitable treatment, and shall enjoy *full legal protection and security* in accordance with international law.”¹²¹ [emphasis added]

Arbitral cases have shown that when tribunals are faced with such an expansive formulation – “full legal protection and security” – they become susceptible to arguments that emphasize the need to extend investment protection not only to physical protection but also to protection against measures that change the regulatory framework, which the investment is subjected to, in such a way that the investor’s legitimate expectations are violated.¹²²

Two regional instruments, the basis for numerous disputes, are of particular importance, namely the Energy Charter Treaty and the North American Free Trade Agreement.

The Energy Charter Treaty is a sectoral treaty dealing with investment in the energy sector. The instrument contains in Article 10(1) principles pertaining to investment promotion, protection and treatment, such as the standards of fair and equitable treatment and full protection and security:

“Each contracting party shall, in accordance with the provisions of this Treaty encourage and create stable, equitable, favourable and transparent conditions for Investors [...] to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors [...] fair and equitable treatment. Such Investments shall also enjoy the most *constant protection and security* and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”¹²³ [emphasis added]

¹²¹ Agreement between the Caribbean Community, acting behalf of the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago and Costa Rica, signed 9 March 2004, reprinted in UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/4, Vol. XIV, (2005), p. 206.

¹²² See *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 308.

¹²³ The Energy Charter Treaty was signed on 17 December 1994, reprinted in 34 ILM 360 (1995).

This provision contains numerous substantive elements that are formulated in an unusual manner – it incorporates in a single provision various investment principles that are usually addressed in different treaty provisions. Such a stipulation can make it challenging for an investor to articulate claims despite relying on investment standards which might have a clear foundation in theory, but which are not stipulated uniformly in practice. A case in point is the *Plama Consortium v Bulgaria*, a case that arose under the Energy Charter Treaty. There, the tribunal criticised the arguments of the claimant relating to government actions that the claimant thought created “unstable, inequitable, unfavourable and non-transparent conditions.” The tribunal pointed out that the “[c]laimant did not, however, set out the content of this standard or to explain precisely how it has been violated. The only specific reference in this regard is that the amendment of [...] allegedly created unstable and inequitable conditions.”¹²⁴ Thus, even though a standard is stipulated with other substantive elements, it is imperative to adhere to the content that is known and acknowledged in practice.

Another interesting aspect of Article 10(1) is its assertion concerning the relationship with customary international law, namely that “[i]n no case shall such Investments be accorded treatment less favourable than that required by international law, *including treaty obligations*.” It is not uncommon that treaties prescribe that protection shall not fall below that which was “required by international law”. However, no clear difference is made between treaty obligations or customary international law. That silence has led to a vibrant academic discussion as to what the reference to international law entails and the relationship between treaty-based standards and the international minimum standard.¹²⁵ The Energy Charter Treaty, however, mentions treaty obligations explicitly whereas other treaties, including most BITs, do not.

The North American Free Trade Agreement is a free trade agreement between Canada, the United States and Mexico that contains twenty-two chapters and focuses mainly on trade in goods as understood in Article XXIV of the GATT. However, Chapter 11 of the agreement contains provisions covering investments. Article 1105 states:

¹²⁴ *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 169 et seq.

¹²⁵ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BYIL (1981), p. 244; S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BYIL (1999), p. 104-105 and 139-144; C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 Journal of World Investment and Trade (2005), p. 359-364; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, Kluwer Law International (2009), p. 264-275.

“Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and *full protection and security*.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).”

This formulation led to various approaches by arbitral tribunals where disputes concerning an alleged violation of investment standards were adjudicated. In two cases in particular, the *S.D. Myers* and the *Pope & Talbot cases*, the tribunals expanded the scope of Article 1105 to a degree that the contracting parties thought it necessary to respond. In the former case, the tribunal came to the conclusion that a violation of Article 1102 entailed in addition a violation of Article 1105; in the latter case the tribunal held that the fair and equitable standard went beyond the international law standard. That development led to the publication of an interpretive note by the NAFTA Free Trade Commission (FTC).¹²⁶ It states:

“B. Minimum Standard of Treatment in Accordance with International Law.

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”¹²⁷

The influence of the note on NAFTA jurisprudence has been varied. Some tribunals seem to have agreed with the note’s content, some opined that they lacked competence to review its content, whereas others did not have an opportunity to address it because its legitimacy was not a contentious issue in the arbitral

¹²⁶ D.A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, Am. U. Int’l L. Rev. 679 (2003-2004), p. 713.

¹²⁷ NAFTA Free Trade Commission Clarification Related to NAFTA Chapter 11, Decision 31 July 2001, available at <<http://www.ustr.gov/regions/whemisphere/nafta-chapter11.pdf>> .

proceedings.¹²⁸ It is, however, worth noting that the restrictive approach aimed for by the parties to NAFTA has influenced treaty law. Here, the United States-Chile free trade agreement serves as an example. The agreement states in Article 10.4:

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

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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

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

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”¹²⁹

It is clear that this provision not only contains elements from Article 1105 and the FTC’s interpretive note of 2001, but goes even further when it incorporates traditional concepts, e.g. denial of justice, into the standard’s definitions according to the trade agreement.¹³⁰

Other regional instruments seem not to go as far as the Energy Charter Treaty and North American Free Trade Agreement in offering substantive standards of protection. In contrast, these instruments often combine the substantive standards, including the full protection and security standard, with one of the relative standards or both. Examples of this are the Colonia and Buenos Aires Investment Protocols of MERCOSUR. Article 3(2) of the former provides:

¹²⁸ *Mondev International Ltd. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), para 100, *ADF Group Inc. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Reports 470, 527, para 177, and *Loeven Group et al v United States of America*, Case No. ARB(AF)/98/3, para 127.

¹²⁹ Other examples can be found in free trade agreements of the United States. See, e.g., Article 15.5 of the United States-Singapore Free Trade Agreement (2003) and Article 11.5 of the United States-Australia Free Trade Agreement (2004). In both cases annexes or exchange letters describe in greater detail the substantive content of the international minimum standard of customary international law.

¹³⁰ See J. Paulsson, *Denial of Justice in International Law*, CUP (2005), p. 6, with regard to the cross-pollination effect this has on the concept of denial of justice.

“Each Contracting Party will give *full protection* to those investments and grant them a not less favourable treatment than granted to investments of their own national investors or third state investors.”¹³¹ [emphasis added]

Article 2(C)(2) of the latter prescribes:

“Each State Parties shall grant *full protection* for such investments, and may not accord them a treatment less favourable than that granted to the investments of its own national investors, or the investments made by investors from other states.”¹³² [emphasis added]

Other agreements do not mention the standard within the context of other relative standards, but mention arbitrary or discriminatory measures. As mentioned before, ASEAN adopted in 1987 an Agreement for the Promotion and Protection of Investments that provided for “full protection” in its Article IV(1). In addition, the contracting parties of the Agreement were not to “impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation” of the investments made. While the Agreement included this provision, it also included numerous restrictive requirements. Pursuant to Article II of the Agreement, investments were to be approved in writing and registered with the authorities in the host country. The adoption of the ASEAN Comprehensive Investment Agreement in 2009, which addressed in Article 11 the standard of full protection and security in greater detail, did not eliminate the restrictive requirements contained in the Agreement for the Promotion and Protection of Investment of 1987. According to Article 4(a), the ASEAN Comprehensive Investment Agreement of 2009 defines “covered investments” as an investment of an investor in the territory of any other member state that has been admitted and specifically approved in writing by a competent authority.

3.3.2.4 Multilateral treaties

3.3.2.4.1 The meaning of different parts and their structure

Attempts in the multilateral sphere to formulate instruments ensuring investment protection have been fraught with difficulties. Even though these instruments have

¹³¹ Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR (“Colonia Protocol”), 17 January 1994. This protocol covers investments that are made by investors coming from states that are parties to MERCOSUR.

¹³² Protocol for the Promotion and Protection of Investments coming from States not Parties to MERCOSUR (“Buenos Aires Protocol”), 5 August 1994. This protocol covers, as its name entails, investments made by investors that come from states that are not parties to MERCOSUR.

not been adopted, they have at times been influential in providing formulations that have been used in BITs and other instruments.¹³³

The substantive concepts of the full protection and security standard do appear in numerous multilateral instruments researched for this paper. As discussed in Chapter 2, the full protection and security standard was not included in the Havana Charter, although that first attempt recognized the importance of security for existing and future investments. However, other instruments incorporate the standard, e.g. the Abs-Shawcross Draft Convention on Investments Abroad and the Multilateral Agreement on Investment. It is worth noting that these instruments were formulated under the auspices of capital exporting countries or organizations of which they formed a part. Other instruments remain silent as their scope is at times more general in nature due to attempts by developing states to curb the power of multinational corporations. An example of these efforts is the UNCTC Draft Code on Multinational Corporations. None of said efforts were accepted despite being formulated when the political climate encouraged and favoured their drafting.

This disagreement was to mirror what would eventually happen. States had different opinions as to the level of protection owed to an investor. The disagreement was not limited to capital exporting and capital importing countries, but could also be found amongst various capital exporting countries. Thus, efforts taken under the auspices of the World Bank have been formulated as guidelines, whereas initiatives taken by *inter alia* the OECD have remained unsuccessful.¹³⁴

The multilateral instruments researched as a part of this study approach the issue of promotion and protection of investment differently. Thus, while some instruments differentiate between investment promotion and investment protection, others do not – a fact that makes categorization not only more difficult but also of limited practical importance.

3.3.2.4.2 Overview of different formulations

The multilateral treaties vary considerably to the BIT and regional investment regime as the formulations of different standards are even more diverse compared to the stipulations contained in the BITs.

¹³³ Examples of influential documents are the Abs-Shawcross Draft Convention of 1965 and the OECD Draft Conventions on the Protection of Foreign Property of 1962 and 1967. See further Chapter 2.5.

¹³⁴ See M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., CUP (2007), p. 269 et seq.

The Abs-Shawcross Draft Convention on Investments Abroad of 1959 contained in its Article I a clause prescribing that property should be protected and secured. Article I of the Draft Convention stated:

“Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the *most constant protection and security* within the territories shall not in any way be impaired by unreasonable or discriminatory measures.”¹³⁵ [emphasis added]

The purpose of adopting substantive standards of this nature coupled with investor-state arbitration was *inter alia* to depoliticize disputes pertaining to investments by providing investors with a course of action where they would not have to depend on the support of their home states.¹³⁶

The instrument was never adopted, but was under consideration of the OECD. Somewhat later, the OECD drafted its Draft Convention on the Protection of Foreign Property. That document, which was adopted in 1962 and then again in 1967, was particularly interesting as it stemmed from an organization composed mainly of capital exporting countries. Even more interesting is the lack of consensus amongst the member states of the OECD to open the instrument for signature. Article 1(a) of the 1967 Draft Convention stated the following with regard to full protection and security:

“Each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the *most constant protection and security* to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures.” [emphasis added]

Here, the full protection and security standard appears with the fair and equitable treatment standard and includes a list of actions that are specifically targeted. According to the commentary that accompanied the Draft Convention there was an established principle of international law according to which a state was bound to respect and protect the property of aliens. Three rules flowed from this principle, namely the (i) fair and equitable treatment, (ii) most constant protection and security,

¹³⁵ See Abs-Shawcross Draft Convention on the Protection of Foreign Property reprinted in UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/2, Vol. V, Regional Integration, Bilateral and Non-governmental Instruments (2000), p. 332.

¹³⁶ See I. Seidl-Hohenveldern, *The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table*, 10 *Journal of Public Law* (1961), p. 109. However, this idea was criticized by some as it would limit the investor's home state to have control over the claim. See on this point, G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 *Journal of Public Law* (1960), p. 162-163.

and (iii) arbitrary and discriminatory measures.¹³⁷ The meaning of this document, even though it would never enter into force, was considerable as it affected the content and structure of many subsequent BITs entered into by states. The reason for this evolution was the willingness of the member states of OECD to incorporate various parts of these multilateral instruments into their bilateral investment treaties.¹³⁸

In the early 1990s, a World Bank study group of experts introduced a document containing principles on the treatment of investment. The document, Guidelines on the Treatment of Foreign Direct Investment, was published in 1992 as guidelines because the group thought that the political climate at the time was not prepared for binding rules on investment.¹³⁹ Article 3(a) prescribed:

“With respect to the *protection and security* of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors as described in Section 1 above, such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances. In all cases, *full protection and security* will be accorded to the investor’s rights regarding ownership, control and substantial benefits over his property, including intellectual property.” [emphasis added]

However, the OECD was of the opinion that the current climate, in favour of liberalization in general due to a policy change by developing countries with regard to the New International Economic Order, was ready for a binding treaty on investment protection. In 1994, the organization began its project of formulating the Multilateral Agreement on Investment (MAI). Article IV.1.1 of the Draft Negotiating Text for a Multilateral Agreement on Investment stated:

“Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and *full and constant protection and security*. In no case shall a Contracting Party accord treatment less favourable than that required by international law.”¹⁴⁰ [emphasis added]

¹³⁷ See OECD Draft Convention on the Protection of Foreign Property with Notes and Comments and Resolution C(67)102 of the Council on the Draft Convention adopted on 12 October 1967, reprinted in 7 ILM 117 (1968), p. 119.

¹³⁸ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BYIL, (1981), p. 241.

¹³⁹ World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, Legal Framework for the Treatment of Foreign Investment. Vol. II (1992), p. 35-44.

¹⁴⁰ OECD, Multilateral Agreement on Investment, Draft Consolidated Text, 22 April 1998, Doc. No. DAF/MAI(98)7/REV1, Chapter IV, Article 1.1; General Treatment.

This article is accompanied by an article dealing with expropriation and an article covering protection from strife. The latter article is of importance as it subjects the investor to a particular principle in certain circumstances, similar to various BITs:

“3.1. An investor of a Contracting Party which has suffered losses relating to its investment in the territory of another Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.”¹⁴¹

The difference between the two articles is of importance. The former article contains an absolute provision that is not curtailed by a national treatment or most-favoured-nation clause. However, the latter article provides for a relative form of protection.¹⁴² In addition to this provision, an additional clause is included with regards to damage caused by government forces:

“3.2. Notwithstanding Article 3.1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from

(a) requisitioning of its investments or part thereof by the latter’s forces or authorities, or
(b) destruction of its investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective, and with respect to compensation.”

A clause of this nature is similar to clauses frequently found in the United Kingdom and the United States.¹⁴³ The effect of this provision is, needless to say, to curtail the scope of the relative nature of Article 3.1 in a way that the state, where the investment is to be found, will have a limited possibility to take over parts of the investment, e.g. housing facilities necessary to combat civil strife, or destroy the investment, e.g. for the purpose of subduing revolutionary forces. As will be discussed in Chapter 4.3.3, investors have had limited success in basing their cases on provisions of this nature.

¹⁴¹ OECD, Multilateral Agreement on Investment, Draft Consolidated Text, 22 April 1998, Doc. No. DAF/MAI(98)7/REV1, Chapter IV, Article 3.1; Protection from Strife.

¹⁴² The difference between these approaches was emphasized in the commentary to the consolidated text of the agreement. See OECD, Multilateral Agreement on Investment, Commentary to the Consolidated Text, 22 April 1998, Doc. No. DAF/MAI(98)8/REV1, p. 29.

¹⁴³ See, e.g., Article 4 of the United Kingdom-Singapore BIT of 1978 and Article IV of the United States-Nicaragua BIT of 1995.

3.3.2.5 The effect of different formulations

The international instruments reviewed in the preceding chapters contain various formulations of the standard. Some versions only mention the standard itself and are quite simple as a result. Others are more elaborate and mention, in addition, other substantive elements incorporating concepts whose purpose is to add to the investment protection that is to be accorded to investors. It must be noted, however, that the effect of these provisions varies depending on whether they are to be found in a BIT or a regional or multilateral instrument. While BITs are effective in providing for investment protection, other instruments are less effective, with few exceptions, due to the failure of states to agree on their substantive content at the regional or multilateral level. Moreover, the relationship between these different types of instruments is also influenced by the fact that multilateral and regional instruments have had, despite not having entered into force, a considerable effect on the content of BITs. There seems to have been a cross-pollination of concepts and structures from multilateral and regional instruments to BITs.

With regard to BITs, in particular, it is safe to state that their structure is more coherent than the structures of other international instruments dealing with the full protection and security standard. However, despite these coherent structures, BITs include different formulations of the standard. Treaty law has revealed that while some formulations are minimalistic, others include, in addition to the basic formulation of the standard, references to other concepts that fall outside the scope of the standard but fall under the scope of principles that are founded, in whole or in part, on other sources of law, e.g. customary international law.

The question arises how this might affect the standard when applied to a particular dispute – should articles in a BIT that contain the simpler version of the standard be applied differently from articles that incorporate other substantive elements? These questions cannot be answered unless a legal assessment has been made as to whether the standard in the respective BITs include any additional elements to those which are thought to be included according to the traditional theory of the full protection and security standard.

Still, some lines have to be drawn in extreme cases, in particular when it comes to differentiating the full protection and security standard from other principles of international law concerning foreign investment. Thus, a provision in a BIT stipulating the full protection and security standard in the article dealing with expropriation, as has been shown, could not be considered to exclude the principle of expropriation. Both principles should be considered independently. If an umpire would conclude that expropriation had not taken place, then he would be at liberty to

assess independently whether the standard of full protection and security would have been violated. The same conclusion can be drawn concerning similar situations subjected to fair and equitable treatment and arbitrary and discriminatory measures.

3.3.3 Customary international law

3.3.3.1 Customary international law and foreign investment

Customary international law plays an important role in the field of international investment law. The formation of customary international law within the context of foreign investment is the same as in general international law. Its substantive components consist of (a) state practice that is uniform and representative and (b) carried out in such a way that it constitutes evidence of a belief that the practice is obligatory by a legal rule requiring it, or *opinio juris*. This definition has been accepted by international tribunals and in academia.¹⁴⁴

Despite a general consensus that customary international law is to be established by exploring the objective and subjective criteria of state practice and *opinio juris*, there are issues that affect the field of foreign investment in particular. This field of law has, needless to say, been affected by the accelerated formulation of BITs. While these investment treaties contain numerous principles and standards, new issues have become topical, including what effect customary international law has on treaty-based standards and what is the nature of the relationship between these two sources of law. This is particularly relevant due to the fact that the various treaty-based standards are often formulated in such a way that it becomes important to consider whether account should be taken of customary international law.¹⁴⁵

3.3.3.2 Customary international law as a minimum standard

Historically, the status of an alien in a host country within the context of the international minimum standard of customary international law has been a topical issue both in academia and arbitral practice.¹⁴⁶

¹⁴⁴ See for a general discussion on the concept of customary international law and its formation, M. Mendelson, "The Formation of Customary International Law", *Académie De Droit International – collected courses of the Hague Academy of International law*, Vol. 272 (1998), p. 155-410, and International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (London 2000), available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/30>>.

¹⁴⁵ See T. Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8 *Journal of World Investment and Trade* (2007), p. 691 et seq.

¹⁴⁶ See e.g. E. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing (1915) and C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928) and *Harry Roberts (USA) v United Mexican States*, IV RIAA (1926), p. 77, and *Daniel Dillon (USA) v United Mexican States*, IV RIAA (1928), p. 368.

The classical approach of customary international law concerning the status of an alien is that an alien who acquires legal interest in a foreign state thereby submits himself to the sovereignty of that state, including its jurisdiction and municipal law.¹⁴⁷ This has, however, not always been widely accepted as the general principle. Even though many states were under no obligation not to discriminate against aliens, commentators of international law were in agreement, as early as the 18th century, that customary international law subjected states to an obligation of protection. In earlier periods many governments were entitled according to international law to treat an alien and his legal interest with unhampered discretion if that treatment was founded on municipal law.¹⁴⁸

The breakdown of consensus concerning the status of aliens following decolonization, a development often accompanied by subsequent revolutions and civil disturbance, lead to the emergence of the international minimum standard. Arbitral practice and academic discussion that followed focused extensively on the status of aliens in their country of residence because the status of the alien in question was largely governed by municipal law that was in violation of customary international law. Therefore, the relationship between municipal law and customary international law became topical.¹⁴⁹ However, the ever-growing number of BITs has affected the status of customary international law within the context of protection of an alien and his property, or, as these concepts are now referred to: the investor and his investment. Due to this evolution there has been a shift in focus from the relationship between municipal law and customary international law to the relationship between treaty standards and customary international law. That was reflected by the tribunal in the *Mondev case* which stated that:

“...the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investment, and largely provide for full security and protection of investment [...] On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal’s views, such a body of concordant practice will necessarily *have influenced* the

¹⁴⁷ I. Brownlie, *Principles of Public International Law*, 7th ed., OUP (2008), p. 520-521.

¹⁴⁸ H. Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815)*, A.W. Sijthoff (1971), p. 94.

¹⁴⁹ This is also reflected in the field of state responsibility as it was researched under the auspices of the United Nations. There, the status of the alien dominated the field of state responsibility when the International Law Commission decided to put the subject on its agenda in 1949. It was not until the International Law Commission approved of reconceptualising the subject of state responsibility in 1963 that a more general approach was taken. See Yearbook of the International Law Commission 1963, Vol. II (Part One) Doc. A/CN.4/152, p. 227-228, paras 4-5.

content of rules governing the treatment of foreign investment in current international law.”¹⁵⁰

In a recent case before the International Court of Justice, the first investment case to be argued before the Court in decades, the Court took note of this development and its effect on other fields of law:

“...in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral and multilateral agreements ... In that context, the role of diplomatic protection somewhat faded...”¹⁵¹

Therefore, the vast amount of BITs has affected customary international law.¹⁵² These treaties have codified principles that form a part of the international minimum standard.¹⁵³ But even though the relationship between customary international law and treaty law is traditional in the sense that treaty law takes precedence over customary law between the states parties to the treaty, customary international law has served as an important tool in individual cases, especially concerning issues which are difficult to address substantively due to the rather limited scope of the concepts of “protection” and “security” in investment treaties. Thus, customary law has supplemented treaty law in many cases and these sources of law have been applied side by side.¹⁵⁴

¹⁵⁰ *Mondev International Ltd. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), para 117.

¹⁵¹ *Case concerning Ahmadou Sadio Diallo (Guinea v Congo) (Preliminary Objections)* (ICJ General List No. 103, 24 May 2007), para 88.

¹⁵² In 2004, Professor Hindelang described the influence and close relationship between treaty law and customary international law in the following way: “...the States have left us today with a network of more than 2,300 BITs – a broad statement that almost the whole community of States views foreign investment favourably and its protection by international law not only desirable but necessary. Can this, however, also be viewed as a statement in favour of common principles embodied in customary international law? The answer is almost certainly yes.” See S. Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of Whether BITs Influence Customary International Law Revisited*, 5 *Journal of World Investment and Trade* (2004), p. 806.

¹⁵³ See T. Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8 *Journal of World Investment and Trade* (2007), p. 697-698.

¹⁵⁴ In *AAPL v Sri Lanka* a tribunal was faced with the task of interpreting the full protection and security standard as it was stipulated in the UK-Sri Lanka BIT. Despite analyzing the treaty-based standard, the tribunal based its decision considerably on customary international law. See further *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) paras 67-69.

3.3.3.3 The relationship between the treaty-based standard and the minimum standard of customary international law

The relationship between customary international law and treaty law has led to divergence in arbitral practice as to the nature of the relationship. Is a treaty-based standard an independent standard in the sense that its content should be determined without considerations to customary international law, or does custom serve as an important and necessary component when determining its content? Is a violation of the customary minimum standard a violation of the full protection and security standard? Is every violation of the full protection and security standard a violation of the international minimum standard? Arbitral practice reveals different opinions.

In earlier times, tribunals applied customary international law when assessing governmental acts and whether a state had committed an international delinquency as regards to the treatment of an alien. In the *Neer case* – a case decided in 1927 – the US-Mexican Mixed Claims Commission adjudicated a dispute relating to the death of an American citizen. The commission noted:

“[I]t is in the opinion of the Commission possible to go a little further [...], and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”¹⁵⁵

This discussion has been considered descriptive of the status of the international minimum standard as it stood in the 1920s.¹⁵⁶ But even after the emergence of treaty law in its current form, different and non-uniform formulations of BITs have resulted in various arguments put forth by tribunals when using the international minimum standard in determining the substantive content of the full protection and security standard. These arguments can be divided into three categories depending on whether the international minimum standard is thought as a limitation to the treaty-based standard, an equivalent of the standard or an addition to the standard. It is necessary to deal with these issues individually.

¹⁵⁵ *L.F. Neer (USA) v United Mexican States*, IV RIAA (1926), p. 61-62.

¹⁵⁶ See *Mondev International Ltd. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), para 115.

(1) The minimum standard as a minimum requirement compared to the treaty-based standard

The FCN treaties that predated the current BIT treaty regime included references to protection of persons and property, including “most constant protection and security”. According to Article V, paragraphs 1 and 3, of the FCN Treaty between the United States and Italy, nationals were to receive protection and security:

“1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the *most constant protection and security* for their persons and property, and shall enjoy in this respect the *full protection and security required by international law*.

3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive *protection and security* with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the *protection and security* which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country.”¹⁵⁷ [emphasis added]

The International Court of Justice commented on Article V in its judgment in the *ELSI case*. The Court emphasized not only the importance of the treaty-based standard in the FCN treaty between the United States and Italy, but that the treaty-based standard would have to conform to the minimum international standard. The Court noted:

“The primary standard laid down by Article V is “the full protection and security required by international law”, in short “the protection and security” must conform to the minimum international standard. As noted above, this is supplemented by the criteria of national treatment and most-favoured-nation treatment. The Chamber is here called upon to apply the provisions of a treaty which sets standards – in addition to the reference to general international law – which may go further in protecting nationals of the High Contracting Parties than general international law requires [...].”¹⁵⁸

Thus, a treaty-based standard could provide for additional protection beyond that found in general international law, but could not go below the international minimum standard.

Similarly, it is not uncommon that a BIT provision includes a reference concerning the scope of the investment protection, namely that the investment shall be accorded fair and equitable treatment and full protection and security and shall in

¹⁵⁷ Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948 and the 1951 Supplement to that Treaty.

¹⁵⁸ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 111.

no case be accorded treatment less than required by international law. Article II(2)(a) of the US-Bulgaria BIT 1992 states:

“Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”¹⁵⁹

Here, the most topical issue is what the third part of the clause entails, namely that protection and security “shall in no case be accorded treatment less than that required by international law”. The tribunal in *Azurix v Argentine Republic* understood an identical provision in the US-Argentina BIT of 1991 to “set a floor”, but shortly thereafter deemed the difference as immaterial due to the evolution of the international minimum standard making it similar to the treaty standard as interpreted according to VCLT.¹⁶⁰

(2) The minimum standard as a limitation of the treaty-based standard

Customary international law has also been used to limit the possibility of tribunals to extend the scope of treaty-based standards. Thus, a tribunal cannot extend the application of a treaty-based standard further than “a ceiling” provided by the customary minimum standard. This has been especially relevant in cases where the distinctive formulation of a treaty standard has led to controversy within the context of the international minimum standard.

The most prominent example addressing the question of the relationship between treaty-based protection clauses and the minimum standard is the formulation of Article 1105(1) of NAFTA, a formulation which emphasizes a close relationship of the fair and equitable treatment standard and the full protection and security standard with international law.¹⁶¹ The interpretation of this formulation by a number of NAFTA tribunals led to the publication of FTC’s interpretative note. There, the parties to NAFTA declared and assumed that the substance of the standard reflected the requirements of the customary minimum standard as accepted in general international law pertaining to the treatment of aliens.

This applies, needless to say, only to disputes subjected to NAFTA, but this approach to equate the fair and equitable treatment standard and the full protection and security standard to the international minimum standard has been controversial.

¹⁵⁹ The same provision can also be found in Art. II(2)(a) of the US-Argentina BIT 1991 and Art. II(2)(a) of the US-Armenia BIT 1992.

¹⁶⁰ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras 361 and 364.

¹⁶¹ Article 1105(1) of NAFTA is reproduced in Chapter 3.3.2.3.2 and Annex II.

NAFTA tribunals have supported it, but other tribunals have rejected it.¹⁶² In one of the more recent cases, *Glamis Gold Ltd v USA*, the tribunal argued that:

“As explained above, the minimum standard of treatment of aliens established by customary international law, and by reference to which the fair and equitable treatment standard of Article 1105(1) is to be understood, is an absolute minimum, a floor below which the international community will not condone conduct. To maintain fair and equitable treatment as an absolute floor, a breach must be based upon objective criteria that apply equally among States and between investors.”¹⁶³

The efforts of the NAFTA governments to influence the scope of liability according to Chapter 11 after the establishment of the treaty regime is problematic for various reasons. These efforts undermine the original concept of establishing a treaty-based investment protection scheme that provides for a stable investment environment. In addition, the efforts of these governments could influence the protection provided for their own investors’ interests’ in other countries. Thus, the efforts serve the NAFTA governments when they are respondents in arbitral disputes, but investors’ interests are jeopardized.¹⁶⁴ Lastly, reliance of ICSID tribunals on arbitral awards in general, including awards in Chapter 11 cases, could have an impact on legal disputes subjected to BIT provisions.¹⁶⁵

(3) The minimum standard as an equivalent of the treaty-based standard

The two preceding categories have rested upon the assumption that there is a difference between the treaty-based standard and the minimum standard. In addition, these categories have presupposed that that difference either serves as a minimum requirement (“floor”) or as a limitation (“ceiling”) to the treaty-based standard. This category, in contrast, does not make that distinction and considers the minimum standard as equivalent to the treaty-based standard.

¹⁶² The tribunals in *Mondev International Ltd. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), para 122, and *ADF Group Inc. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Reports 470, 527, para 199, followed the guideline in the interpretative note, whereas the tribunal in *Pope & Talbot v Canada*, UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 ILM 1347 (2002), did not.

¹⁶³ *Glamis Gold Ltd. v United States of America*, UNCITRAL Arbitration, Award 8 June 2009, para 619.

¹⁶⁴ D.A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, Am. U. Int’l L. Rev. 679 (2003-2004), p. 685-689.

¹⁶⁵ See e.g. Argentina’s pleadings in the *Azurix* case where reference is made to Article 1105(1) and the Interpretative Note of 2001, despite the fact that the dispute in that case was subjected to the US-Argentina BIT of 1991. *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 334.

In *AAPL v Sri Lanka* the tribunal dealt with a treaty-based standard that did not refer to international law. The tribunal entered into a detailed discussion about the interrelationship of the standards and stressed that the inclusion of the words “constant” and “full” could be intended to strengthen the standard of protection and security to such an extent that it would provide higher protection than the minimum standard of general international law.¹⁶⁶ Still, the tribunal applied customary international law when deciding the case:

“Once failure to provide “full protection and security” has been proven (under Article 2.(2) of the Sri Lanka/U.K. Treaty or under a similar provision existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State’s responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the States failure to comply with its “due diligence” obligation under the minimum standard of customary international law.”¹⁶⁷

Similarly, the tribunal in *AMT v Zaire* concluded that the protection and security of the investment required by the BIT’s provisions should be in conformity with and not any less than those recognized by international law. It argued:

“For the Tribunal, this [...] requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.”¹⁶⁸

The tribunal in the *Noble Ventures case* remained critical as to whether the treaty-based standard, which provided for protection and security without any reference to international law, could be considered to provide a higher level of protection:

“[...] that it seems doubtful whether that provisions can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State.”¹⁶⁹

After having acknowledged the similarities with the *ELSI case*, which had been sceptical towards limiting the discretion of the state despite an obligation to provide

¹⁶⁶ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 50.

¹⁶⁷ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 67.

¹⁶⁸ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.06.

¹⁶⁹ *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, paras 164-166.

protection and security, the tribunal failed to see any violation of the customary international law standard.

In *Azurix Corp. v Argentina* the tribunal took note of the stipulation of the full protection and security standard in the US-Argentina BIT which provided for protection, but curtailed it by stating that it should not fall below that which was “required by international law”. The tribunal expressed the opinion that this entailed that the treaty-based standard should not provide protection higher than required by international law. However, the tribunal asserted later in its award that the difference was immaterial due to the evolution of the minimum standard and its similarity with the terms of the BIT:

“[...] the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”¹⁷⁰

In a more recent award, *Vivendi v Argentina*, which was a case dealing with a particular formulation of the standard, the tribunal also remained critical towards arguments referring to the notion that the minimum standard should limit the scope of the treaty-based standard. Here, both the claimant and the respondent presented their versions of the fair and equitable treatment standard and the full protection and security standard. The tribunal dismissed any arguments which stated that the standard should be limited to and weighed against the international minimum standard. Instead, it argued by referring to the BIT’s provisions, which emphasized that the investment should be treated *in conformity* with the principles of international law, not as required by international law, that such a stipulation could not be understood as a limitation to the standard of treatment. In addition, the tribunal emphasized that the minimum standard had evolved considerably since the 1920s and that it should be applied autonomously in individual cases.¹⁷¹

¹⁷⁰ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 361. See also para 364 of the same award.

¹⁷¹ The tribunal’s discussion concerning the fair and equitable treatment is also relevant to the full protection and security standard due to a particular formulation in the French-Argentina BIT. Article 5(1) of the treaty stated: “...investments...shall enjoy...protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement.” Article 3 of the BIT prescribed that investments should receive “...fair and equitable treatment in conformity with the principles of international law.” See *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, paras 7.4.5.-7.4.7 and 7.4.13.

3.3.3.4 Can a clear conclusion be drawn?

It is disputable whether any clear conclusion can be drawn from arbitral practice concerning the relationship between the treaty-based standards and customary international law. A number of tribunals have in their arguments entertained the question, regardless of whether the treaty-based standard includes a reference to international law or not, as to whether the minimum standard and the treaty-based standard are one and the same substantively. Despite acknowledging the importance of the treaty-based standard, a combination of that standard and the minimum standard of customary international law has been applied due to the fact that their substantive content has been considered similar or identical. This lack of clarity in arbitral practice is, however, not isolated to the full protection and security standard, but applies *a fortiori* to other standards.¹⁷²

An arbitral tribunal cannot but be bound by the sources of international investment law. Treaty law and customary international law are sources that are not arranged in a hierarchical way. Therefore, these sources of law can co-exist and apply simultaneously to a dispute at hand. That applies even though the treaty does not include any reference to a particular standard, e.g. fair and equitable treatment or full protection and security, for the simple reason that these standards are partly based on customary international law that bind states independently of treaty law.

It must be stressed that this does not entail that customary international law overrides treaty law. To the contrary, if an arbitral tribunal is of the opinion that a treaty provision is formulated in a way that it can be interpreted without any reliance on customary international law, it should prevail with reference to the principle *lex generalis – lex specialis*. An example of such a scenario can be found *Phillips Petroleum Co. Iran v Iran* which dealt *inter alia* with the question whether the provision “in no case less than that required by international law” in Article IV(2) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran of 1955 was limited to full protection and security or applied also to the taking of property. The former standard included a reference to international law whereas the latter standard did not. The tribunal stated that the reference to international law:

“...clearly relates to the standard of ‘most constant protection and security’ set forth in the same sentence and cannot be understood as modifying the taking and compensation requirements of the second and third sentence of that paragraph, which contains no reference to international law and which clearly and completely describe the requirements for takings and compensation. Concerning the argument that treaties generally should be

¹⁷² See V. Heiskanen, ‘Arbitrary and Unreasonable Measures’ in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 108-109.

interpreted in the light of customary law as it may evolve, the Tribunal has already found in the *INA* award that the Treaty of Amity as *lex specialis* prevails in principle over general rules.”¹⁷³

This principle also leads to the conclusion that treaty law can describe to what extent customary international law should affect treaty-based provisions. Examples can be found where a formulation plays a role in defining the relationship between the treaty-based standard and customary international law. The Netherlands-Venezuela BIT states the following:

“If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.”¹⁷⁴

However, when a treaty either omits articles defining the nature of the relationship or does not formulate provisions in such a way that they can be interpreted without any reference to other methods of interpretation, customary international law can be used to provide additional guidance when individual concepts are interpreted – or in other words complete individual treaty-based concepts.¹⁷⁵

This balancing of the treaty-based standards *vis-à-vis* the customary international law standard could have considerable significance in practice depending on which of the two is relied more upon by tribunals during the process of interpretation. The difference lies in the different nature of these two standards. The treaty-based standard must be interpreted within the context of other treaty provisions – many of which are designed to promote foreign direct investment and provide for protection of investment made. The latter is based on customary international law and by its very nature provides for minimal protection as established by a centuries-old state practice that has, as of late, been influenced by thousands of BITs. Consequently, in order to violate the standard, a state would have to show a different level of inappropriateness – a relatively higher degree of inappropriateness is needed in order to violate the minimum standard of customary international law compared to the full

¹⁷³ *Phillips Petroleum Co. Iran v Iran*, Award 29 June 1989, 21 Iran-US Claims Tribunal Reports p. 79, para 107.

¹⁷⁴ Article 3(4) of the Netherlands-Venezuela BIT.

¹⁷⁵ See *Amoco Int. Finance Corp. v Islamic Republic of Iran*, Award of 14 July 1987, 83 ILR (1990) 500, para 112.

protection and security standard that has its foundation in treaty law.¹⁷⁶ This generally means that any violation of the international minimum standard of customary international law is most likely a violation of the treaty-based full protection and security standard. However, not every violation of the treaty-based standard is a violation of the international minimum standard of customary international law.¹⁷⁷

In conclusion, it is safe to assert that a balanced approach taking into account the different sources upon which the standard rests seems most appropriate. Such a method makes it inevitable to employ a case-by-case approach whereby the facts of individual cases are subjected to the full protection and security standard. Even though such a method might be problematic, as it might result in a casuistic standard, the solution will present itself by exploring the vast amount of cases that have been adjudicated from the beginning of the last century to today.

3.3.4 General principles of law recognized by civilized nations

General principles of international law concerning the protection and security of aliens have a long documented history within the context of the protection of aliens in a host state. Its status has, as other sources of international law, been affected by numerous developments which have taken place at various times and intervals during the last century. It is generally accepted amongst scholars that this source of law is of considerable importance. It has been argued that general principles of law “lie at the very foundation of the legal system and are indispensable to its operation”¹⁷⁸ and that the concept has played “a prominent role in arbitrations between States and foreign nationals”.¹⁷⁹

The current version of Article 38(1)(c) stems from the statute of the Permanent Court of International Justice. Even though it is clear that the purpose of this provision is to avoid the problem of *non liquet* by the then World Court, now the International Court of Justice, it was not easily formulated due to a difference of opinion between the drafters of the statute of the Permanent Court of International

¹⁷⁶ See *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, paras 292-294.

¹⁷⁷ Here, parallels can be drawn between the full protection and security standard and the fair and equitable treatment standard. See comments made by Professor Christoph Schreuer at the conference held by the Investment Treaty Forum on 9 September 2005, printed in F. Ortino et al (eds.), *Investment Treaty Law – Current Issues II; Nationality and Investment Treaty Claims and Fair and Equitable Treatment in Investment Treaty Law*, British Institute of International and Comparative Law (2007), p. 95.

¹⁷⁸ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 390.

¹⁷⁹ C. Schreuer, *The ICSID Convention: A Commentary*, CUP (2001), p. 614.

Justice.¹⁸⁰ However, it is clear following a consensus reached during the stipulation process that this provision permits the World Court to deduce rules relevant to a particular case by analogy from existing rules accepted in domestic law of all civilized states or even from other general principles of law.¹⁸¹

The important function of such a source cannot be underestimated as argued by the British-United States Claims Arbitral Tribunal of 1910. In *Eastern Extension, Australasia and China Telegraph Company Ltd. v United States*, a dispute was adjudicated concerning damage caused to an investment of a London-based company. The company had entered into a concession agreement granted by the Government of Spain concerning telegraph cables connecting Manila and Hong Kong. During the US-Spanish War of 1898 the US Naval forces destroyed the cable which resulted in a case brought by Great Britain before the arbitral tribunal. The tribunal noted when dealing with the contention that no treaty or specific rules of international law could be found to which the dispute would be subjected:

“International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find ... the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.”¹⁸²

General principles of law are deduced by analogy from existing rules found in various national legal systems that are considered to represent the international community. This entails that the principles must be found by a comparative study of national legal systems whereby individual rules and principles will be used in abstract for the needs of the international legal order.

The way in which general principles of law come into existence is interesting within the context of international investment law. Even though the field of foreign investment is heavily influenced by states, in particular through the making of treaties, it provides for a system of rules and principles that applies to transactions of

¹⁸⁰ See e.g. the different opinions of Baron Deschamps and Mr. Elihu Root in the Advisory Committee of the League of Nations, which held its meetings during 16 June – 24 July 1920, who influenced the stipulation process and lead to the current version of Article 38(1)(c) in B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 6 et seq.

¹⁸¹ See further on Article 38, A. Pellet in A. Zimmermann et al (eds.), *The Statute of the International Court of Justice: A Commentary*, OUP (2006), p. 677.

¹⁸² *Eastern Extension, Australasia and China Telegraph Company Ltd. (Great Britain) v United States*, VI RIAA (1923), p. 114-115.

private entities.¹⁸³ The content of the primary sources of this field of law, i.e. treaty law and custom, is determined by the actions and inaction of states, as subjects of international law, through treaty making and custom. In contrast, general principles of international law are established by a comparative study of various legal systems. The content of this source of law is derived from municipal law which applies to relationships and transactions where private entities play a bigger role compared to international law. Therefore, general principles of law are an important source of law – albeit a subsidiary one – when it comes to interpretation of treaties or as a tool for completing treaties or customary rules via the process of gap-filling.¹⁸⁴

It has been pointed out within the context of international investment law that the application of the principle of state responsibility concerning the protection of aliens and their property in cases adjudicated by the various claims commissions focused not on the treatment of foreign investment, but the physical security of an alien.¹⁸⁵ The implications of this fact, and the further expansion of investment protection provided by an ever-growing BIT regime, raised the question whether general principles of law are less important than before. Arbitral practice points to the contrary as can be seen in three international law cases which dealt with legal disputes at different times and used general principles of law to determine various substantive obligations, including the concept of “unjust enrichment”, the concept of “pacta sunt servanda” and the concept of “protection and security”. The first case was adjudicated prior to the great upsurge in the making of BITs, the second case deals with general international law within an applicable law clause in a concession agreement and the last example deals with a state’s obligation according to a treaty provision and general principles of law.

In the *Lena Goldfields case*, the tribunal was faced with a London-based company which had acquired a concession agreement from the Russian Government in 1925 with regard to gold mining operations in Russia. Only four years later the Russian Government adopted a different policy – the “Five-Year Plan” – which led to the development of the USSR and its economy on Communist principles and resulted in a class war against capitalistic enterprises. This policy change produced great difficulty for the investor and his employees. That situation made it impossible for

¹⁸³ See T. Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 *Journal of World Investment and Trade* (2009), p. 109.

¹⁸⁴ C. Schreuer, *International and Domestic Law in Investment Disputes – The Case of ICSID*, 1 *Austrian Review of International and European Law* (1996) 89, p. 107, and same author, *The ICSID Convention – A Commentary*, CUP (2001), p. 614, para 112.

¹⁸⁵ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 115. Despite this general statement, it must be noted that some cases are similar to investment cases, e.g. *Irene Roberts case in Venezuela Arbitrations of 1903*, Government Printing Office (1904) p. 142-145.

the investor to operate not only because of change in policy but also because of direct actions taken by Soviet authorities resulting in arbitration proceedings against the Government.¹⁸⁶ During the proceedings the matter of governing law needed to be addressed. The counsel for the plaintiff argued (the Soviet Government participated in the initial phase of the proceedings, but later ceased to do so) that Soviet laws should govern all domestic matters of the contract, including interpretation, unless excluded by the contract itself. It was, however, also argued by plaintiff's counsel that for other purposes general principles of law should govern:

“But it was submitted by him that for other purposes the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice at the Hague should be regarded as “the proper law of the contract” and in support of this submission counsel for Lena pointed out that both the Concession Agreement itself and also the agreement of June, 1927, whereby the coal mines were handed over, were signed not only on behalf of the Executive Government of Russia generally but by the Acting commissary for Foreign Affairs, and that many of the terms of the contract contemplated the application of international rather than merely national principles of law. In so far as any difference of interpretation might result the Court holds that this contention is correct.”¹⁸⁷

The arbitral tribunal concluded that the Soviet Government was in breach of the contract and awarded the plaintiff considerable damages by referring to the principle of unjust enrichment; a principle of general international law.

In the *Texaco case*, an investor instigated legal proceedings against Libya following the country's decision to nationalize its oil industry. The investor had been granted an oil concession, the agreement for which included an arbitration clause that determined applicable law if a dispute arose between the parties. The clause included a reference to the “principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law [...]” A sole arbitrator, Professor Dupuy, argued that this provision presupposed an analysis whether contracts should be honoured according to Libyan law and principles of international law. He concluded on that point:

¹⁸⁶ The various actions taken by the authorities entailed grave violations of the international minimum standard. These actions included lack of police protection which resulted in massive theft of gold, workers of the company losing trade union and political rights as a result of working for the company, harassment of organizations of central and local power, in particular a raid carried out by police forces where documents important to the company's operation were seized and numerous officers of the company were prosecuted for “counter-revolutionary activity and espionage”. See further the text of the award in Appendix to A. Nussbaum, *The Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 *Cornell Law Quarterly* (1950-1951) 31, p. 48-49.

¹⁸⁷ See A. Nussbaum, *The Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 *Cornell Law Quarterly* (1950-1951) 31, p. 50.

(1) On the one hand, as regards the principles of Libyan law: regardless of the source of Libyan law taken into consideration, whether we refer to the Sharia [...] (“O ye believers, perform your contracts!”) or to the Libyan Civil Code [Articles 147 (“The contract makes the law of the parties”) and 148 (“A contract must be performed in accordance with its contents and in compliance with the requirements of good faith”)] one is led to the same conclusion [...]: that Libyan law recognizes and sanctions the principle of the binding force of contracts. (2) On the other hand, as regards the principle of international law: from this second point of view, it is unquestionable, as written by Professor Jessup in concluding his opinion [...] that the maxim ‘pacta sunt servanda’ is a general principle of law; it is essential foundation of international law.¹⁸⁸

Even though a dispute has been subjected to a treaty provision, a court will also take into account general principles of law during the process of interpretation. As argued by the International Court of Justice in the *Iranian Hostage case*, a state is obliged, even though a particular dispute is subjected to a FCN treaty provision, according to general international law, to provide protection and security to an alien:

“So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, *in addition to the obligations of Iran existing under general international law*, requires the parties to ensure “the most constant protection and security” to each other’s nationals in their respective territories.”¹⁸⁹ [emphasis added]

Arbitral tribunals that have dealt with cases subjected to the ICSID Convention have applied various concepts that rest upon general principles of law as a source of law.¹⁹⁰ However, despite the vast number of BITs that provide investment protection for investors, these investment instruments do not always include an applicable law clause. Article 42 of ICSID, which refers to “such rules of international law as may be applicable” has proven to be an indispensable tool for tribunals as it is understood to entail all sources of general international law as defined by Article 38(1) of the statute of the International Court of Justice.¹⁹¹

¹⁸⁸ *Texaco Overseas Petroleum Co. and Californian Asiatic Oil Co. v Libya*, Award of 19 January 1977, 17 ILM 1, para 51.

¹⁸⁹ *Case Concerning United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 67.

¹⁹⁰ See e.g. *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991), para 56, concerning the concept of burden of proof and *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Award of 27 December 2010, para 127, concerning legitimate expectations within the context of fair and equitable treatment.

¹⁹¹ See C. Schreuer, *The ICSID Convention – A Commentary*, CUP (2001), p. 608, para 103 et seq.

Therefore, general principles of law can be used by tribunals during the process of adjudication for various purposes. Reference to this source may assist tribunals in using principles that are not provided for in a treaty, but may be necessary for the treaty's proper function as determined by the tribunal in question.¹⁹² However, taking into account the increasing number of BITs, most of which include standards that are formulated in an open way, such as the standard of full protection and security, this source of law will be used as a tool to support or further define the proper meaning of the treaty text as interpreted and understood by the tribunal. Here, parallels can be drawn between other concepts of international law, which are founded upon customary international law, that are increasingly affected by the increasing number of BITs or international human rights conventions.¹⁹³

3.3.5 Arbitral awards

While the status of this source of law has long been debated, it has at the same time long been acknowledged in academia and practice that judicial decisions are of immense importance.¹⁹⁴ The importance of this source of law is somewhat surprising taking into account its origin. According to Article 38(1) judicial decisions are a subsidiary source of law. This was acknowledged during the debates that took place in the Advisory Committee of Jurists that later led to the formulation of the statute of the Permanent Court of International Justice, the forerunner of what is now Article 38. Or as Baron Deschamps stated:

“Doctrine and jurisprudence no doubt do not create law; but they assist in determining the rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.”¹⁹⁵

¹⁹² See T. Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 *Journal of World Investment and Trade* (2009), p. 107-109 and C. McLachlan, ‘Investment Treaties and General International law’, in A.K Bjorklund, I.A. Laird and S. Ripinsky (eds.), *Investment Treaty Law – Current Issues III; Remedies in International Investment Law and Emerging Jurisprudence of International Investment Law*, British Institute of International and Comparative Law (2009), p. 142-143.

¹⁹³ See H.E. Zeitler, ‘Full Protection and Security’, in S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, OUP (2010), p. 199, and J. Bering et al, *General Public International Law and International Investment Law – A Research Sketch on Selected Issues*, The International Law Association German Branch Sub-Committee on Investment Law, December 2009, available at <http://www.50yearsofbits.com/docs/0912211342_ILA_Working_Group_III_PIL.pdf>.

¹⁹⁴ See e.g. H. Lauterpacht, *Development of International Law by the International Court*, Stephens and Sons (1957), p. 8-22, G. Schwarzenberger, *International Law as Applied by Courts and Tribunals*, Vol. I, Stephens and Sons (1957), p. 30 et seq, and G. Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ in J.H. Verzijl and F.M. van Asbevk (eds.), *Symbolae Verzijl: présentées au Professeur J.H. Verzijl à l’Occasion de son LXX-ième Anniversaire*, Nijhoff (1958), p. 172.

¹⁹⁵ Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux*, of the Proceedings of the Committee, 16 June-24 July (The Hague, 1920), p. 336.

Discussions of this kind and the interests of states to preserve control over the development of the international legal system influenced the stipulation of Article 59 of the ICJ statute which includes a caveat emphasizing that the decisions of the World Court have no binding force except between the parties to a particular case.¹⁹⁶ The formulation “determining the rules which exist” is particularly interesting taking into account how difficult it can be to determine what customary law entails. This fact has only added authority to judicial decisions as a (subsidiary) source of law.¹⁹⁷

The views of commentators, which concern the judgments of tribunals as sources of law, are applicable *mutandis mutatis* to arbitral awards. Both doctrine and arbitral awards refer frequently to earlier decisions despite the caveat of Article 59 of the Statute of the International Court of Justice. This has been acknowledged by leading authorities in both international law and international investment law – Herch Lauterpacht stated with regard to judicial decisions in general: [j]udicial decisions, particularly when published, become part and parcel of the legal sense of the community.”¹⁹⁸ In addition, Jan Paulsson has stated that: “it is pointless to resist the observation that precedents generate norms in international law...” and “...a special jurisprudence is developing from the leading awards in the domain of investment arbitration [that] can only be denied by those determined to close their eyes.”¹⁹⁹

So, despite the fact that there is no legal obligation for a tribunal to follow a conclusion decided by another tribunal, there seems to be consensus that arbitral awards are of considerable importance.²⁰⁰ But how does this legal reality manifest itself in practice? The tribunal in *AES v Argentina* emphasized the independence of each tribunal to approach the subject matter before it, but also took into account that earlier decisions were of importance:

¹⁹⁶ See further on Article 38, A. Pellet in A. Zimmermann et al (eds.), *The Statute of the International Court of Justice: A Commentary*, OUP (2006), p. 677.

¹⁹⁷ R.Y. Jennings ‘What is International Law and how do we tell it when we see it?’ in M. Koskenniemi (ed.), *Sources of International Law*, Ashgate (2000), p. 42.

¹⁹⁸ E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. II, CUP (1975), p. 473-474.

¹⁹⁹ J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, Paper delivered to the ICCA, Biennial Conference, June 2006, p. 3 and 14.

²⁰⁰ See C. Schreuer, *The ICSID Convention: A Commentary*, CUP (2009), p. 1101, and G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* The 2006 Freshfields Lecture, *Arbitration International*, Vol. 23, No. 3, LCIA (2007), p. 368, about the issue whether the principle of *stare decisis* exists in international law.

“Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution ... precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.”²⁰¹

Similarly, the tribunal in *Oostergetel v Slovak Republic* argued that it was not bound, but it was to pay due consideration to earlier decisions:

“In its Decision on Jurisdiction, the Tribunal has already stated – and it restates here – that it is not bound by previous decisions, but is of the opinion that it must pay due consideration to earlier decisions of international tribunals and that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.”²⁰²

Moreover, arbitral awards have become one of the most valuable sources of law in international investment law due to the frequent rate of adjudication of investment disputes by arbitrators.²⁰³ However, the de-centralized nature of the dispute settlement system in investment arbitration and the different quality of individual awards can lead to extreme situations, the most extreme of which occurs when arbitral tribunals dealing with similar subject matters reach opposite conclusions.²⁰⁴

Another element meriting mention in the context of investment arbitration is the different methodologies used by investment tribunals when dealing with individual cases. The often vague formulation of investment treaty standards, including the full protection and security standard, makes interpretation a process whereby the investment tribunal has considerable discretion how to establish the standard’s substantive content. Due to the vague concepts often used, tribunals have difficulty in concretizing the substantive elements of the standard – different approaches are taken, some tribunals rely on treaty law whereas others employ a combination of treaty law and customary international law. Arbitral practice shows that various substantive elements are used when determining the substantive content

²⁰¹ *AES Corp. v Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, paras 30-31.

²⁰² *Oostergetel v Slovak Republic*, UNCITRAL Arbitration, Award 23 April 2012, para 145.

²⁰³ The cumulative number of known treaty-based cases adjudicated by arbitral tribunals reached 390 by the end of 2010. During 2010, at least 25 new treaty-based arbitration cases were filed. See UNCTAD, *World Investment Report: Non-Equity Modes of International Production and Development*, United Nations (2011), p. 100-103.

²⁰⁴ See *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001 and *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001.

of the standard and which obligations the host state owes to the investor. Such a development is to be expected taking into account how open and ambiguous the treaty standards are and how difficult it can be to determine customary international law. This situation is problematic not only for the investor but also for the host state as it is difficult to predict what should be expected from either party or, even whether the investor can contribute to the damage caused to the investment.

The problems relating to various discrepancies stemming from arbitral practice necessitate considerable restraint when dealing with arbitral awards. Various examples can be found where arbitral tribunals invest considerable time to describe facts and procedure in great detail. However, the tribunal's material assessment within the context of a principle or a standard's substantive elements is surprisingly shallow. In such a scenario it can be tempting to go further in an attempt to determine the substantive content of a standard and draw conclusions from the parties' submissions. Therefore, some commentators have sought, when determining the content of an investment protection standard, to draw conclusions not from the awards themselves, but also from submissions by the parties, such as counter-memorials, where the a party provides its counter-arguments in response to the claims of the opposing party.²⁰⁵

It should be stressed that even though submissions by the parties' counsel can play an important role and influence the conclusion of the tribunal, they have to be viewed and assessed in their proper context.²⁰⁶ A memorial or a counter-memorial is an instrument presented in an investment dispute that is being adjudicated before an arbitral tribunal. Its purpose is to present the arguments and counter-arguments to the claims of the opposing party. The nature of the adjudication process – as a process concerned with a legal dispute – is adversarial. That fact leads to the situation in which the parties present their claims and arguments not as they see *de lege lata* but within the context of the dispute being adjudicated and in support of their position. Needless to say, tribunals have recognized this situation. In *PSEG v Turkey* the tribunal noted concerning this issue:

²⁰⁵ See I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, OUP (2007), p. 139. There, the following argument is made: "One possible starting point in the identification of the FET content may be by looking at the shared expectations of the parties concerning FET."

²⁰⁶ See regarding the importance of council's submissions on behalf of parties to a dispute T.W. Wälde, "Interpreting Investment Treaties" in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in honour of Christoph Schreuer*, OUP (2009), p. 726. For a critical view of the quality of pleadings see J. Paulsson, 'Awards–And Awards', in A.K. Bjorklund, I.A. Laird and S. Ripinsky (eds.), *Investment Treaty Law, Current Issues III; Remedies in International Investment Law – Emerging Jurisprudence of International Investment law*, British Institute of International and Comparative Law (2009), p. 102-103.

“As it is by now customary in investment arbitration, the aggrieved party invokes the breach of every BIT clause dealing with the standards of the investor’s protection, while the Respondent vehemently denies any breach. This the Claimants have done in the present case, with the sole exception that they have not claimed direct expropriation of the investment. The Government of Turkey denies any breach of the BIT.”²⁰⁷

It is therefore commonplace that a party to an investment dispute identifies all the relevant clauses of the BIT which in his opinion are violated and that to which the dispute is subjected. In contrast, the respondent state denies every violation which it is accused of. Such a scenario can only lead to the conclusion that there is considerable need for a careful approach when general conclusions from memorials and counter-memorials are drawn.

Other tribunals have been liberal in interpreting the legal meaning and effect of individual decisions. A case in point is one of the major decisions concerning the evolution the full protection and security standard, the *Neer case* of 1927. In this case the US-Mexican Claims Commission acknowledged that governmental acts should be put to the test of international standards and the treatment of an alien must “...amount to an outrage, to bad faith, to wilful neglect of duty...” to be considered an international delinquency. Even though the origins of the fair and equitable treatment standard and the full protection and security standard are entirely different – the full protection and security standard originates from the FCN treaties and state practice whereas the fair and equitable treatment standard originates in treaty law after the end of the Second World War – the *Neer case* has been used as an example of a violation of the fair and equitable treatment standard.²⁰⁸

Unfortunate as such developments may be, it cannot be ignored that arbitral awards are important for the mere fact that they determine the substance of various investments standards included in BITs. So, despite the fact that these standards are often formulated in an open and ambiguous manner, their substantive content is brought to life depending on how and the way in which an arbitral tribunal subjects the facts of its case to the standard. This process of adjudication with the increasing number of arbitral awards that deal with similar treaty language has led to a situation where a more detailed body of jurisprudence is developing. This evolution has contributed considerably to the development of international law and international investment law.²⁰⁹

²⁰⁷ PSEG Global Inc. and Konya İlgün Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No. ARB/02/5, Award of 19 January 2007, para 220.

²⁰⁸ See e.g. *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 293.

²⁰⁹ I. Brownlie, *Principles of Public International Law*, 6th ed., OUP (2003), p. 19-20.

3.3.6 Writings of highly qualified publicists

Due to the wide nature of the formulation of the treaty-based standard, tribunals are inclined to seek guidance in writings of highly qualified publicists. Again, the argument of the first major investment award provides guidance. The tribunal in *AAPL v Sri Lanka* discussed extensively writings of numerous publicists, including Vattel, Cheng, Zemanek and Brownlie, in great detail in order to provide a substantive assessment of the elements of treaty protection and the burden of proof before international tribunals.²¹⁰ Another example is the *Parkerings v Lithuania* case. The tribunal argued that the variation of language in treaty law did not make a significant difference in the level of protection and referred to academic writings in support of this notion.²¹¹ In *Pantehniki v Albania*, the umpire referred to Professor O'Connell's treatise on international law and Newcombe and Paradell's monograph on international investment law when assessing the scope of the due diligence principle.²¹² Having recited the academic text, the umpire subjected the facts of the case to the premise thus established.²¹³ In *Suez and InterAgua v Argentina* and *Suez and Vivendi et al v Argentina*, the tribunal referred to Professor Freeman's lecture at the Hague Academy of International Law and Professor Brownlie's treatise on principles of international law describing the meaning of due diligence.²¹⁴

In addition, tribunals have referred to studies made by international organizations that have sought to further define the substantive elements of the full protection and security standard or describe state practice within the context of customary international law. It is clear that these documents do not fall under the sources of law as prescribed in Article 38 of the Statute of the International Court of Justice or under the structure provided for in Articles 31-33 of the Vienna Convention on the Law of Treaties. Still, it happens on occasion that a tribunal seeks guidance in documents produced by international organizations that are involved

²¹⁰ See *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) at e.g. paras 49, 52, 56, 63, 76 and 77.

²¹¹ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para 354.

²¹² *Pantehniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, paras 79-81.

²¹³ Other examples could be mentioned. See e.g. *Jan de Nul v Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, para 269 and *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 447.

²¹⁴ *Suez and InterAgua v Argentine Republic*, ICSID Case No. ARB/05/17, Award of 30 July 2010, para 157, and *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 163.

with investment. A case in point is the tribunal in *Bivater Gauff v Tanzania*. In this case, the tribunal referred to a study published by UNCTAD when addressing whether the standard included an obligation of result or an obligation of good faith efforts and what conclusions could be drawn from earlier case law in that regard.²¹⁵ In the *Mondev case*, the tribunal similarly referred to another study published by UNCTAD when discussing “a reasonable evolutionary interpretation of Article 1105(1)” of NAFTA.²¹⁶

3.4 The status of international investment law within the sphere of public international law and municipal law

Another issue is relevant within the context of the sources of international investment law, regardless of whether international investment law should be researched as a part of international law or as a special category in itself: the effect of the situation that every dispute concerning international investment law constitutes a case of mixed arbitration – a dispute involving a private entity and the host state.

One of the more obvious peculiarities of a dispute between a sovereign state and a private entity is the fact that the former is a subject of international law, whereas the latter is not. This mixture complicates the status of the investment transaction – namely whether it should be thought to fall under the sphere of public international law or municipal law.

Traditionally, a clear distinction is made between public law and municipal law; both are discussed in two different genres of law. International law is the law that governs the relationships between sovereign states, whereas municipal law is applied in a particular state and controls the relationship between citizens and their relationship with the executive branch of government.²¹⁷ Sub-categories in both international law and municipal law cover the substantive principles of these genres in greater detail; public international law contains *inter alia* international economic law, international human rights law, whereas municipal consists of constitutional law, administrative law, law of contracts, employment law, tax law, etc.

A dispute between an investor and a sovereign state can, depending on the nature of the dispute, deal with issues which are treated in the sub-categories which

²¹⁵ See *Bivater Gauff Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para 726, where the tribunal refers to UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, United Nations (2005), p. 40-41.

²¹⁶ See *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 123. The tribunal referred to UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, United Nations (1998), p. 53-55.

²¹⁷ I. Brownlie, *Principles of Public International Law*, 7th ed., OUP (2008), p. 31-32.

have been mentioned. The line between international law and municipal law can, therefore, be blurred in practice.²¹⁸ The problems linked to this situation are well reflected in arbitral practice. Should the law of the host state, the law of the investor's home state and the law of a third country apply to the legal dispute? To what extent should international law play a role in that context?

A lawyer will be faced with numerous issues when dealing with a dispute between an investor and a state. First, the investment will most likely be channelled through a vehicle – a legal entity – incorporated under the laws of the host state. That entity will probably have entered into an agreement, e.g. a concession agreement, stipulated and executed taking into account many laws of the host state, e.g. laws dealing with natural resources, building laws and regulations, tax laws, employment laws, etc. Hence, the first legal system to explore will probably be municipal law, not international law.²¹⁹ Second, the national laws of the host state of the investment might not be compatible with the obligations of the state. This situation is unlikely to arise when an investment agreement is signed, but might do so later in the event of a regime change in the host country.²²⁰ The effects of this might have different repercussions depending on whether they are subjected to municipal laws of the host state or international law. Therefore, the law applicable to the investment and the legal dispute pertaining to the investment is of paramount importance.

Historically, it has not been self-evident what law should be applicable to the dispute at hand. The Permanent Court of Justice argued in the *Serbian loans case*:

“Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.”²²¹

²¹⁸ This is particularly topical if the BIT includes substantive elements that are subjected to municipal law. A case in point is the UK-Czech Republic BIT. The terms “asset” and “investment” refer to rights and claims which have a financial value for the holder – in doing so, the BIT established a link between itself and municipal law. See further C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration – Substantive Principles*, Oxford University Press (2009), p. 183-184.

²¹⁹ That does not necessarily mean that the investor's legal position is negatively affected. In some cases municipal law is very advantageous to the investor as can be seen in the Albania's national law dealing with investment. According to Article 8(2) of the Albanian Law on Foreign Investment of 1993 a foreign investor “...may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes.” See further *Tradex v Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review-Foreign Investment Law Journal 161, 174 (1999).

²²⁰ In many cases, municipal laws stipulated after the investment has been made are the primary reason for the investment dispute. See e.g. *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001 and *Sempra Energy v Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007.

²²¹ *Serbian Loans Case*, PCIJ, Judgment, No. 14, 1929, Series A, 1929, No. 20, p. 41.

This *obiter dictum* of the Permanent Court of Justice created a presumption that took considerable effort to change in arbitral practice. As mentioned before, the investor in the *Lena Goldfields case* was successful in arguing that the dispute should be subjected to international law despite the fact that there was no provision to that effect in the concession agreement. Other cases are also of importance in this context. In three cases – *Texaco v Libya*, *Liamco v Libya* and *BP v Libya* – investors instigated legal proceedings after Libya’s decision to nationalize its oil industry. All investors had been awarded concession agreement to extract oil in the host countries. All the agreements included a choice of law clause that sought to delocalize the concession agreement by stating that the agreement should be governed by “principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law [...]” Three different arbitrators came to three different conclusions with respect to applicable law; international law, Danish law (*lex arbitri*) and Swiss law and international law (application of *lex arbitri* and international law).²²²

The various issues that arbitrators had to deal with in earlier times have become moot as a result of the wide-ranging BIT regime currently in place. The likelihood of establishing a state’s responsibility solely on principles that are based on general principles of law, as was done in the *Lena Goldfields case*, is lower than before. This has led to a situation where substantive principles govern to a large extent the investment of foreign investors during the process of adjudication. These principles, which almost without exception concern fair and equitable treatment, full protection and security and expropriation are provided for by states in the form of BITs, regional agreements or multilateral agreements. All these types of agreements are instruments stipulated and interpreted in accordance with public international law and provide the substantive principles upon which the investor’s claim, in the event of a violation, rests. Moreover, the arbitral tribunals which adjudicate the disputes between states and investors are established in accordance with public international law – many of which according to the 1965 ICSID Convention or 1976 UNCITRAL Arbitral Rules. Both of these arbitral frameworks are, needless to say, instruments of public international law, as they are stipulated by states and signed by them.

Therefore, the current state of play is that there is continuous interaction between, on one hand, international law and municipal law and, on the other hand, general international law and international investment law. As to the former point, the interplay between municipal law and international law can be considerable when

²²² See *Texaco Overseas Petroleum Co. and Californian Asiatic Oil Co. v Libya*, 17 ILM 1 (1978), *Libyan American Oil Co. v Libya*, 20 ILM 1 (1978) and *British Petroleum Exploration Co. v Libya*, Award 10 October 1973, 53 ILR 297 (1973).

deciding on e.g. the nationality of an investor, whether a public authority should be considered a part of the host state, whether government measures should be considered tantamount to expropriation or whether the government action or inaction failed to provide the necessary protection of an investment. Therefore, the division of international law and municipal law is difficult to sustain when dealing with the particulars of a complicated investment dispute. As to the latter point, the obligations owed to the investor according to the relevant bilateral investment treaty are not free standing obligations which are to be applied in a vacuum, but take into account other principles of law. Similarly, any division between general international law and international investment law can at times be seen as superfluous rather than as having any practical importance.

Therefore, the reality is that municipal law and international can at times apply both to investment transactions, in particular when these two fields of law lead to the same conclusion. However, if discrepancy exists between these two fields of law to such an extent that municipal law is contrary to international law, the latter will most likely prevail and decide the outcome.²²³

3.5 Conclusion

This chapter has looked at the various sources of international law upon which the full protection and security standard rests. The research has revealed that the standard was included in the first BIT ever stipulated, the Germany-Pakistan BIT of 1959. When the standard is included in a treaty, it is formulated in various ways and often linked to the fair and equitable treatment standard or to the relative standards of national treatment or most-favoured-nation standard. Needless to say, such combination will influence the standard's application in practice. In addition to being included in BITs, the standard also forms a part of various multilateral and regional treaties. There, the standard becomes a part of international instruments which do not focus exclusively on investment, but also cover trade related matters. These treaties include another group of formulations that are often distinctly different and at times more detailed compared to the formulations found in various BITs.

²²³ For an overview, see C. Schreuer, *ICSID Convention – A Commentary*, CUP (2009), p. 617 et seq. It must be noted that scholars remain divided on the issue of whether international law prevails in the event that municipal law is contrary to international law. See P. Weil, *The State, the Foreign Investor, and International law – The No longer Stormy Relationship of a Ménage À Trois*, 15 ICSID Review 401 (2000), p. 409, where the importance of international law is emphasized. For an opposing view, see E. Gaillard and Y. Banifatemi, *The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Review 375 (2003), p. 403-409.

The full protection and security standard is also founded upon customary international law. This source of law played a crucial role in earlier times due to the importance of the international minimum standard as applied by claims commission in the first half of the last century. However, one can argue that its stature has been affected by the vast number of BITs leading to a structural change that is a result of the increasing number of treaty-based standards to which investments are subjected to. It is important to stress at the same time that this change is not as dramatic as originally presumed. The main reason for this assumption is that customary international law is a source of law independent from treaty law. Therefore, both sources of law can be applied to a particular dispute independently. As has been discussed, various treaty formulations of the full protection and security standard refer explicitly to customary international law. Therefore, these two sources of law can be connected regardless of what the intention of the parties to the treaty might be by doing so.

General principles of law are, as a source, of particular importance, not least because of their different nature compared to the two sources previously mentioned. This source is derived from various municipal jurisdictions and can only be determined by a comparative study of different legal systems. Therefore, the general principles stem from systems that are, in contrast to the system of international law, influenced by non-state actors. In addition, this source of law plays a considerable role, taking into account the often vague concepts inherent in treaty law and the uncertain content of customary international law, as a tool for completing treaties and customary rules of international law.

The last two sources covered in this chapter – arbitral awards and writings of highly qualified publicists – are subsidiary ones. It was revealed that arbitral awards have become important due to the frequent rate of adjudication. However, while arbitral awards have shed light on various substantive concepts of treaty law and determined the content of customary international law, they are not without faults. The different quality of awards and the non-uniform methodology of arbitral tribunals has at times created problems and raised more questions than answers. Despite these problems, arbitral awards serve as an important source due to the fact that various awards have contributed considerably to the development of international law and in that way clarified both concepts and determined obligations of states and investors that are parties to legal disputes. With regard to the writings of highly qualified publicists, they have had considerable influence in individual cases, while their overall influence remains uncertain.

Taking into account the structural change that has occurred with the ever-growing number of BITs, it is only logical to look more closely towards the interpretation and application of the standard of full protection and security. Chapter 4 will focus on interpretation, but Chapter 5 will deal with the standard's substantive elements and their application in practice.

4. INTERPRETATION OF THE STANDARD OF FULL PROTECTION AND SECURITY

4.1 Introduction

The interpretation of the full protection and security standard, as the interpretation of other standards of international investment law, is not entirely undisputed. That does not, however, mean that these standards can be used without restriction or without the use of accepted rules of interpretation. To the contrary, this situation makes it particularly important that umpires rely on the content of the relevant BIT, declarations of interpretation provided by entities authorized to do so, and rules provided for in the Vienna Convention on the Law of Treaties.

The purpose of this study is to examine in greater detail how arbitral tribunals have interpreted the standard, in particular their interpretation of different formulations when arguing for a certain conclusion. This is important for both structural and substantive reasons.

The system of sources of law has, as discussed in preceding chapters, changed considerably after the end of the Second World War, in particular with the conclusion of the FCN treaty regime and with the emergence of a BIT-dominated regime of investment protection. Thus, emphasis has shifted structurally within the system of sources of law. In addition, the scope of protection has changed – with the emergence of the fair and equitable treatment standard and the ever-widening concept of an investment – and increased the level of protection. That has, however, not lead to a uniform interpretation/usage of the standard in individual arbitral cases.

As became increasingly clear during the stipulation process of the ILC's Draft Articles on State Responsibility, states have had difficulty agreeing on the substantive content of various rules and principles of international law dealing with that subject matter.²²⁴ That was the main reason for the adoption of a new approach on distinguishing between primary and secondary rules of state responsibility. In a structure of that nature interpretation becomes increasingly important. Whereas the objective elements of a primary rule can often easily be found in treaty law or in another rule of international law, the conduct attributed to the state in question is more problematic. Establishing whether an act or omission is attributable to a state is

²²⁴ The disagreement was such that little progress was made. In 1957, the International Law Commission postponed the discussion of the special rapporteur's proposals. See Yearbook of the International Law Commission 1957, Vol. I, UN Doc. No. A/CN.4/SER.A/1957, p. 181.

most often a matter of interpretation and application of the primary rule in question taking into account all relevant facts of each case.²²⁵ Therefore, it is important to discuss in greater detail the process of interpretation and the different approaches taken by tribunals.

4.2 General considerations as regard interpretation

4.2.1 Vienna Convention on the Law of Treaties

The main task of an arbitral tribunal is to adjudicate. After having dealt with jurisdictional issues raised by the parties to the dispute, the tribunal's first step is to recognise where the legal dispute of the two parties lies. That entails that the tribunal has, firstly, to establish the applicable law and, secondly, to establish the facts of the case. Having established these two fundamental parts of the dispute the tribunal is able to adjudicate.²²⁶

The starting point for any tribunal adjudicating an investment dispute is the text of the relevant BIT, in particular the provision that describes that full protection and security should be accorded to the investor and his investment. The fact that a tribunal is faced with the task of interpreting treaty law makes Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) highly relevant, but these articles are generally considered to codify customary international law.²²⁷ Article 31 states:

“1. A treaty shall be interpreted 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 its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

²²⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, CUP (2005), p. 82.

²²⁶ As established by the Permanent Court of International Justice, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or interests between the parties.” See *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment No. 2, 1924, PCIJ Reports, Series A, No. 2, p. 11. This definition has been adopted by the International Court of Justice, cf. e.g. *Case concerning East Timor (Portugal v Australia)*, ICJ, Judgment rendered 30 June 1995, ICJ Reports (1995), para 21, where the Court argues in greater detail that a legal dispute is a dispute on points of law or fact – something which can be determined objectively.

²²⁷ See e.g. *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), at para 43: “...the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.”

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”²²⁸

According to Article 31 a distinction is to be made between three approaches to treaty interpretation. All these approaches are embodied in the article’s first paragraph which notes that a treaty should be interpreted in accordance with the ordinary meaning of the terms of the treaty (objective approach), taking into account in their context (subjective approach) and in the light of the treaty’s object and purpose (teleological approach).²²⁹

Article 32 is also highly relevant with regards to interpretation. It provides as follows:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”²³⁰

Some arbitral tribunals cite from the very outset, when interpreting relevant provisions dealing with full protection and security, the VCLT in general or the rules set forth in Article 31 of the VCLT. It is appropriate to refer to the first investor-state arbitral award, *APL v Sri Lanka*, which focused on the application of the full protection and security standard. The tribunal argued that:

²²⁸ Article 31 of the Vienna Convention on the Law of Treaties, 1155 UNTS, p. 331.

²²⁹ See the ILC’s commentaries on Article 31 of the VCLT in the Yearbook of the International Law Commission 1966, Vol. II, p. 218, para 2 and p. 220, para 12 et seq (the commentaries to Article 31 are to be found under Article 27 of the ILC draft).

²³⁰ Article 32 of the Vienna Convention on the Law of Treaties, 1155 UNTS, p. 331.

“...the first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty’s relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by l’Institut de Droit International in its General Session in 1956, and as codified in Article 31 of the Vienna Convention on the Law of Treaties.”²³¹

Similarly, the tribunal in *Siemens v Argentina* emphasized the importance of Article 31 before addressing the individual concepts of the standard:

“The allegations of the parties will require that the Tribunal interpret the Treaty. In this respect and as a general matter, the Tribunal recalls that the Treaty should be interpreted in accordance with the norms of interpretation established by the Vienna Convention on the Law of Treaties of 1969 [...] Article 31(1) of the Vienna Convention requires that a treaty be “interpreted 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 its object and purpose.”²³²

Other tribunals acknowledge and emphasize that the full protection and security standard should be construed in accordance with accepted rules of treaty interpretation.²³³ However, in the great majority of awards no examples can be found where tribunals cite the VCLT when applying the full protection and security standard. In *Wena v Egypt* and *Suez and Vivendi et al v Argentina* and *Suez and InterAgua v Argentina* reflect this practice of non-referral, but the tribunals start their argumentation by briefly citing the relevant treaty provisions, subjecting various facts to the treaty provisions and analyzing earlier case law dealing with the full protection and security standard.²³⁴

The reasons for the lack of references to VCLT are numerous. First, tribunals often have referred to the VCLT early on in the award when determining applicable law to which the legal dispute should be subjected.²³⁵ Second, arbitral tribunals often deal with the fair and equitable treatment standard before addressing the full

²³¹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 38. See also e.g. *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, para 292 and *Oostergetel v Slovak Republic*, UNCITRAL Arbitration, Award 23 April 2012, para 140.

²³² *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 80.

²³³ *Rumeli Telekom v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 668.

²³⁴ See *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), para 84 et seq, and *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 158 et seq, and *Suez and InterAgua v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 152 et seq.

²³⁵ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 80.

protection and security standard.²³⁶ Therefore, an additional reference to VCLT when addressing the full protection and security standard might be seen as superfluous. Third, it could be argued that the methods of objective, subjective or teleological interpretation of treaty interpretation could be considered relatively ineffective in providing guidance as to the meaning of the concepts of “protection” and “security” due to their general character and the lack of *travaux préparatoires*. This nature of the standard makes it more challenging to apply it in individual cases and contributes the non-uniform approach taken by tribunals.²³⁷ That applies to the full protection and security standard in the same way as it applies to other standards, including the standard of fair and equitable treatment.²³⁸

4.2.2 The meaning of “protection”

According to The Concise Oxford English Dictionary the word ‘protection’ means “the action or state of protecting or being protected”. The word stems from the Latin word ‘*protegere*’ which means “cover in front”.²³⁹ The French concept of ‘protection’ means “protection” or “guard” and the Spanish concept of ‘*protección*’ means “protection” or “defence”.²⁴⁰ Finally, the German concept of ‘*Schutz*’ means in its literal sense “protect”.²⁴¹ Thus, there seems to be no substantive difference in its literary meaning in the languages which are used in formulating BITs.

The concept of protection appears in various parts of BITs. It appears always in the title of the BIT regardless of whether it is included in the preamble or the body of a treaty. A typical formulation of a treaty’s title is “Treaty between [...] and [...] concerning the reciprocal encouragement and protection of investments.”²⁴² It appears almost always in the preamble – an example of a conventional formulation is “Recognising that the encouragement and reciprocal protection of such investment

²³⁶ See e.g. *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, para 292 and 305 and *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, paras 155 and 177 and *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, paras 296 and 486-496.

²³⁷ See H.E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 27 et seq.

²³⁸ This challenge has lead commentators to propose additional approaches to determine the meaning of the substantive elements of fair and equitable treatment. See J. Bering et al, *General Public International law and International Investment Law – A Research Sketch on Selected Issues*. The International Law Association, German Branch, Sub-Committee on Investment Law, December 2009, p. 11 et seq.

²³⁹ The Concise Oxford English Dictionary, 11th ed., OUP (2004), p. 1154.

²⁴⁰ The Collins Spanish-English Dictionary, 5th ed., Harper Collins (1997), p. 579, and The Collins Robert French-English Dictionary, Collins (1985), p. 530.

²⁴¹ The Oxford Duden German Dictionary, OUP (1997), p. 647.

²⁴² The title of the US-Turkey BIT of 1985, for example, states: “Treaty between the United States of America and the Republic of Turkey concerning the reciprocal encouragement and protection of investments.” For an overview of selected BITs containing various formulations see Annex II.

will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.”²⁴³ As to the body of the treaty, formulations providing for the substantive elements of the standard are various and different in nature. The standard often appears as a stand-alone principle, in conjunction with the fair and equitable treatment standard within the context of expropriation or in connection with international law in general. A typical formulation of the concept of protection in the full protection and security standard would constitute the following structure:

“Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy *full protection and security* in the territory of the other Contracting Party.”²⁴⁴ [emphasis added]

“Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with customary international law, including fair and equitable treatment and *full protection and security*, in the territory of the other Contracting Party.”²⁴⁵ [emphasis added]

“Investments by investors of each Contracting Party shall at all times enjoy *full protection and security* in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair in its territory by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments by investors of the other Contracting Party.”²⁴⁶ [emphasis added]

While a positive formulation is the most common formulation in the BITs that were the subject of this study, a negative formulation could also be found on occasion:

Except for measures required to maintain public order, such investments shall enjoy *continuous protection and security*, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.²⁴⁷ [emphasis added]

The concept has played a vital role in international law as a substantive part of the international minimum standard prescribing the obligations of states to protect foreigners residing within their borders. It is this backdrop to the formulation of the standard – protection of aliens and their property – that is particularly important within the context of investment protection. The question whether the treaty-based

²⁴³ See the preamble of the Thailand-India BIT of 2000 which states: “Recognising that the encouragement and reciprocal protection of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.” For an overview of selected BITs containing various formulations see Annex II.

²⁴⁴ UK-Philippines BIT, Art. 3(2).

²⁴⁵ UK-Mexico BIT, Art. 3.

²⁴⁶ Finland-Brazil BIT, Art. 2(2).

²⁴⁷ Belgium/Luxembourg-Nigeria BIT, Art. 3.

standard is formulated with the purpose of describing the general obligation of states of protection, or to increase the level of protection when dealing with investments, can only be answered after an assessment on a case-by-case basis.

It is, however, clear that the word ‘protection’ entails in general an obligation to protect. That entails the obligation to provide for institutions that either protect the investment (e.g., police force or courts of law) or a legal framework that grants security by enabling the investor to protect itself (legal rules that protect property rights and institutions that enables the investor to guard its interest).²⁴⁸ In such a scenario an investor is in a position to guard his interest. He can expect (or request protection if he has knowledge of a threat) that the host state will exercise its powers, e.g. police force, and in that way subject anyone who intends to commit or has committed actions that have an adverse effect on the investment to the law that protects the investment.

The question arises what the meaning of “full protection” entails, as opposed to “protection”. The international minimum standard provided for protection and security of aliens when residing in another country than their home country. That protection was, however, not understood to include “full protection”, but only “protection”. In recent case law tribunals have afforded this formulation additional importance and argued that the word “full” entails an increased level of protection. The tribunal in the *Bivater case* argued that the word meant not only protection from adverse action of third private parties, but also from adverse action from the state itself.²⁴⁹ The tribunal in the *Siemens case* concluded that the word “full” extended the investment protection of the BIT to intangible assets/investments.²⁵⁰ In the *Azurix case* the tribunal argued that the effect of the word’s inclusion leads to the situation that a secure investment environment was protected.²⁵¹

However, there are limits as to how far a tribunal is willing to stretch the level of protection when determining the repercussions of the concept of “full protection”. Tribunals have rejected arguments that would entail that the standard should incur absolute liability to the state and would as such serve as a guarantee for investors for any losses.²⁵² The investor in the *AAPL case* argued that the words “full” and “enjoy” should be understood as establishing an obligation that was absolute in nature – a

²⁴⁸ C. Schreuer, ‘Interrelationship of standards’ in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 4.

²⁴⁹ *Bivater Gauff Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para 729.

²⁵⁰ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 303.

²⁵¹ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 408.

²⁵² See e.g. *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 177, and *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 12 October 2005, para 164.

strict liability obligation – which would in effect lead to a situation where the investor enjoyed a guarantee against losses. The tribunal rejected the idea with reference *inter alia* to customary international law and arbitral cases noting that such an understanding would render other parts of the BIT in question “superfluous”. The tribunal cited Freeman when describing the applicable principle with regard to strict liability:

“The State into which an alien has entered ... is not an insurer or a guarantor of his security ... It does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners.”²⁵³

Therefore, the concept of ‘protection’ indicates exactly what it means. The state has an obligation to protect. However, that obligation is far from absolute and should be assessed on a case-by-case basis. The fact that the concept of protection forms a part of a standard leads to the conclusion that two factors reign supreme when applying the standard. First, various different sources of law must be taken into account when determining its substantive content, namely treaty, custom and general principles of law. Second, an arbitrator is not allowed to apply his own idiosyncratic definition of the concept, but must adhere to the various disciplines needed to ascertain the concept according to the sources. In such a scenario, the concept cannot be determined in abstract, but must be interpreted taking into account the facts of the case. However, as will be explored, customary international law plays a pivotal role in determining the nature of the obligation and what behaviour obliges the state to act in order to protect the party in question.

4.2.3 The meaning of “security”

The Concise Oxford English Dictionary described the meaning of ‘security’ as “the state of being free or feeling secure”. In addition, the dictionary names as an additional meaning “the safety of a state or organization against criminal activity such as terrorism”. The word comes from the Latin word ‘securitas’, from ‘securus’ which means “free from care”.²⁵⁴ The French word ‘sécurité’ means “security” and the

²⁵³ See *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 45 et seq and A.V. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, 88 RCADI 267 (1955), p. 276.

²⁵⁴ The Concise Oxford English Dictionary, 11th ed., OUP (2004), p. 1301.

Spanish word ‘seguridad’ means “security”.²⁵⁵ Identically, the German language concept of ‘Sicherheit’ conveys the same meaning.²⁵⁶

In contrast to the word ‘protection’, the concept of security appears only in the body of the treaties researched. A typical formulation of the concept of security, as a part of the full protection and security standard, is usually as follows:

“Investments by investors of either Contracting State shall enjoy *full protection and security* in the territory of the other Contracting State.”²⁵⁷ [emphasis added]

“Investments or returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in accordance with principles international and shall enjoy *full protection and security* in the territory of the other Contracting Party.”²⁵⁸ [emphasis added]

“Investment shall at all times be accorded fair and equitable treatment, shall enjoy *full protection and security* and shall in no case be accorded treatment less than that required by international law.”²⁵⁹ [emphasis added]

Still, different variations of the concept appear in various BITs, such as “full security and protection”,²⁶⁰ “adequate physical security and protection”,²⁶¹ “full physical security and protection”²⁶² and “protection and constant security”.²⁶³

The question arises what legal effect the word “security” has in practice. A textual interpretation lead to the conclusion that an investor should be in a state of being free or feeling secure – in practical terms this means that the investor should be able to manoeuvre freely in connection to his economic activities. However, more importantly, in particular due to the fact that the word “security” almost only appears with the word “protection”, the question should be asked and answered what legal effect the words “protection and security” have in practice. Is there any difference in substance between the concepts of “protection” and “security” when formulated together in a BIT prescribing that an investor and his investments shall enjoy “full protection and security”? A textual interpretation of the concepts, which is important not least because of the lack of *travaux préparatoires* in the traditional sense, seems to

²⁵⁵ The Collins Spanish-English Dictionary, 5th ed., Harper Collins (1997), p. 649, and The Collins Robert French-English Dictionary, Collins (1985), p. 612.

²⁵⁶ The Oxford Duden German Dictionary, OUP (1997), p. 661.

²⁵⁷ Germany-Philippines BIT, Art. 4.1.

²⁵⁸ Argentina-Canada BIT, Art. 2(4).

²⁵⁹ US-Ecuador BIT, Art. II(3)(a).

²⁶⁰ Egypt-Nigeria BIT, Art. 2(3).

²⁶¹ This formulation is found in a number of Indonesia BITs. See e.g. Indonesia-Netherlands BIT, Art. 3(1); Indonesia-Chile, Art. IV(1) and Indonesia-Bangladesh BIT, Art. III(1).

²⁶² Netherlands-Venezuela BIT, Art. 3(2).

²⁶³ UK-Argentina BIT, Art. 2(2).

lead to a negative conclusion. While protection means “the action of protecting someone or something, or the state of being protected”, security means “the state of being free from danger or threat”. In general, the rule must be that the concepts can in certain circumstances mean the same thing, but it is, however, not self-evident that the same meaning would always be applied.

Here, it is appropriate to mention the fact that while these obligations generally oblige a state to protect and secure an investment, they have particular importance during periods of civil unrest, demonstrations, insurrections or full-scale revolutions. It is helpful to differentiate among these scenarios in order to understand the practical effects of the concepts. Arbitral practice reveals that there is one recurrent pattern when it comes to the application of the concepts of “protection” and “security” – it is important to examine the circumstances of each case and to determine whether individual acts or omissions can lead to the conclusion that a state has not provided for the protection owed to the investor. Here, three cases will be discussed dealing with different scenarios where an investment was purportedly damaged by a third party: (i) during peacetime in a stable society; (ii) during demonstrations against the investment; and (iii) during revolutionary times.

In *Parkerings v Lithuania*, an investor entered into an agreement with a city concerning the management of its parking system. The investor installed payment machines in various parts of the city in order to collect fees for parking. These machines were repeatedly vandalized by third parties. The police opened an investigation but was unable to find the perpetrators of the damage caused. The tribunal noted the following:

“The Claimant alleges damages to its materials due to vandalism. However, the Claimant does not show that such vandalism would have been prevented if the authorities had acted differently. The Claimant only contends that the police did not find the authors of this offence. Both parties agree that Lithuanian authorities started an investigation to find the authors of the vandalism [...] The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty.”²⁶⁴

In another case, *TECMED v Mexico*, an investor participated successfully in an auction of real property, buildings and facilities relating to a controlled landfill of hazardous industrial waste. Shortly after the purchase the investor experienced difficulties relating to the license needed to operate the landfill. The landfill became a contested issue in the community that resulted in civil unrest and demonstrations against the project. Finally, the authority responsible for renewing the operating

²⁶⁴ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras 356-357.

license of the landfill rejected the investor's further application for renewal and requested that the investor submit a program for the closure of the landfill. The investor argued that the host state had failed to provide protection and security during demonstrations against the project. The tribunal rejected the claim as it considered:

"[...] that the Claimant has not furnished evidence to prove that the Mexican authorities, regardless of their level, have encouraged, fostered, or contributed their support to the people or groups that conducted the community and political movements against the Landfill, or that such authorities have participated in such movement. Also, there is not sufficient evidence to attribute the activity or behaviour of such people or groups to the Respondent pursuant to international law."²⁶⁵

The obligation to provide protection and security becomes particularly difficult during civil unrest and mob violence that reaches revolutionary proportions. In the case of *United Painting Co., Inc. v Iran* an investor left equipment in storage with the National Iranian Oil Company (NIOC) that was later taken by the company or entities under its control. The Iran-US Claims Tribunal argued the following:

"From the evidence before it, the Tribunal concludes that the equipment had been left [...] in storage. It is an accepted principle of law that such a circumstance normally confers an obligation on the entity in charge to protect the property of third parties which is left in its exclusive control. For this reason the Tribunal finds that the loss of the equipment must in principle be deemed to be NIOC's responsibility."²⁶⁶

As these cases show, an investor is often subjected to direct or indirect violence. The main cause for the violence can be either independent in itself (not related to the

²⁶⁵ *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 176.

²⁶⁶ *United Painting Co., Inc. v Islamic Republic of Iran*, Award No. 458-11286-3 rendered on 30 December 1989, reprinted in 23 Iran-US Claims Tribunal Reports 351, p. 370-371. It must be noted that the evolution of events during the Iranian revolution are of particular interest as it serves as an example where a government, which is under the obligation to provide protection and security, gradually loses control of a country. Therefore, the jurisprudence of the Iran-US Claims Tribunal could have provided guidance as it deals with events that start in the form of civil unrest and lead to full-scale revolution. Under such conditions it can be difficult to decide whether actions against aliens are perpetrated by groups of private individuals or groups of individuals that are associated with a new government. However, while the principles of international law were objectively described by the tribunal, their subjective application is at times controversial. A case in point is how the tribunal addressed the concept of "constructive expulsion" according to international law in e.g. *Short v Islamic Republic of Iran*, Award No. 312-11135-3 rendered on 14 July 1987, 14 Iran-US Claims Tribunal Reports 20, *Rankin v Islamic Republic of Iran*, Award No. 326-10913-2 rendered on 3 November 1987, 4 Iran-US Claims Tribunal Reports 135, and *Yeager v Islamic Republic of Iran*, Award No. 324-10199-1 rendered on 2 November 1987, 17 Iran-US Claims Tribunal Reports 92. See C.N. Brower and J.D. Brueschke, *The Iran-US Claims Tribunal*, Martinus Nijhoff (1998), p. 364-365.

investment itself, e.g. violence in connection to a revolution that is taking place) or directly linked to the investment (often linked to the investment in the form environmental issues or statements made by politicians following privatization projects). Therefore, the situations, which words “protection and security” need to cover, are numerous – a fact that makes it difficult to predict with accuracy to which extent a state must go in order to secure the investment in question. It does not come as a surprise, therefore, that arbitral tribunals have sought assistance from customary international law when determining the obligation of a state within the context of full protection and security. This requires further analysis of the nature of the obligation to provide protection and security to an investor and his investment.²⁶⁷

4.3 Interpretation in practice

4.3.1 Textual interpretation – ordinary meaning

Investment tribunals faced with questions pertaining to the meaning of “protection” and “security” have usually, as a starting point, emphasized that these concepts be interpreted in accordance with Article 31(1) of the Vienna Convention.²⁶⁸

Investment tribunals have as a starting point emphasized the importance of textual interpretation – or in other words the “ordinary meaning” of the terms of the instrument that is interpreted. That has in individual cases lead to a conclusion that rejects an expansive interpretation put forth by the investor. The tribunal in *AAPL v Sri Lanka* rejected the notion argued by the investor that the generally formulated full protection and security standard should interpreted as to entail strict liability to which the host state was subjected to. The tribunal noted:

“In conformity with Rule (B), the words “shall enjoy full protection and security” have to be construed according to the “common use which custom has affixed” to them, their “*usus loquendi*”, “natural and obvious sense”, and “fair meaning”.”²⁶⁹

²⁶⁷ It is obvious that the “security” to be provided to an investor overlaps with the concept of “security” that is to be found in various human rights instruments. Following the end of the Second World War numerous legal and non-legal instruments were concluded and adopted with the purpose of ensuring the security of individuals from various violations originating from government actions. These instruments include the Universal Declaration of Human Rights (Article 3), International Covenant on Civil and Political Rights (Article 9) and the European Convention on Human Rights (Article 5). That can in some cases lead to scenarios of potential conflict, in particular concerning the privatization of services that are considered to be a human right. See further U. Kriebaum, ‘Privatizing Human Rights – The Interface between International Investment Protection and Human Rights’ in A. Reinisch and U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Eleven International Publishing (2007), p. 168.

²⁶⁸ See Chapters 4.2.2-4.2.3.

²⁶⁹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 47.

Similarly, other tribunals have emphasized the wording of a particular provision. A case in point is the tribunal in *GEMPLUS and TALSUD v Mexico*. In this case, the claimant argued that the relevant provision provided for protection beyond physical violence. The tribunal stated:

“The Tribunal considers that the two BIT provisions relating to the Respondent’s obligation to provide ‘protection’ are materially similar for the purposes of the present case, despite their different wording and different scope [...] Such ‘protection’ provisions, in the form of the *wording here under consideration*, do not generally impose strict liability on a host state under international law; and the mere fact of other unlawful conduct in the form of expropriation or inequitable and unfair treatment by the host state is not, without more, to be treated as a breach of these provisions.”²⁷⁰ (emphasis added)

The tribunal in *Total v Argentina* emphasized the “plain reading of the terms used” according to Article 31 VCLT when addressing individual concepts of the standard and noted that a particular formulation, which included reference to the fair and equitable treatment standard, supported a particular understanding of individual concepts:

“A *plain reading of the terms used* in Article 5(1) of the BIT, in accordance with Article 31 VCLT, shows that the protection provided for by Article 5(1) to covered investors and their assets is not limited to physical protection but includes also legal security. The explicit linkage of this standard to the fair and equitable treatment standard supports this interpretation.”²⁷¹ (emphasis added)

In another case, *Siemens v Argentina*, the investment tribunal was also faced with the question of whether the full protection and security standard entail the protection of “legal security”. It noted that the elements of ordinary meaning and contextual meaning during the process of interpretation:

“As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than “physical” protection and security. [...] In its *ordinary meaning* “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.” It is clear that in the *context of this meaning* the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term “security”, whether the Treaty covers physical security at all. Arguably it could be considered to be included under “full protection”, but that is not an issue in these proceedings.”²⁷² (emphasis added)

²⁷⁰ *GEMPLUS S.A. and TALSUD S.A. v Mexico*, ICSID Joined Additional Facility Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award of 16 June 2010, paras 9-9 and 9-10.

²⁷¹ *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Award of 27 December 2010, para 343.

²⁷² *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 303.

Textual interpretation of individual substantive elements of the standard in treaty law has greatly influenced the standard and to what extent it protects the investment. That has led to a discussion in various tribunals as to the meaning of “full” in “full protection and security”. In *Azurix v Argentina*, the tribunal contemplated whether such an adjective could extend the protection of the standard. It concluded that it should do so:

“However, when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their *ordinary meaning*, the content of this standard beyond physical security.”²⁷³ (emphasis added)

In contrast, the tribunal in the *Suez Vivendi v Argentina* emphasized that the treaty-based standard did not include the adjective – a fact that would lead to the conclusion, amongst other factors, to limit the protection of the standard to physical security:

“As far as this Tribunal is concerned, it is inclined to think that the absence of the word “full” or “fully” in the full protection and security provisions in the Argentina-Spain and the Argentina-U.K. BITs supports this view of an obligation limited to providing physical protection and legal remedies for the Spanish and U.K. Claimants and their assets.”²⁷⁴

Interestingly, examples can be found where a tribunal deviates from a conclusion that might, from the outset, seem to be more logical. The tribunal in *Suez Vivendi v Argentina* was faced with a particularly broad formulation of the full protection and security standard.²⁷⁵ The tribunal emphasized that earlier decisions did not analyse or give a clear reason for departing from the “historical interpretation traditionally employed” on the contentious point at issue:

“While strict textual interpretation of the treaty language would lead this Tribunal to conclude that the applicable BITs in the present cases do not have the expansive scope on which the Claimants are basing their claim, there is another reason for the Tribunal not to follow the interpretation made in [earlier case law]. Neither [...] awards provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.”²⁷⁶

²⁷³ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 408.

²⁷⁴ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award 30 July 2010, para 175. The same approach was followed in a similar case; *Suez and Inter.Agua v Argentine Republic*, ICSID Case No. ARB/03/17, Award of 30 July 2010, para 169.

²⁷⁵ Article 5(1) of the France-Argentina BIT stated: “Investments made by investors of one Contracting Party shall be *fully and completely protected and safeguarded* in the territory” (emphasis added).

²⁷⁶ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award 30 July 2010, para 177.

Therefore, a closer look of a provision's text often shows that a presumed understanding of the concepts of protection and security is not as clear as one might think before an assessment of a provision's substantive meaning is conducted.

4.3.2 Object and purpose

According to Article 31 of the VCLT the object and purpose of a treaty is to be taken into account during the process of interpretation.²⁷⁷ The preambles of BITs usually do not include a provision of the full protection and security standard as such. However, almost all preambles researched for this thesis state the objective to be achieved with the promulgation of the treaty: the promotion and protection of investments. The US-Argentina BIT includes the following provision in its preamble:

“Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both states.”²⁷⁸

Given the open formulations of the full protection and security standard in various BITs, one would think that tribunals would refer to the object and purpose of the relevant treaty, not least because all BITs include the world protection in their title and almost always in their preamble. However, reference to the objective and purpose in a treaty's preamble is not as common within the context of the full protection and security standard as one might expect.

This lack of reference to the object and purpose of the relevant BIT is in stark contrast to the other most common standard of international investment law – the standard of fair and equitable treatment. Arbitral tribunals repeatedly refer to the object and purpose of the relevant BIT when addressing that standard and its substantive elements.²⁷⁹

²⁷⁷ See Chapter 4.2.1.

²⁷⁸ The US-Argentina BIT goes on to include the standard by prescribing in Article 2(2) that investors are to enjoy “protection and constant security” in the territory of the other party.

²⁷⁹ See e.g. *Lander v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, para 292, *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 156, *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para 298, *National Grid Plc. v Argentine Republic*, UNCITRAL Award, 3 November 2008, para 170, *Suez and InterAgua v Argentine Republic*, ICSID Case No. ARB/03/17, Award of 30 July 2010, paras 194-201, *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, paras 211-220 and *Oostergetel v Slovak Republic*, UNCITRAL Arbitration, Award 23 April 2012, paras 228-230.

In *AAPL v Sri Lanka*, the investor emphasized that the words “enjoy” and “full” in the treaty based standard had substituted the due diligence obligation of general international law with “strict liability” principle to which the host state was subjected to. The tribunal did not concur *inter alia* with reference to the object and purpose of the relevant BIT:

“According to Rule (C) [...], proper interpretation has to take into account the realization of the Treaty’s *general spirit and objectives*, which is clearly in the present case the encouragement of investments through securing an adequate environment of legal protection. But, in the absence of travaux préparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by the previous treaties, and to establish a “strict liability” in favour of the foreign investor as one of the *objectives of their treaty protection*.”²⁸⁰ (emphasis added)

The specific relationship established between the full protection and security standard and the fair and equitable treatment standard in various treaties has at times had the effect that the full protection and security standard is interpreted within the context of a treaty’s object and purpose. In *Vivendi v Argentina*, the two standards were connected in such a way in the France-Argentina BIT that the full protection and security standard was to be considered a part of the principle of fair and equitable treatment. The tribunal took particular note of the treaty’s preamble:

“...the Tribunal notes the parties’ wish, *as stated in the preamble*, for the Treaty to create favourable conditions for French investment in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development.”²⁸¹ (emphasis added)

It then went on to conclude that the full protection and security standard could not be limited to physical security alone.

4.3.3 Contextual interpretation

Article 31 of the Vienna Convention of the Law of Treaties clearly indicates that the concept of “context” plays an important role during the process of interpretation.²⁸² The concept is included in the first three paragraphs of Article 31. However, it is

²⁸⁰ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 51.

²⁸¹ *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award 20 August 2007, para 7.4.4.

²⁸² Article 31 of the Vienna Convention on the Law of Treaties is reproduced in Chapter 4.2.1.

important to note that it serves different roles in these three paragraphs.²⁸³ Tribunals have determined the meaning of the full protection and security standard with reference to various provisions of the same BIT.²⁸⁴ When interpreting the fair and equitable treatment standard and the full protection and security standard, the tribunal in *Middle Eastern Cement v Egypt* took into account other provision of the BIT relevant to the case, most notably provisions dealing with government actions “tantamount to expropriation” and the “due process of law”. The respondent was found to have violated the BIT as it had not informed the investor that part of his investment was to be auctioned off.²⁸⁵ In *Saluka v Argentina*, the tribunal took note that the full protection and security standard was linked to the fair and equitable treatment standard and was to provide protection for investments which were defined broadly. That context led to a higher level of protection:

“Given that these terms are closely associated with fair and equitable treatment, which is not limited to such physical situations, and *in the context of* the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets – physical assets – when it was not restricted in that fashion by the Contracting Parties.”²⁸⁶ (emphasis added)

Investment instruments often include references to the full protection and security standard in different parts of the body of the treaty. A case in point is the Germany-Venezuela BIT that includes a stand-alone formulation of the standard in Article 2 dealing with protection of investments:

“This Agreement shall apply to investments of nationals or companies of either Contracting Party that have been made in the territory of the other Contracting Party in accordance with its laws. The investments shall enjoy full protection under this Treaty.”²⁸⁷

In addition, the same BIT also includes another formulation in Article 4 which essentially concerns expropriation:

²⁸³ See A. Aust, *Modern Treaty Law and Practice*, 2nd ed., CUP (2007), p. 234, for the logical structure of Article 31 of the Vienna Convention of the Law of Treaties.

²⁸⁴ Similar provisions in other BITs can also be of relevance if an investment standard prescribes that the treatment of an investor should not be less favourable than the treatment accorded by a Contracting Party to nationals of third states. See *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 54.

²⁸⁵ *Middle East Cement Shipping and Handling Co. C.A. v Egypt*, ICSID Case No. ARB/99/6, Award 12 April 2002, para 143.

²⁸⁶ *National Grid Plc. v Argentine Republic*, UNCITRAL Award, 3 November 2008, para 187.

²⁸⁷ Article 2(2) of the Germany-Venezuela BIT prescribes in the original version: “Dieser Vertrag findet Anwendung auf Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei, die im Hoheitsgebiet der anderen Vertragspartei gemäß deren Gesetzgebung vorgenommen worden sind. Die Kapitalanlagen genießen vollen Schutz dieses Vertrags”.

“Investments by nationals or companies of one of the Contracting Parties shall enjoy in the territory of the other Contracting Party full legal protection and security.”²⁸⁸

The repeated inclusion of the full protection and security standard in different contexts could affect its interpretation in practice, as it seems to indicate that a higher level of protection should be provided for in different circumstances. Any other conclusion would be contradictory – why repeat the full protection and security standard in an article, whose substance regulates a state’s right to expropriate, if it is to have the same meaning as the general formulation of the standard. An interpretation that deprives a treaty provision of any meaning seems an unlikely proposition.²⁸⁹

Numerous BITs include clauses that deal with revolutionary forces, mob violence, civil disturbance, etc. These clauses prescribe how an investor should be treated in the event that he suffers damage caused during such circumstances. An example of such a provision is the Italy-Egypt BIT. Article 4, which deals with “Compensation for Damage or Loss”, states:

“(1) Investments by nationals or companies of either Contracting party shall enjoy full protection in the territory of the other Contracting Party.

(2) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, other armed conflict, or to other incidents considered as such by the international law [sic], shall be accorded treatment not less favourable by such other Contracting Party than that Party accords to its own nationals or companies, as regards indemnification or compensation.

(3) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in the present Article.”²⁹⁰

Here, Article 4(2) does not provide for that the investor should be compensated, but only that he should not be discriminated against, if nationals of the host state or nationals of third states are compensated. However, some BITs go even further and provide for a right to compensation if the investment is taken over by the host state’s

²⁸⁸ Article 4(1) of the Germany-Venezuela BIT prescribes in the original version: “Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genießen im Hoheitsgebiet der anderen Vertragspartei vollen rechtlichen Schutz und Sicherheit”.

²⁸⁹ Other examples can be found where scholars have contemplated whether one treaty provision should influence the interpretation of another provision, e.g. whether the fair and equitable treatment standard should be considered a different obligation from the full protection and security standard. See C. Schreuer, ‘Introduction: Interrelationship of Standards’, in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 4.

²⁹⁰ See e.g. Article 5 of the Italy-Egypt BIT and *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 539.

armed forces. The UK-Sri Lanka BIT includes a similar provision to Article 4(2) of the Egypt-Italy BIT, but then prescribes the following:

“Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from

- (a) requisitioning of their property by its forces or authorities, or
- (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation [...].”²⁹¹

The effect of this provision is that an investor does not need to prove that the state has acted unlawfully, only that he has suffered damage due to the actions of the state listed in the relevant provision.²⁹² Here, the context of individual parts of a BIT, in which the full protection and security standard can be found, needs to be established following a substantive assessment in order to determine which part is applicable to the dispute at hand. This becomes topical, in particular, in cases where the BIT envisages different situations under which the full protection and security standard can be invoked, such as during an armed conflict, revolution, etc. If the investor is unable to establish that the investment is damaged during such a scenario, the general formulation of the standard should be applied.

The context of individual provisions has become topical in a number of cases. In *AAPL v Sri Lanka*, the tribunal was faced with Article 2(2) providing for a general formulation of the full protection and security standard and Article 4(2) mentioned above. The tribunal interpreted the two articles in their context:

“Moreover, both Rules (D) and (E) [interpretation rules emphasizing “integral context” and “principle of effectiveness”] confirm the Tribunal’s opinion, as Article 2.(2) should not be taken separately out of the Treaty’s global context. [...] The Claimant’s contention that Article 2.(2) adopted a standard of “strict liability” would lead logically to the inevitable conclusion that Article 4 in its entirety becomes superfluous, in the sense that according to the Claimant’s interpretation the Parties were not serious in adding their Treaty two provisions which are not susceptible of getting any application in practice. Such an interpretation has to be rejected in application of Rule (E) [interpretation rule emphasizing the “principle of effectiveness”] which requires that Article 2.(2) be interpreted in a manner that does not deprive Article 4 from having any meaning or scope of applicability.”²⁹³

²⁹¹ See Article 4(2) of the UK-Sri Lanka BIT.

²⁹² See S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law (2009), p. 25.

²⁹³ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 52.

Having established that the contextual difference between the two articles, the tribunal noted that in order to apply Article 4, the investor was required to prove that the damage had occurred in a way that the provision described. Here, an investor, which based its claims on this provision, would bear a “heavy burden of proof”.²⁹⁴

This issue also became topical in another case, *LESI et al v Algeria*, which dealt with severe security issues that threatened the investment. The relevant BIT included two formulations of the standard, one general in nature and another specific to damage caused in war and during revolutionary times:

“Investments made by nationals or legal persons of a Contracting State, shall enjoy in the territory of the other Contracting State, protection and constant security, fully and completely, excluding any unreasonable or discriminatory measures that could hinder, in law or in fact, their management, maintenance, use, possession, processing, or liquidation subject to measures necessary to maintain public order.”²⁹⁵

“Nationals or legal persons of a Contracting State whose investments suffer losses owing to war or other armed conflict, revolution, state of national emergency or revolt occurring in the territory of the other Contracting State, benefit, from the latter, treatment no less favorable than that accorded to its own nationals or legal persons or to those of the most favored nation.”²⁹⁶

The tribunal argued that it could not employ both articles cumulatively, but understood the latter article to be an exception to the general principle of full protection and security – a fact that should lead to a restrictive interpretation.²⁹⁷ The tribunal then entered into an assessment whether the respondent had undertaken measures to ensure the full protection and security of the investor and his investment. The tribunal noted that the parties to the dispute were in agreement that fighting had taken place between government forces and terrorism groups that

²⁹⁴ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) paras 57-64.

²⁹⁵ Article 4.1 of the Algeria-Italy BIT prescribes in the original version: “Les investissements effectués par des nationaux ou personnes morales de l’un des Etats contractants, bénéficient sur le territoire de l’autre Etat contractant, d’une protection et d’une sécurité constantes, pleines et entières, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en fait, leur gestion, leur entretien, leur utilisation, leur jouissance, leur transformation, ou leur liquidation sous réserve des mesures nécessaires au maintien de l’ordre public.” See *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 173.

²⁹⁶ Article 4.5 of the Algeria-Italy BIT prescribes in the original version: “Les nationaux ou personnes morales de l’un des Etats contractants dont les investissements auront subi des pertes dues à la guerre ou à tout autre conflit armé, révolution, état d’urgence nationale ou révolte survenus sur le territoire de l’autre Etat contractant, bénéficient, de la part de ce dernier, d’un traitement non moins favorable que celui accordé à ses propres nationaux ou personnes morales ou à ceux de la nation la plus favorisée.” See *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 173.

²⁹⁷ *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, paras 174-175.

affected the investment and that the disagreement concerned whether the security measures undertaken by the respondent had been reasonable and not less favourable than that accorded to the respondent's own nationals or nationals of third states. The tribunal described the various security measures undertaken by the respondent – these measures included meetings with local authorities to discuss security issues, providing for the services of a private security company to increase security, allocation of army personnel to deal with security issues and other support provided for by the host state's army. Having compared these measures to the treatment accorded to nationals in general, the tribunal then concluded:

“Given the prevailing security situation after the conclusion of the Agreement the Algerian state, Article 4.5 of the Agreement - *lex specialis* - is applicable. The Defendant, having taken several security measures to provide protection to the Group, has fulfilled its obligation by according the investor protection not less favorable than that accorded to its own nationals. Section 4.5 of the Agreement is not violated.”²⁹⁸

The question arises why BITs include provisions of this nature – provisions that only require that damage be caused by the state in question under certain circumstances. According to UNCTAD there seem to be two principal reasons. First, the organization argues that customary international law does not state that property destruction caused in military action should be compensated – such provisions are meant to deal with this vacuum of customary international law. Second, the organization notes that the rationale for clauses addressing war and civil disturbance is that these are exceptional situations that are often excluded from investment insurance agreements.²⁹⁹

4.3.4 Can the intention of the parties be ascertained?

The intention of the parties to a treaty is not as such included in Articles 31 and 32 of the Vienna Convention.³⁰⁰ Despite this fact, tribunals inquire or refer to various instruments, e.g. other treaties made by a party or transmittal notes used by the parties to ratify the treaty, during the process of interpretation. In doing so, a tribunal seeks to ascertain the meaning of various concepts included in a treaty.

Needless to say, the starting point of any tribunal seeking the intention of parties to a treaty is the treaty itself. In *AAPL v Sri Lanka*, the tribunal was faced with contradictory arguments from the parties to the dispute as to the level of protection

²⁹⁸ *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 182.

²⁹⁹ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, United Nations (2007), p. 52.

³⁰⁰ Articles 31 and 32 of the Vienna Convention on the Law of Treaties are reproduced in Chapter 4.2.1.

provided for by the US-Sri Lanka BIT. The tribunal emphasized the principle of due diligence of customary international law when interpreting the treaty:

“In the opinion of the present Arbitral Tribunal, the addition of words like “constant” or “full” to strengthen the required standard of “protection and security” could justifiably indicate the *Parties’ intention* to require within their treaty relationship a standard of “due diligence” higher than the “minimum standard” of general international law. But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words “constant” or “full” are by themselves not sufficient to establish that the *Parties intended* to transform their mutual obligation into a “strict liability”.³⁰¹ [emphasis added]

The intention of the parties to a treaty has also become topical within the context of whether the protection provided for in an investment agreement was limited to physical protection or not. One of the core arguments for this conclusion has been the fact that the formulation of the BIT does not include the word ‘physical’. This was the case in *Vivendi v Argentina* that concerned a concession agreement pertaining to a water and sewage system. The tribunal was faced with a particular formulation of the full protection and security standard, namely that investments were to enjoy “...protection and full security in accordance with the principle of fair and equitable treatment.” It started by interpreting the fair and equitable treatment standard within the context of the BITs’ object and purpose. Having noted that the conviction of the parties to the treaty had been to protect and promote investment, the tribunal went on to conclude that the full protection and security standard was to be interpreted as to include protection beyond physical security alone – the parties’ intention to the contrary could not be found in the text of the treaty:

“As to these competing positions, the Tribunal notes that the text of Article 5(1) does not limit the obligation to providing reasonable protection and security from “physical interference”, as Respondent argues. If the parties to the BIT had *intended* to limit the obligation to “physical interferences”, they would could have done so by including words to that effect in the section.”³⁰² [emphasis added]

Article 32 of the Vienna Convention on the Law of Treaties states that recourse may be had to the supplementary means of interpretation. However, the article only includes two examples of what instruments might be of help in that process, namely preparatory work of the treaty and the circumstances of the treaty’s conclusion.

³⁰¹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 50.

³⁰² *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award 20 August 2007, para 7.4.15.

Tribunals have reverted to the *travaux préparatoires* of a treaty in order to ascertain the intention of the parties to the treaty. However, that approach is often of limited use due to the fact that the *travaux préparatoires* either does not exist or is not accessible, in particular when BITs are concerned.³⁰³ States that are in the process of negotiating a BIT usually do not negotiate every provision between themselves, but rely on model BIT templates. Preparatory work of the treaty are often not accessible as a result. This scenario prompted Professor Wälde to argue with regard to the use of the *travaux*:

“What these features do is to place a question mark over the use of *travaux* under Article 32 VCLT, but also over too much reliance on established interpretation maxims such as ‘*e contrario*’ or the principle of effectiveness of each element of the text. These assume a degree of perfection and information with the drafters that did not exist.”³⁰⁴

This has not, however, lead to a situation whereby tribunals are reluctant to identify various instruments, including those that are produced in order to ratify these instruments, for the purpose of treaty interpretation. In the *Mondev case*, the tribunal emphasized that transmittal letters of parties to the treaty in question during the process of ratification could provide information about a state’s position towards the content of a treaty:

“It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law. Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*.”³⁰⁵

³⁰³ Multilateral treaties, such as NAFTA and ICSID, provide for exceptions here. In 2004, the NAFTA Free Trade Commission released the negotiating history of Chapter 11 of NAFTA. In addition, ICSID’s negotiating history is available in great detail and at times referred to by ICSID tribunals. See C. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3(2) *Transnational Dispute Management* (2006), p. 9-10 and T.W. Wälde, ‘Interpreting Investment Treaties’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 732 and 777-779.

³⁰⁴ T.W. Wälde, ‘Interpreting Investment Treaties’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 750.

³⁰⁵ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 111.

The tribunal then took into account Canada's Statement on Implementation of NAFTA and transmittal notes, which accompanied various BITs when they were submitted to the United States Senate.³⁰⁶ The tribunal also analyzed similar language in transmittal notes that followed the US-Ecuador and US-Albania BITs in order to substantiate the US official position on the relationship between the substantive standards of fair and equitable treatment and full protection and security and the minimum standard of customary international law.³⁰⁷

Interpretative notes issued by the parties to the relevant treaty can play a role in ascertaining the intention of the parties to the treaty. In the *CME case*, the parties to the Dutch-Czech BIT met following the publication of an award which declared that the Czech Republic had violated the Dutch-Czech BIT. The parties to the treaty issued a "Common Position" that included an understanding on various issues related to the legal dispute. Subsequently, the Czech Republic argued that the tribunal should take the "Common Position" into account during the quantum phase of the arbitral proceedings. The tribunal did not concur as it could not find any foundation for the Common Position in the Dutch-Czech BIT itself.³⁰⁸ In contrast, the interpretative note issued by Free Trade Commission established according to NAFTA in order to determine further the substantive meaning of the fair and equitable treatment standard and the full protection and security standard in Article 1105(1) had more influence on later proceedings. The tribunal in the *ADF case* stated the following with regard to this instrument and its effect:

"We begin by noting that the Free Trade Commission (FTC) created under Article 2001 consists of cabinet-level representatives of the NAFTA Parties and its mandate includes the "[resolution of] disputes that may arise regarding [the] interpretation or application of [NAFTA]." An interpretation of a NAFTA provision rendered by the FTC is under Article 1132(2) binding on this and any other Chapter 11 Tribunal."³⁰⁹

³⁰⁶ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 111.

³⁰⁷ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 112.

³⁰⁸ *CME v Czech Republic*, UNCITRAL Arbitration, Final Award of 14 March 2003, paras 400 and 437.

³⁰⁹ *ADF Group Inc. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Reports 470, 527, para 176. Other tribunals have considered the FTC Interpretation Note as binding; see e.g. *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 100 et seq and *Loewen Group et al v United States of America*, Case No. ARB(AF)/98/3, para 125.

It is safe to say that interpretative declarations of this sort have a mixed record in influencing arbitral tribunals established following an award that is considered wrong on substance by the parties to the treaty. In addition, it must be somewhat special, as a matter of policy, that the parties to a treaty, which has the stated purpose to provide for investment protection, try *ex post facto* to influence the arbitral proceedings that are taking place. While there is nothing that prevents states that are parties to a treaty to issue such interpretative notes, they can be considered questionable when viewed through the prism of the principles of good faith, equality of arms and legitimate expectations.³¹⁰

4.4 Treaty interpretation and customary international law

Any research on the interpretation of the full protection and security standard reveals that a number of tribunals include a limited analysis on the treaty-based standard, including the inherent meaning of the concepts of “protection” and “security”. Instead, a tribunal’s analysis is often based on customary international law, in particular within the context of physical protection and security. Customary international law seems, therefore, to provide tribunals with a tool to clarify the concepts of “protection” and “security” as understood in customary international law. This parallel discussion of investment tribunals pertaining to the treaty-based standard *vis-à-vis* the customary international law standard often becomes more a question of application of the “standard” rather than a question of treaty interpretation according to Articles 31-33 of the Vienna Convention.

The tribunal in *AMT v Zaire* was faced with a treaty-based standard that included the standard formulation of “full protection and security” but then prescribed that the investment should not be accorded treatment less than required by international law. The tribunal began its assessment by reciting the treaty-based standard but directly thereafter emphasized the importance of customary international law:

“These treatments of protection and security of investments required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than required by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.”³¹¹

³¹⁰ T.W. Wälde, ‘Interpreting Investment Treaties’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 765-767.

³¹¹ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997), para 6.06.

In *Noble Ventures v Romania* the tribunal was faced with a similar formulation of the standard that included a reference to international law. The tribunal stated:

“With regard to the Claimant’s argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the “*Investment shall ... enjoy full protection and security*”, the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens.”³¹²

Similarly, the tribunal in *El Paso v Argentina* emphasized that despite the treaty-based standard, the fundamental obligation was one of prevention and repression according to customary international law. Moreover, the concept of due diligence played a considerable role in determining the extent of those obligations:

“The BIT requires that Argentina provide “full protection and security” to El Paso’s investment. The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law [...] A well-established aspect of the international standard of treatment is that States must use “due diligence” to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least “due diligence” to punish such injuries.”³¹³

However, even in cases where there is no reference to international law, a tribunal will seek guidance in customary international law when interpreting the treaty-based standard. In *AAPL v Sri Lanka*, the BIT to which the legal dispute was subjected to included a stand-alone formulation of the full protection and security standard. Still, the tribunal focused heavily on the concept of due diligence as established by customary international law.³¹⁴ Similarly, the tribunal in *Wena v Egypt* recited the treaty-based standard, which did not include reference to international law, and then focused its attention to the respondent’s obligation of vigilance – an obligation of customary international law.³¹⁵

Even though some tribunals emphasize the “historical development” or the “traditional interpretation” of the full protection and security standard – elements refer to how the part of the standard that rests upon customary international law – their conclusions are reached under the rubric of interpretation. The tribunal in *Suez and InterAgua v Argentina* was faced with an expansive formulation that prescribed that

³¹² *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, para 164.

³¹³ *El Paso v Argentina*, ICSID Case No. ARB/03/15, Award 31 October 2011, paras 522-523.

³¹⁴ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 67.

³¹⁵ *Wena Hotels Ltd. v Republic of Egypt*, Award, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 84-85.

the investment should be “fully and completely protected and safeguarded”. The tribunal argued in length that a difference was to be made between the treaty-based standard and the due diligence obligation of customary international law:

“Having considered the specific language of both of the applicable BITs and the *historical development of the “full protection and security” standard under international law*, as well as the recent jurisprudence, this Tribunal is not persuaded that it needs to depart from the *traditional interpretation given to this term*. Consequently, the Tribunal concludes that under the applicable BITs, Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina’s obligations *under the relevant provisions* do not extend to encompass the maintenance of a stable legal and commercial environment. As a result, in the instant case Argentina has not violated its obligations *under the respective BIT provisions*.³¹⁶ (emphasis added)

Is a tribunal that applies treaty law, which includes a reference to international law, asked to apply customary international law as it stood when the treaty was entered into by the parties or customary international law as it stands when the dispute is adjudicated? In practice this seems a question that would not change the legal position of either party in any major way. However, that proposition is only applicable to the parts of the international minimum standard that are generally not disputed, such as that the international minimum standard provides for physical protection and security. Questions pertaining to whether customary international law includes protection of legal security, i.e. whether the intangible investments should enjoy physical protection and security or whether the minimum standard provides for protection beyond physical security in the form of legal framework, could be affected.

In the *Mondev case*, this became a topical issue, namely whether the customary international law applicable to the case was the standard that existed in 1994 or the standard as referred to by the FTC Commission in its interpretative note.³¹⁷ The tribunal noted that the parties to the dispute were in agreement that the international minimum standard by its very nature continued to evolve even after an instrument providing for investment protection had been concluded. The tribunal agreed with the parties’ understanding and argued that:

³¹⁶ *Suez and InterAgua v Argentine Republic*, ICSID Case No. ARB/03/17, Award of 30 July 2010, para 173. The discussion undertaken prior to this conclusion, in particular with regard to *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, seems to suggest that if the BIT had included the concept of “legal security”, the conclusion might have supported the notion that stability of the legal and commercial environment should have been protected.

³¹⁷ It is also conceivable within the context of BIT treaty practice that the contracting parties have entered into a new BIT. Such a scenario could lead to a situation whereby two BITs could apply to the legal dispute in question. See *Jan de Nul v Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, paras 134-135.

“...there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for “fair and equitable” treatment of, and for “full protection and security” for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.”³¹⁸

As a result, it seems logical to apply the current customary international law standard as it stood when the legal dispute is adjudicated, not unless any other documents of legal significance indicate that a different approach should be taken.³¹⁹

In cases where there is no reference in the treaty-based standard to the international minimum standard of customary international law, it is clear that customary international law is applied as a separate legal basis to the dispute in question. In many such cases tribunals apply the customary principle of due diligence when determining the state obligation to provide protection – such an application of the due diligence principle often includes a historical discussion that takes into account earlier jurisprudence, in particular derived from various claims commissions.³²⁰ One of the more clear examples of this scenario is the *Parkerings v Lithuania* award. The formulation of the full protection and security standard was very limited. The Norway-Lithuania BIT prescribed that each contracting party should accord to investments “equitable and reasonable treatment and protection.” The tribunal noted that despite the fact that the instrument only mentioned protection, both parties had referred to awards that dealt with full protection and security. The tribunal then referred to the criteria of due diligence as defined by customary international law:

³¹⁸ *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 125.

³¹⁹ See, for comparison, O. Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EJIL 301 (2008), p. 311-312.

³²⁰ See e.g. *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 40.

“A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual.”³²¹

Another example is the award in *Pantechniki v Albania*. The umpire in the case began his assessment by reciting the standalone formulation of the full protection and security standard in the Greece-Albania BIT, but then entered into an elaborate discussion of the due diligence principle of customary international law.³²²

4.5 Conclusion

This chapter set out to discuss the way in which the full protection and security standard is interpreted. Here, the research of arbitral awards showed that the point of departure for investment tribunals is Article 31(1) of the Vienna Convention. That entails that treaty law – most notably the relevant BIT and the substantive elements of Article 31-32 of the Vienna Convention on the Law of Treaties – is of particular importance when determining the substantive content of a state’s obligation to provide for protection and security.

Arbitral awards also revealed that the textual interpretation of the substantive elements of the standard plays the most important role in treaty interpretation. In contrast, the object and purpose of the relevant treaty plays a lesser role, not unless the full protection and security standard is linked specifically to the fair and equitable treatment standard. Moreover, it is important to note that contextual interpretation becomes particularly important in individual cases when more than one formulation of the standard is included in a treaty or when there is a specific provision dealing with damage caused in particular circumstances, such as during war or armed conflict. Furthermore, examples of awards can be found where the intent of the parties to the relevant treaty has played a role. While the text of the treaty itself is usually considered to most accurately describe the joint intent of the contracting parties, other instruments have also been employed by tribunals in order to determine further the meaning of individual concepts of the standard. These instruments include interpretative statements issued by the contracting parties, documents used during the ratification process of the relevant BIT and similar provisions of other international instruments.

³²¹ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para 355.

³²² *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 71 and 76 et seq.

Arbitral awards revealed at the same time that while arbitral tribunals employ traditional methods of interpretation, which are based on the Vienna Convention on the Law of Treaties, they at times seek guidance in customary international law, or, in other words, the “historical application of the standard”. Tribunals have in that way approached legal disputes by entering into a normative discussion on the treaty-based elements of the standard followed by an approach that relies on the facts of the case at hand within the context of other sources of law, such as customary international law.

The various approaches undertaken by tribunals have, despite their non-uniform nature, clarified the way in which arbitral tribunals address the substantive elements of the full protection and security standard and, more importantly, revealed that the approach taken by tribunals does not always focus exclusively on interpretation. These approaches can be summarized in the following way:

- (1) An investment tribunal will apply Articles 31-32 of the Vienna Convention on the Law of Treaties when interpreting the substantive elements of the relevant BIT in individual cases (*AAPL v Sri Lanka* and *Siemens v Argentina* and *GEMPLUS and TALSUD v Mexico*);
- (2) Investment tribunals will focus on the “ordinary meaning” (*AAPL v Sri Lanka*, *Total v Argentina* and *Axurix v Argentina*), “object and purpose” (*Vivendi v Argentina*), contextual interpretation (*Middle Eastern Cement v Egypt*, *Saluka v Argentina* and *LESI et al v Algeria*) and the “intention of the parties” (*AAPL v Sri Lanka* and *Vivendi v Argentina*) when interpreting the treaty-based standard of full protection and security.
- (3) When the full protection and security standard appears in various forms, or other specific provisions related to the standard, in the same BIT, an arbitral tribunal will employ the specific standard, if applicable and if the investor has fulfilled the necessary burden of proof in order to substantiate his claims. If the specific standard is not relevant, the tribunal will apply the general standard of protection and security (*AAPL v Sri Lanka* and *LESI et al v Algeria*);
- (4) The interpretation of the full protection and security standard is frequently affected by the customary international law – this leads to the influence of customary international law on treaty law (*AAPL v Sri Lanka*) or that customary international law is applied as a independent source of law (*AMT v Zaire*, *Wena Hotels v Egypt* and *El Paso v Argentina*), in particular with reference to the “historical interpretation of the standard” (*Suez and Vivendi et al v Argentina* and *Suez and InterAgua v Argentina*).

In summary, the conclusion must be that arbitral tribunals adhere to the Vienna Convention on the Law of Treaties when interpreting the standard. However, due to the general nature of the standard's substantive elements, tribunals also rely considerably on customary international law – either through treaty interpretation or by applying customary international law as an independent source of law. This approach of relying on customary international law influences the process of interpretation and adds individuality to it that makes the standard more flexible when all relevant facts are taken into account – as a result, general rules of interpretation do not always render the same result, even in cases where factual circumstances are similar.

5. THE CONTENT OF THE STANDARD OF FULL PROTECTION AND SECURITY

5.1 Introduction

After having discussed the interpretation of the full protection and security standard, it is appropriate to enter into a discussion on other elements that play a considerable role in its application in individual cases. The standard of full protection and security is, by definition, a standard. That fact has considerable effect on its content. A standard must, as a concept, be differentiated from a rule or a principle of law. This has been accepted both in theory and practice in national jurisdictions from which the concept stems.³²³

The standard's substantive content needs to be addressed independently and within the context of its various sources. It is here where other obligations become relevant, most notably the obligation of due diligence, which enables a tribunal that has established the objective meaning of the standard's substantive elements to explore the subjective element of the standard within the context of the facts of the case before it. However, while the due diligence obligation provides information about how far the standard should be applied in individual cases, it also raises questions as to how far the substantive elements of the standard can be stretched in practice. This customary obligation of due diligence has wide-ranging consequences due to its relationship with the international minimum standard. Its practical consequences become particularly clear when a state, which has not entered into a BIT covering investments in particular, contemplates to act or not to act when dealing with an investor – that state owes an obligation to an investor as an alien residing within its borders to protect him and his property as an obligation based on customary international law and general international law.

A discussion concerning the outer limits of the standard's application raises various issues concerning not only the standard's application but also the standard's connection with other standards. International law standards do not operate in isolation from one another, but are inter-linked on various levels. Thus, two or more standards can be applied depending on their various sources for the attainment of different objectives. An investor who loses an argument that his investment has been expropriated, or that actions of a state are tantamount to expropriation, is able to argue that the full protection and security standard has been violated. As noted by

³²³ G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RCADI 7 (1966), p. 67 et seq.

the International Court of Justice in the *ELSI case*, the FCN treaty in question mentioned the “most constant protection and security” but included also a reference to general international law. This reference prompted the court to argue: “The Chamber is here called upon to apply the provisions of a treaty which sets standards – in addition to the reference to general international law – which may go further in protecting nationals of the High Contracting Parties than general international law requires”.³²⁴ Thus, there is a need to address the standard’s relationship with other standards and their sources.

5.2 Conceptual issues – substantive elements of the standard

5.2.1 The concepts of protection and security prior to the evolution of the BIT

The substantive elements of the standard are protection and security. Both elements have a long history in international law and most notably as a part of the minimum standard of customary international law. Thus, the obligation to protect and secure aliens arises from customary international law.

The concepts of protection and security were first mentioned within the context of merchants travelling from one state to another. In Article 41 of the Magna Carta of 1215, merchants were entitled to “...be safe and secure in leaving and entering England, and in staying and travelling in England...”³²⁵ This protection was later extended in England by the Statute of the Staple of 1353 as foreign merchants were put under the protection of the sovereign.³²⁶ An example of a clause that provided for protection of merchants can be found in Article XVII of the Treaty of Commerce between Great Britain and Russia of 1766:

“Russian merchants in the dominions of Great-Britain, shall [...] have the same protection and justice, which, according to the laws of that kingdom, are granted to other foreign merchants, and shall be treated as the subjects of the most favoured nation.”³²⁷

³²⁴ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 111.

³²⁵ J.C. Holt, *Magna Carta*, 2nd ed., CUP (1992), p. 461.

³²⁶ This practice of affording protection to foreign merchants was, in fact, older, as it originated from the Italian city-states in the Holy Roman Empire. However, the relations between these states can hardly be considered international relations as that concept was later understood, but could be construed as having been quasi-international. See G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RCADI 7 (1966), p. 21-22.

³²⁷ See *A Collection of All the Treaties of Peace, Alliance and Commerce between Great-Britain and Other Powers from the Revolution in 1688 to the Present Time*, Vol. II (1771), p. 318-327.

Another example of a clause providing for “most complete protection and security” for merchants and traders can be found in the Treaty of Commerce between the United Kingdom and the United States of 1815. Article 1 stated *inter alia* that:

“...generally the Merchants and Traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce but subject always to the Laws and Statutes of the two countries respectively.”³²⁸

Scholarly writings up to this point had acknowledged that there was an obligation incumbent upon the state (sovereign) to provide for protection for foreign merchants. Grotius stressed that no power had the right to prevent one nation from trading with another. He acknowledged the need for sovereigns to protect not only foreign merchants, but also trade in general. He noted that for such a “security and protection” of trade the sovereign would be entitled to levy moderate and reasonable duties to counter the expenses incurred relating to the protection.³²⁹ In addition, Grotius acknowledged that when a foreigner was murdered while residing in another country, the crime committed would establish the debt of the host state:

“In this case we find that the personal liberty of subjects, which may be considered as a kind of incorporeal right, including the right of residing where they please, or doing whatever they may think proper, is made answerable for the debt of the state, who is bound to punish the criminal acts of her subjects: so that the subjects suffers constraint, till the state has discharged the debt, which it is bound to pay; and by the payment of this debt is meant the punishment of the guilty.”³³⁰

In his treatise Law of Nations, Vattel conceived a similar duty owed to aliens by the host state (sovereign) regardless of their activity or occupation. He distinguished between foreign persons that permanently lived in another country and foreign persons that visited or resided temporarily within another country. As to the former group, he argued that they were subjected to the laws of the host state and the treatment accorded to the nationals of that state. That entailed that an alien’s home state could not interfere as it had to respect the jurisdiction of the host state, including its right to charge the alien for offences allegedly committed. In the event, that such a process was unjust or justice was denied, or rules violated, the home state

³²⁸ See Convention to Regulate the Commerce between the Territories of the United States and his Britannick Majesty of 3 July 1815. The treaty is available at the following homepage: <http://avalon.law.yale.edu/19th_century/conv1816.asp>.

³²⁹ H. Grotius, *De Jure belli ac pacis*, Book II, Chapter 2, translated by A.C. Campbell, M. Walter Dunne Publisher (1901), p. 97.

³³⁰ H. Grotius, *De Jure belli ac pacis*, Book III, Chapter 2, translated by A.C. Campbell, M. Walter Dunne Publisher (1901), p. 309-310.

of that person would acquire jurisdiction to protect its subject.³³¹ With regard to the latter group, which consisted of aliens that travelled to another country for business or pleasure and stayed there only for a limited period of time, he argued:

“The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare: as soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him. Accordingly, we see that every sovereign who has given an asylum to a foreigner, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subject.”³³²

These statements are problematic due to their brevity – no substantive concepts or other elements can be found that would guide a practitioner faced with the problem of determining the scope of protection and security to a particular set of facts. It is not until the treatises’ of later writers, such as Wharton and Moore, that further details emerge supported by material that reproduces official statements of the United States with various countries.³³³ Later, Oppenheim provides commentary as to what extent the nature of the obligation that a state owes to an alien.³³⁴ The approaches taken by scholars at that time focused on the protection and security of aliens as being a matter of a state’s self-preservation and a part of international legal personality. Therefore, protection and security of aliens was described through a two-sided prism that consisted of, first, a state’s jurisdiction over individuals residing in its territory and, second, a discussion on state responsibility for acts of either governmental agencies or of private persons.³³⁵

The multitude of cases that are the subject of respected writers at the time reveal recurrent patterns as to what was protected. In short, a state would be responsible for unlawful acts of its agents and agencies, but not responsible for acts of private persons. However, injurious acts of private persons could lead to international responsibility if a state intentionally, maliciously or even negligently failed to exercise

³³¹ E. Vattel, *The Law of Nations*, Book II, Chapter 7, printed for G.G. and J. Robinson, London (1797), para 84.

³³² E. Vattel, *The Law of Nations*, Book II, Chapter 8, printed for G.G. and J. Robinson, London (1797), para 104.

³³³ See F. Wharton, *Digest of International Law*, Vol. II, Government Printing Office (1887), para 226 and J.B. Moore, *A Digest of International Law*, Vol. VI, Government Printing Office (1906), paras 1019-1020.

³³⁴ L. Oppenheim, *International Law – A treatise*, Vol. I., 2nd ed., Longmans, Green and Co (1912), paras 164-167.

³³⁵ See, for comparison, J.B. Moore, *A Digest of International Law*, Vol. IV, Government Printing Office (1887), para 537, and same author in *A Digest of International Law*, Vol. VI, Government Printing Office (1906), paras 1019-1020, and L. Oppenheim, *International Law – A treatise*, Vol. I., Longmans, Green and Co (1912), paras 317 and 164-167.

due diligence by preventing the act or pursue all necessary remedies after the act had been committed.³³⁶ This obligation was limited to an alien's person and property and generally excluded various business dealings. That led to a situation whereby agreements made with foreign governments, or contract violations of a foreign government to be more precise, generally did not fall within the purview of diplomatic protection, not unless the violation was so severe that it could be considered "a confiscatory breach of contract".³³⁷

This poses a conceptual problem when applying the "old doctrine" of protection and security to cases involving investment disputes. Taking into account the ever-widening definition of the concept of investment, as defined by a growing number of BITs and other instruments, one must exercise considerable constraint in extracting general principles from state practice of the last two centuries.

Following this caveat pertaining to the concepts of "protection" and "security", it is necessary to mention an additional concept of importance. Even though these concepts of "protection" and "security" make up for the substantive elements needed to address, they must be examined within the context of the subject matter of which they form a part, namely a "standard". It will, therefore, become necessary to investigate what the concept of a standard entails. Here, various issues are relevant to what the concept of a standard consists of and how it can be differentiated from other concepts usually applied by scholars and practitioners.

5.2.2 The concept of a standard

5.2.2.1 Standards as non-sources of law

Article 38 of the Statute of the International Court of Justice, which is generally considered to encapsulate the sources of international law, does not include the concept of a standard. It has been acknowledged by publicists that the article's three-pronged structure – which consists of treaties, custom and general principles, in addition to judicial teachings and teachings of the most highly qualified publicists – entails a description of the generally accepted sources of international law.³³⁸

It is, however, generally agreed that international law lacks, despite Article 38 and the sources mentioned therein, a constitutional machinery similar to those of nation states. This lack of structure, which would provide for tools to distinguish the

³³⁶ R. Pisillo-Mazzeschi, 'State Responsibility in International law', in R. Provost (ed.), *State Responsibility in International Law*, Ashgate/Dartmouth (2002), p. 111 et seq concerning the role of due diligence within the context of state action and actions taken by private entities.

³³⁷ J.B. Moore, *A Digest of International Law*, Vol. VI, Government Printing Office (1906), p. 722 et seq.

³³⁸ I. Brownlie, *Principles of Public International Law*, 7th ed., OUP (2008), p. 1-5.

sources formally and materially, as known in national jurisdictions, leads to a fluid state of affairs in terms of how norms are created and what constitutes international law.³³⁹ Or, as acknowledged by Simma and Verdross:

“In contrast to national law, international law does not know a *numerus clausus* in its norm creation ... Norm creation is not limited to particular kind of sources but finds itself in a state of liquid aggregation.”³⁴⁰

The result of this situation is that norm creation is a process, which includes various declarations made by states portraying their will to the subject matter at hand, by means of recognition, tolerance or by disputing certain acts or situations which have or can have an effect on norm creation over time.

While it is apparent that a standard is not a source of law, it is obvious that it is a legal concept that has considerable effect in international law. Scholars have pointed out that there must be a fundamental difference between a standard and the rules included as sources of law according to Article 38 of the Statute of the International Court of Justice. The standard, as a non-source of law, is based on rules that form a part of the sources of international law. Therein lies the different nature of the standard *vis-à-vis* other sources of law. Even though the standard is to be found within the international legal system, it is an abstraction of rules of international law.³⁴¹ So, when a standard is applied to a particular legal dispute between an investor and a state, it is not the standard that *stricto sensu* obliges the state to provide full protection and security, but the rules from which the standard is abstracted. These rules are almost always based on treaty law, but can also be established in customary international law.³⁴² Other scholars have sought to identify the concept of a standard in more concrete terms by pointing to its various functions in general. In that sense a line has to be drawn between standards depending whether they used in national jurisdictions, e.g. common law or German law, or in international law. As to the standards in the latter category, they can play a considerable role as tools of

³³⁹ G. Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’, originally published in *Symbolae Verzijl* (1958), but reprinted in M. Koskenniemi (ed.), *Sources of International Law*, Ashgate (2000), p. 65.

³⁴⁰ In the original: “Im Gegensatz zum innerstaatlichen Recht kennt das Völkerrecht keinen Numerus Clausus der Rechtserzeugungsarten [...] Die Völkerrechtserzeugung ist also nicht in bestimmten formalisierten Gestalten erstarrt, sondern befindet sich gewissermaßen noch in einem flüssigen Aggregatzustand.” Translation provided by author. See B. Simma and A. Verdross, *Universelles Völkerrecht – Theorie und Praxis*, 3rd ed., Duncker & Humblot (1984), p. 323-324.

³⁴¹ G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RCADI 7 (1966), p. 67.

³⁴² G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RCADI 7 (1966), p. 68.

interpretation, guideline or yardstick of “...reasoning for existing but open hard law rules and principles.”³⁴³ It is in this context, namely when binding and non-binding norms coincide, where standards seem to add to the traditional sources of international law.

5.2.2.2 The usage of standards in national and international law

Standards played a considerable role in various jurisdictions long before the establishment of the Westphalian system of international law. Roman law used numerous standards that are still used in national jurisdictions. Tort law has used *bonus pater familias* as a standard of behaviour in order to decide whether a person has shown culpable behaviour in particular circumstances. The principle of good faith – *negotia bonae fidei* – has been used as a standard applicable to contractual obligations. Many jurisdictions apply a multitude of standards, most notably common law systems. Common law applies various standards of care when dealing with negligence and its consequences in tort law.³⁴⁴ In their studies on the historical origins of the standard as a concept, both Roscoe Pound and Al Sanhoury argued that standards had been unknown to primitive societies and could only be found in legal systems that had obtained a certain level of development.³⁴⁵

The wide scope of the concept has influenced its structure and usage in international law and international relations. In terms of international law, the international minimum standard ranks amongst the most important standards. Historically, that concept of a standard has been used most often within the context of the international minimum standard. The objective or subjective nature of the international minimum standard has been topical ever since the breakdown of the consensus enjoyed by foreigners in the settlements of the colonial powers. The colonial powers argued for an objective standard whereas the newly independent states emphasized either its subjective application or argued against its existence. However, a strict subjective interpretation of the international minimum standard goes, by its very nature, against the international minimum standard as its purpose is to provide an alien with protection independent of the particular situation of the host

³⁴³ E. Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 EJIL (1991) 58, p. 83.

³⁴⁴ See e.g. C. v. Damme, *European Tort Law*, OUP (2006), p. 90 et seq concerning the fragmented approach to the tort of negligence in English common law and p. 222 et seq in relation to different standards of reference within the context of evaluating negligence.

³⁴⁵ See R. Pound, *The Administrative Application of Legal Standards*, 44 Annual Reports of American Bar Association, 445 (1919), p. 454-456, and A. Sanhoury, *Les restrictions contractuelles à la liberté individuelle de travail dans la jurisprudence anglaise, Contribution à l'étude comparative de la règle de droit et du standard juridique*, Marcel Giard (1925), p. 36.

country. That position was argued by the US-Mexican General Claims Commission in the *Hopkins case* which emphasized that “[t]he citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.”³⁴⁶

During the interwar periods the concept of a standard was studied considerably. A study made by Roscoe Pound on the nature of the standard in 1919 differentiated between four different norms. First, there were rules that were detailed. The rules were clearly defined and applicable to particular situations. They were common in earlier societies with less developed legal systems. Among examples of ancient codes made up by detailed rules, Pound’s study quoted Hammurabi’s law: “If a free man strike a free man, he shall pay ten shekels of silver.” Here, no legal assessment is needed, but deductive reasoning suffices to provide an answer. Thus, rules were almost always particular in nature and provided for an answer to the problem at hand. Second, there were principles, which were “...general premises for judicial and juristic reasoning, to which we turn to supply new rules, to interpret old rules, to meet new situations, to measure the scope and applications of rules and standards and reconcile them when they conflict.”³⁴⁷ An example of these principles was the principle of unjust enrichment – that one shall not unjustly enrich himself at the expense of another. Third, there are legal conceptions. These conceptions are well defined and enable lawyers to classify cases – a defined legal conception subjects a particular set of circumstances or facts or transactions to certain legal consequences. Examples of these conceptions included contract, tort, sale, etc. – building blocks of law study to categorize cases for structural purposes. Fourth, there were standards, which are defined as “...legally defined measures of conduct, to be applied by or under the direction of tribunals.” These standards would include *inter alia* the *bonus pater familias*, the standard of due care and the standard of due process of law in terms of validity of legislation *vis-à-vis* the US constitution. Thus, the standards were necessary to every particular case involving a multitude of variant factors and necessitating an assessment of reasonableness or fairness. In addition, the standards usually contained moral elements and called for common sense or moral judgment *in lieu* of deductive logic.³⁴⁸

³⁴⁶ *George W. Hopkins (USA) v United Mexican States*, IV RIAA (1926), p. 47.

³⁴⁷ R. Pound, *The Administrative Application of Legal Standards*, 44 Annual Reports of American Bar Association, 445 (1919), p. 455.

³⁴⁸ R. Pound, *The Administrative Application of Legal Standards*, 44 Annual Reports of American Bar Association, 445 (1919), p. 454.

The structure of these norms was gradual from casuistic and particular rules that could be applied logically to standards that varied in application with changes in circumstances, time and in the context to which they are applied. Despite its complex and ambiguous structure, Pound emphasized, in line with other commentators at the time, e.g. Justice Oliver Wendell Holmes Jr., that the standards were tools for assessing conduct and in doing so provided for security of an individuals' interest:

“These standards have a variable application with time and place, and contain a large moral element. Yet they are significant legal institutions. The legally defined measure of conduct, applied by or under the direction of a tribunal is as much a part of the machinery by which, organized society secures interests as the precise rules which it uses for the same purpose in other situations.”³⁴⁹

In this structure the intuition and experience of the arbitrator played a considerable role due to the moral element of the standard. However, while this approach emphasized experience, it also stressed the importance of logic as a source of reasoning. Thus, experience was not to be used exclusively, neither only deductive logic, but a mixture of both in individual cases.³⁵⁰ Here, again, references to the views of Justice Holmes concerning US tort law can be found. With regard to whether logic should dictate adjudication, Justice Holmes argued: “these judgments depend on intuitions too subtle for any articulate major premise.”³⁵¹

International lawyers that advocated for a tort-law approach to state action encountered a problem on the international plane with regard to how such an approach should be applied to states. The logic was based on an argument of similarities. A distinction was made between what kind of situations and what interest were to be protected. The reason for why rules applied to property, but standards to individuals, was because of similarities that could be drawn from different situations. While rights of states over some interests, e.g. their territorial waters or immunity of government owned property, necessitated clear rules, as was the case with property in national law, the conduct of a nation and its actions, similar to individuals in national law, should be subjected to individualized standards. Thus,

³⁴⁹ See R. Pound, *Juristic Science and Law*, 31 *Harvard Law Review* (1917-1918) 1046, p. 1061. See also the views of Oliver Wendell Holmes Jr. In this book *The Common Law* Justice Holmes, who served as an associate judge on the US Supreme Court from 1902-1932, advocated for objective and external standards in US law, most notably the reasonable man standard of US tort law. See O.W. Holmes, *The Common Law*, John Harvard Library (2009), Lecture 3, p. 101-102.

³⁵⁰ See R. Pound, *The Administrative Application of Legal Standards*, 44 *Annual Reports of American Bar Association*, 445 (1919), p. 460.

³⁵¹ See R. Pound, *The Administrative Application of Legal Standards*, 44 *Annual Reports of American Bar Association*, 445 (1919), p. 457.

action of a “civilized nation” was to be subjected to standards applied with some degree of individualization with consideration of the circumstances of the case.³⁵²

In addition to scholarly analysis of the interwar period, lawyers frequently referred to standards in order to protect the life, freedom and property of individuals under the rubric of physical protection of aliens in a host state. Thus, the concept of an international standard was repeatedly used in numerous cases. As discussed earlier, the US-Mexican Claims Commission referred to “international standards” in the *Neer case*. The commission did not limit itself to that one case, but continued to refer to international standards in other subsequent cases, such as the *Faulkner case*, *Roberts case*, *Swinney case*, *Teodoro case*, *Venable case*, *Chattin case*, *Dillon case*, *Harkerader case*, and the *Mecham case*.³⁵³

Vast numbers of treaties were concluded after the end of the Second World War, a development which one might think would lead to the diminished role of the “standard” in international law. However, that did not happen and the “standard” continued to be used as a tool for either determining the substantive elements of international law or as a tool for developing coherence amongst nations in various fields of international law, such as international labour law, international economic law and human rights law.³⁵⁴ A case in point is the International Labour Organization that continued to base its work on a standard setting procedure as it had done since its inception. With the increase of economic relations and transactions amongst nations, standards increased in importance and were studied.³⁵⁵ In addition, the development of international human rights law made use of a standard-based language. A case in point is the Preamble of the Universal Declaration of Human Rights which states that:

³⁵² See *Notes concerning Standards in International Law*, 34 Harvard Law Review 768 (1920-1921), p. 776-779.

³⁵³ *Walter H. Faulkner (USA) v United Mexican States*, IV RIAA (1926), p. 71, *Harry Roberts (USA) v United Mexican States*, IV RIAA (1926), p. 80, *J.W. and N.L. Swinney (USA) v United Mexican States*, IV RIAA (1926), p. 100, *Teodoro García and M.A. Garza (United Mexican States) v United States of America*, IV RIAA (1926), p. 120-121, *H.G. Venable (USA) v United Mexican States*, IV RIAA (1927), p. 228-229, *B.E. Chattin (USA) v United Mexican States*, IV RIAA (1927), p. 295, *Daniel Dillon (USA) v United Mexican States*, IV RIAA (1928), p. 369, *A.L. Harkerader (USA) v United Mexican States*, IV RIAA (1928), p. 372-373 and *Laura A. Mecham and Lucian Mecham Jr. (USA) v United Mexican States*, IV RIAA (1929), p. 443.

³⁵⁴ See E. Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 EJIL 58 (1991), p. 70.

³⁵⁵ See G. Schwarzenberger, *The Principles and Standards of International Law*, 117 RCADI 7 (1966), 7-98.

“...the General Assembly proclaims this Universal Declaration of Human Rights as a *common standard* of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind...”³⁵⁶ (emphasis added)

While this document is not a binding instrument *stricto sensu*, the two other major human rights instruments stipulated under the auspices of the United Nations, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966, are binding upon those that have ratified them.³⁵⁷ As a consequence, the rights of aliens and their property were subjected to various international human rights regimes and the international minimum standard pertaining to the protection of foreigners and their property.³⁵⁸

The most recent document describing the tenets of state responsibility, the Draft Articles of State Responsibility prepared by the International Law Commission, has acknowledged the importance of the concept of a “standard”. The approach of the Draft Articles, which is built on the dichotomy of primary and secondary rules of state responsibility, does not provide for the principles often necessary to determine the substantive obligations of states in international law. Therefore, the Draft Articles emphasize the importance of the standard, in particular when determining the objective or subjective nature of the responsibility of states:

“Whether the responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.”³⁵⁹

Thus, the standard, as a concept, still enjoys an important role in international law. The question arises whether earlier doctrine is still applicable to present problems of international law, in particular international investment law.

³⁵⁶ UN GA resolution 217 A (III) of 10 December 1948.

³⁵⁷ M. Nowak, *Introduction to the International Human Rights Regime*, Martinus Nijhoff (2003), p. 75.

³⁵⁸ See First Report of F.V. Garcia-Amador, Special Rapporteur on International Responsibility, Yearbook of the International Law Commission 1956, Vol. II, UN Doc. No. A/CN.4/96, p. 199, and Second Report of F.V. Garcia-Amador, Special Rapporteur on International Responsibility, Yearbook of the International Law Commission 1957, Vol. II, UN Doc. No. A/CN.4/106, p. 121.

³⁵⁹ J. Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, CUP (2005), p. 82.

5.2.2.3 Does past doctrine apply to present problems?

A caveat seems to be appropriate when answering whether earlier doctrine and arbitral awards can still be applied when addressing present problems of international investment law.

The strict categorization of rules, principles, legal concepts and standard, as discussed by Pound, has not been supported by later scholars or tribunals. In contrast, Brownlie warned about the “inappropriateness of rigid categorization of the sources”.³⁶⁰ In addition, both the Permanent Court of Justice and the International Court of Justice have argued that even though same concepts might appear in different sources, they are in essence the same:

“the association of the terms “rules” and “principles” is no more than the use of a dual expression to convey one and the same idea, since in this context “principles” clearly means principles of law, that is, it also included rules of international law in whose case the use of the term “principles” may be justified because of their more general and more fundamental character.”³⁶¹

Moreover, it must be said that the extensive discussion of earlier scholars emphasizing the intuition and expertise of the judge seems alien to modern doctrine. It is true that arbitrators and judges must rely, in practice, on the experience and expertise which they have accumulated over time when adjudicating disputes. However, established methods of interpretation constitute the tools to be used in the process of adjudication. That includes using the various substantive elements of the standard, which might vary taking into account treaty law, customary law or decisions of arbitral tribunals, in order to establish the substantive content. The tribunal in *Mondev* emphasized that when it argued how the standards of fair and equitable treatment and full protection and security, as stipulated in Article 1105(1) of NAFTA, were to be interpreted:

“a reasonably evolutionary interpretation of Article 1105(1) is consistent both with the travaux, with the normal principles of interpretation and with the fact [...] the terms “fair and equitable treatment” and “full protection and security” had their origins in bilateral investment treaties in post-war period. In these circumstances the content of the minimum

³⁶⁰ See I. Brownlie, *Principles of Public International Law*, 5th ed., OUP (1998), p. 19.

³⁶¹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ, Judgment rendered on 12 October 1984, ICJ Reports (1984), p. 246, para 79. See also *Chorzów Factory, (Merits) (Germany v Poland)* PCIJ Reports, Series A, No. 17 (1928), p. 29 where the Court stated it is “a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

standard today cannot be limited to the content of customary international law as recognized in arbitral decisions of the 1920s.”³⁶²

“A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these.”³⁶³

“Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what “fair” or “equitable” in the circumstances of each particular case [...] the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is “fair” and “equitable” without reference to established sources of law.”³⁶⁴

Thus, an arbitrator enjoys considerable discretion due to the nature of the standard as a legal instrument with vague substantive elements. However, when assessing and determining the standard’s substantive content regardless of whether it is based on treaty, custom or other sources, an arbitrator must adhere to the established principles used when applying these sources: (i) when interpreting the treaty-based standard, a tribunal must adhere to established principles of interpretation, including the Vienna Convention on the Law of Treaties; (ii) when assessing the content of customary international law, the tribunal must adhere to the principles used in establishing state practice and *opinio iuris*; and (iii) when using arbitral awards as a subsidiary source of law a tribunal must use constraint depending on whether the case is comparable to the one being adjudicated. It is important to note with this last point in particular that practice has shown awards to be different in quality and that experience of arbitrators can play a role when applying principles relating to different sources.³⁶⁵ Thus, awards should not be read in a non-critical way.

5.2.3 The standard’s substantive elements and due diligence

Despite the fact that the standard of full protection and security is composed of the substantive elements of “full”, “protection” and “security”, international courts and tribunals have not exclusively limited themselves to these elements, but submitted states to a due diligence test. The course was set in the landmark investment

³⁶² *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 123.

³⁶³ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 118.

³⁶⁴ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 119.

³⁶⁵ J. Paulsson, ‘Awards—And Awards’, in A.K. Bjorklund, I.A. Laird and S. Ripinsky (eds.), *Investment Treaty Law, Current Issues III; Remedies in International Investment Law – Emerging Jurisprudence of International Investment law*, British Institute of International and Comparative Law (2009), p. 102-103.

arbitration case – *AAPL v Sri Lanka* – that turned out to be the first case in which the arbitration request was exclusively based on a treaty provision instead of an arbitration agreement between the investor and the host state.³⁶⁶

This fact made the case unusual because prior to that point arbitration had been a consensual affair. If an investor claimed that his rights had been violated, he would have had difficulties in instigating arbitration proceedings unless an arbitration agreement between him and the host state had been stipulated previously. In the event that no such agreement was in force, a state could object to an arbitration tribunal's jurisdiction. This was, however, not the case in the case of *AAPL v Sri Lanka*; the claimant based his claim on Article 8(1) of the UK-Sri Lanka BIT, which submitted any legal dispute between an investor and a contracting party to the International Centre for Settlement of Investment Disputes, and the respondent did not object to the tribunal's jurisdiction. Thus the case went forward.³⁶⁷

Another aspect of the case was to become more influential and turn out to be the starting point for a body of law concerning investment treaty jurisprudence. When faced with applicable law, the tribunal sought to interpret the “full protection and security” standard not only according to the Vienna Convention on the Law of Treaties, but also by subjecting the host state to a due diligence test. It was the relationship of a treaty-based standard and the due diligence standard that led to the conclusion that the state had violated its obligations to the investor:

“Once failure to provide “full protection and security” has been proven (under Article 2.(2) of the Sri Lanka/U.K. Treaty or under similar provisions existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the States failure to comply with its “due diligence” obligation under the minimum standard of customary international law [...] Hence, any foreign investor, even if his national State has not concluded with Sri Lanka a Bilateral Investment Treaty containing a provision similar to that of Article 2.(2), would be entitled to a protection which requires “due diligence” from the host State, *i.e.* Sri Lanka. Failure to comply with this obligation imposed by customary international law entails the host State's responsibility.”³⁶⁸

³⁶⁶ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 18.

³⁶⁷ J. Paulsson, *Arbitration without Privity*, ICSID Review-FIJL, Vol. 10, Number 2, p. 232 et seq. See also same author ‘Arbitration without Privity’ in T.W. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, Kluwer Law International (1996), p. 422, concerning the new reality that arbitral agreements would cease to be a precondition for investor-state arbitration: “This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant, and where the tables could not be turned; the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim”.

³⁶⁸ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) paras 67 and 69.

Having established the treaty-based standard of full protection and security according to Art. 2(2) of the UK-Sri Lanka BIT and the due diligence obligation according to customary international law, the tribunal established a relationship between these two concepts by applying the so-called ‘renvoi’ technique. It argued:

“In the light of the above-stated international law precedents and authorities, the arbitral Tribunal has to review the evidence submitted by both Parties in the present case in order to establish the proven facts, and to determine whether these facts sustain the Claimant’s allegation that the Respondent Government failed to comply with its obligation under the Sri Lanka/U.K. Bilateral Investment Treaty (particularly the standard provided for in Article 2.(2), as well as by virtue of the rules governing State responsibility under general international law (which becomes necessary applicable by virtue of the *renvoi* contained in Article 4.(1) of the Treaty).”³⁶⁹

Thus, the use of the *renvoi* technique served as an important tool in establishing the liability of the state.³⁷⁰ This approach enabled the tribunal to determine, once failure to provide full protection and security according to Article 2(2) had been proven, the standard of derogation required to establish a violation of the due diligence standard according to Article 2(2). Having established liability, the tribunal moved on to compensation issues in accordance with the principles of general international law.³⁷¹

Other tribunals have also adhered to the approach of submitting a state, despite there being a treaty-based standard available to the tribunal, to a due diligence test when assessing whether its action or inaction has resulted in liability. The tribunal in

³⁶⁹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 78.

³⁷⁰ The ‘renvoi’ technique is a principle dealing with conflict of laws. The principle entails, in its original form, a method or technique for resolving a problem that arises out of the difference between a connecting factor of two independent systems or sources of law. See further J. O’Brien, *Conflict of Laws*, Cavendish Publishing (1999), p. 133 et seq. The principle has within the context of international law been applied by connecting treaty law and customary international law. As investment treaties generally are based on and recognize treatment standards which are also based on customary international law, it has been argued that the treaties themselves seek to bolster the existence of customary international law standards of treatment. Thus, by applying the *renvoi* technique, which in effect entails a reference to customary international law, when interpreting treaty-based standards, effect and meaning is not only given to the treaty-based standards of treatment but rules of customary international law also gain continued validity. See M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed., CUP (2010), p. 335.

³⁷¹ The third arbitrator dissented and criticized the tribunal for employing the *renvoi* technique to establish the liability of the state. The arbitrator argued that the full protection and security standard prescribed in Article 2(2) of the UK-Sri Lanka BIT was a standard general in nature. In contrast, Article 4(1), which specifically dealt with losses incurred by an investor due to civil war. Therefore, treaty interpretation based on the principle of *generalia specialibus non derogant* could only lead to the conclusion that the specific rule of Article 4(1) governing investment losses resulting from civil disturbances should prevail over the general protection clause in Article 2(2). See further the dissenting opinion *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991), p. 634 et seq.

AMT v Zaire recognized the treaty-based standard of full protection and security in addition to mentioning the importance of the “obligation of vigilance” when assessing whether the state had occurred liability.³⁷² In *Noble Ventures v Romania*, the tribunal refrained from entering into a detailed investigation whether the treaty-based standard of full protection and security had been violated, but stated that the investor had failed to show that alleged losses could have been prevented had the state exercised due diligence.³⁷³ In contrast, in *Vecchi v Egypt* the tribunal acknowledged that the standard of protection expected of the host state was not absolute and that the host state should therefore exercise due diligence in preventing harm to an investment. That had not been done as Egypt had allowed expropriation to occur and not taken steps to return the investment to the investor.³⁷⁴ In a recent case, *Pantehniki S.A. Contractors & Engineers v Albania* the umpire entered into a detailed discussion about the concept of due diligence within the context of a treaty-based standard of full protection and security and concluded that the due diligence principle should be affected by the resources available to a state.³⁷⁵ And finally, *Suez and Vivendi v Argentina*, a tribunal was faced with the task of applying a treaty-based standard that prescribed that an investment should be “fully and completely protected and safeguarded in the territory”. This led the tribunal to analyse the nature of the due diligence obligation and treaty-based standard of full protection and security. It concluded that despite the specific language of the BIT it would not depart from the historical application of the standard, namely to limit protection to physical protection. Therefore, the respondent was obliged to provide physical protection as further defined by the due diligence obligation.³⁷⁶

In summary, tribunals have applied the treaty-based standard of protection and security when determining a state’s obligation owed to an investor. However, these tribunals have sought to use a due diligence rule to further define the substantive elements of the standard. Therefore, the due diligence rule does not substitute the full protection and security obligation, but serves as an additional tool to determine the substantive content of the concepts of “full”, “protection” and “security”. This leads to a situation whereby the standard becomes a living concept as the obligations that form a part of it change taking into account the circumstances of each case.

³⁷² *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.07.

³⁷³ *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 12 October 2005, para 166.

³⁷⁴ *Waguib Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 447.

³⁷⁵ *Pantehniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 71 et seq.

³⁷⁶ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/17, Award of 30 July 2010, para 179.

5.3 The meaning of state actors and private actors

General international law within the context of state responsibility prescribes that the state is responsible for its internationally wrongful acts committed by its organs and public officials that have the authority to act on their behalf.³⁷⁷ In addition, general international law prescribes that states are not, as such, responsible for acts of private parties.³⁷⁸ Here a line must be drawn between the act of a private party and the act or omission of a state related to the private act in question. The arguments in the *Janes case*, a case which dealt with the question whether Mexico was responsible for not having apprehended and punished a murderer of an American, are descriptive of the distinction necessary to make when assessing the nature of a state's obligation to exercise due diligence in connection with a third party's aggression towards an alien:

“Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country the State; the State [...] has transgressed a provision of international law as to State duties.”³⁷⁹

Here, the private act serves as an occurrence that triggers the question of a state's obligation to act or to not act; or, in other words, the question of state responsibility arises as a consequence of the private party's action.

In such a scenario, as with state responsibility in general, the international responsibility of the state is not to be presumed.³⁸⁰ The question does not become topical, unless an alien (investor) can prove that a state did not provide protection and security to him and his property by failing to exercise due diligence in using its authority in a prompt manner and with appropriate force.³⁸¹ Within the context of investment, that principle is almost always supported further by a bilateral investment treaty, where the state declares to provide investment protection.

³⁷⁷ See J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, CUP (2005), p. 77 et seq and A. V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 88 RCADI 267 (1955), p. 276-279, which includes a general discussion about principles of responsibility within the context of due diligence.

³⁷⁸ J. Crawford and S. Olleson, *The Nature and Forms of International Responsibility*, in M.D. Evans, *International law*, 2nd ed., OUP (2006), p. 462-463.

³⁷⁹ *Laura M.B. Janes (USA) v United Mexican States*, IV RIAA (1926), p. 87.

³⁸⁰ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 304.

³⁸¹ See *Sambiaggio case*, X RIAA (1903), p. 513 et seq.

Such a two-tier system of responsibility, which depends on whether the obligation stems from an international wrong committed by agents of the state or is a result of action or inaction related to wrongful acts committed by private third parties, has practical implications in individual cases. As a result, the concept of an actor is important within this context as that influences *inter alia* the nature of the international responsibility.

There is at times confusion amongst parties to investment disputes concerning this point. In *AAPL v Sri Lanka*, the claimant argued that government forces had destroyed the investment, whereas the respondent argued that rebels caused the damage. Faced with these conflicting remarks the tribunal pointed out the following:

“In final analysis, no conclusive evidence exists sustaining the Claimant’s allegation that the special security forces were themselves the actors of said destruction causing the losses suffered. [...] At the same time no conclusive evidence sustains the Respondent’s allegation that the destruction were “caused directly by the terrorist action”.”³⁸²

The tribunal concluded that a violation of the international responsibility of the state had been incurred because the area, where the investment was located, had been under the control of government forces and that the tribunal could, due to the fact that the proof of fact was extremely difficult, be satisfied with less conclusive evidence.

In other cases, the dispute concerned whether the entity that acted to inflict harm on the investment was a part of the government or a private entity. In the *Wena Hotels v Egypt* arbitration it was uncertain which entity was the instigator of a take-over of an investment. After the investment had been seized by employees of a public sector company which supervised the interests of the state in numerous hotel projects owned by foreign investors, it became apparent that the government minister, who held the only share in the company, did nothing to protect the investment or punish the employees of the company for seizing the investment.³⁸³ The tribunal concluded that the full protection and security standard had been violated. In contrast, the *Rumeli Telekom v Kazakhstan* award is an example where it was documented that the security forces of the state had enjoined the claimants from accessing the premises of the investment. Here, the investor established in cooperation with a local business partner, which was owned by family members of the president of the Kazakhstan Republic, a joint venture for the purposes of

³⁸² *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 84.

³⁸³ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 85-94.

providing telecommunication services in Kazakhstan. This company was later awarded the concession of establishing a mobile phone network in Kazakhstan. This business relationship became strained where the security forces made it impossible for the investor to enter the premises of the investment. The tribunal concluded that these measures could not be attributed to the state because the security forces had taken action against the investor upon instructions of the investor's business partner. As the security forces were under the instruction of a private entity, no violation of the standard could be found.³⁸⁴

In addition, cases can be found where there is no dispute whether the entity that takes adverse action is a government entity or not. This particularly applies to cases when a state privatizes a part of its operation and later takes the investment back or when it liberalizes a part of its economy that was under its control, but introduces restrictions later on. Arbitral practice seems only to provide different approaches to the problem – from concluding that the full protection and security standard only provides protection against actions of third parties to concluding that while the standard provides protection and security from public and private parties alike it can only be limited to physical protection against actions from both these parties.

An example of the first position is the *Eastern Sugar v Czech Republic* arbitration that dealt with an investor that had invested in the Czech sugar production industry. Shortly prior to the country's accession to the European Union, it started to implement new regulatory regimes that resembled EU legislation. This led to the implementation of a regulatory regime that subjected the sugar production industry to a quota system. The investor argued that this negatively affected the investment and that the Czech Republic had not provided for full protection and security. The tribunal refused to address issues on the basis of the full protection and security standard due to the fact that the actions complained of were state action, but not actions of private entities.³⁸⁵ Another example of the first position is the *El Paso v Argentina* arbitration. Here, the claimant had invested in the energy sector of the host state. During the economic crisis of 2001-2001, the country amended the regulatory structure set up to attract foreign investment. The tribunal acknowledged the treaty-based standard provided for protection and security, but emphasized that the concept was to be understood within the context of customary international law of preventing and repressing actions of third parties:

³⁸⁴ The tribunal did not identify which officers of the company had given the order. See *Rumeli Telekom v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 670 and para 711.

³⁸⁵ *Eastern Sugar B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award 27 March 2007, SCC, paras 204-207.

“El Paso did not specify or determine the duty to act against a third party that has allegedly been breached by Argentina under the BIT: all the impugned acts that allegedly violate the FPS standard are directly attributable to the GOA and not to any third party. In the present case, none of the measures challenged by El Paso were taken by a third party; they all emanated from the State itself. Consequently, these measures should only be assessed in the light of the other BIT standards and cannot be examined from the angle of full protection and security.”³⁸⁶

Needless to say, this approach of limiting the full protection and security standard to third parties alone is remarkable, as it does not have foundation in the writings of scholars of international law.³⁸⁷

An example of the second position can be found in the *Suez and Vivendi v Argentina* cases. While the conclusions in these cases are similar to the conclusion in *Eastern Sugar v Czech Republic*, the arguments produced are more elaborate. The cases dealt with the privatization of water and sewage systems in the province of Santa Fe and Buenos Aires. The government had approached international investors with the purpose of privatizing these infrastructure projects and made assurances upon which the investors had relied on. During the economic difficulties of 2000/2001, Argentina reneged on the promises made which resulted in the total collapse of the investor’s legitimate expectations. The tribunal acknowledged that the full protection and security standard could apply to state action and action of private third parties. However, it went further and noted that according to customary international law the protection owed to the investor was only against physical violence, not changes to the regulatory framework. Such amendments could only be assessed according to the fair and equitable treatment standard.³⁸⁸

³⁸⁶ *El Paso v Argentina*, ICSID ARB/03/15, Award 31 October 2011, para 524.

³⁸⁷ See C. McLachlan et al, L. Shore, M. Weiniger, *International Investment Arbitration – Substantive Principles*, OUP (2007), p. 247 and R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 204.

³⁸⁸ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/05/19, Award of 30 July 2010, para 173, and *Suez and Inter.Agua v Argentine Republic*, ICSID Case No. ARB/03/17, Award of 30 July 2010, para 167.

5.4 The due diligence principle and obligations of the host state

5.4.1 General

The concept of due diligence and its implications for states has a long history in international law. The failure to use it to prevent injuries to aliens has been recognized as a reason to impose international responsibility on a state.³⁸⁹ Its modern application in international law dates back to the American civil war when the United States claimed compensation from Great Britain in the *Alabama case*. A number of war ships commissioned by the Confederate to be built in England caused damage to the Union's shipping. Great Britain consented reluctantly to refer these claims to arbitration. In an arbitration agreement, the Washington Treaty, the concept of due diligence was introduced within the context of the responsibility of a neutral state for damages caused by private persons acting within its jurisdiction. Not surprisingly, the two states had different opinions on the nature of due diligence; Britain opted for a restrictive approach, while the United States pursued an interpretation emphasizing "active diligence". The US position prevailed. The arbitral tribunal acknowledged the US position and concluded that the US had shown that Great Britain omitted, after having being warned by US diplomatic agents during the construction of the ship, to take any effective measures to prevent its construction.³⁹⁰

This does not mean that the state is responsible for the actions of private individuals or entities by default. Obviously, a state is responsible for the acts of its own agents. However, the nature of state responsibility within the context of responsibility for behaviour of private parties is complicated as responsibility can be based on acts of states or its entities, omissions of states or a combination of both. Here, it is important to look more closely at the nature of the obligation of a state when dealing with foreign investment.

³⁸⁹ Grotius argued in his treatise *De Jure Belli ac Pacis* that sovereign princes should be answerable for their neglect, if they use not all the proper means within their power for suppressing piracy and robbery. See H. Grotius, *De Jure Belli ac pacis*, translated by A.C. Cambell, Chapter 17, London 1814.

³⁹⁰ The Treaty of Washington is regarded as having established the rule of due diligence. However, the concept's vagueness served as a point of discussion and numerous attempts were made to clarify its meaning. The Institut de Droit International took up the issue at its session at The Hague in 1875 and the matter was discussed at the XIII Hague Convention in 1907. See AJIL, Vol. 2 (1908) Supp., p. 202. Again, the matter was addressed in the Harvard Law School Draft of 1929, cf. Harvard Law School, *Research in International Law*, Vol. II, *Responsibility of States* (1929), p. 228. Finally, F.V. Garcia Amador discussed the issue both in his second report in 1957 and in his work on the Harvard Draft Convention of 1961 on the responsibility of states. See Special Rapporteur to the International Law Commission, *Report on State Responsibility for the International Law Commission*, Annexes, UN Doc. A/CN.4/96, YILC 1957, Vol. II, p. 104 and *Report on State Responsibility for the International Law Commission*, UN Doc. A/CN.4/SER.A/1961/Add. 1, YILC 1961, Vol. II, p. 47.

5.4.2 Negative and positive obligations of the host state

A state's obligation with regard to foreign investment is a mixture of different obligations. It is important to differentiate between two categories in which different demands are made with regard to a state's action or inaction.

It is appropriate to refer to the arguments of the umpire in the *Sambiaggio case* concerning this dual nature of the state's obligation. The deciding umpire had to determine whether Venezuela was responsible for damage caused by revolutionary forces fighting against the government to property owned by Italian nationals. According to Article 4 of the Treaty of Amity, Commerce and Navigation, between the two countries, both contracting states stated that "[t]he citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property...". In assessing whether Venezuela should incur liability because of the damage caused by the revolutionists, the umpire acknowledged that a distinction should be made between actions of the state itself and actions of third parties. In addition, the umpire stated that a state could only be found liable for its own actions, but not for actions of third parties out of its control, unless exceptional circumstances would apply. With regard to what substantive assessment should take place to determine a state's obligation in exceptional circumstances, the umpire argued:

"The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved."³⁹¹

Therefore, a state's obligation is, on one hand, with regards to its own agents, negative which entails the absence of action. This means within the context of international investment law that a state is to refrain from taking action which could have adverse effects on the investor and his investment. On the other hand, the state's obligation is positive, i.e. the state is obliged to take action by exercising *due diligence* in the event that the investor and his investment is suffering from adverse effects stemming from the action or inaction of a third party or in the event that agencies of the state itself have taken action infringing upon the rights of the investor.

³⁹¹ See *Sambiaggio case*, X RIAA (1903), p. 524. This case was referred to repeatedly by umpires and arbitrators in mixed claims commissions after its publication. See e.g. *Guastini case*, X RIAA (1903), p. 561; *De Caro case*, X RIAA (1903), p. 635; *J.N. Henriquez case*, X RIAA (1903), p. 713. It has also been referred to more recently within the context of state responsibility. See e.g. J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, CUP (2005), p. 115-116.

The positive obligation becomes relevant after the fact and establishes a three-pronged obligation which the state has to fulfil. The state has to (1) prevent that damage be inflicted upon the investor and his investment; (2) restore the previous situation, if possible, after the damage has been caused; and (3) investigate the authors of the infringement, charge them accordingly and punish them. It is necessary to look closer at this three-pronged obligation relating to the duty to protect.³⁹²

(1) Duty to prevent damage to the investor

There is ample evidence that a state has an obligation to prevent that damage be inflicted upon aliens residing within its borders.³⁹³ During the revolutionary period of Central and South America, mixed claims commissions concluded that states had on numerous occasions not exercised due diligence to prevent that damage be caused by revolutionists. However, the mere fact that an alien is attacked does not suffice. The tribunal in the *Wipperman case* argued with regard to the nature of the obligation of the host state concerning prevention:

“Of course, if a government should show indifference with reference to the punishment of the guilty authors of such outrages, another question would arise, but as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs and an honest and serious purpose is manifested to punish the perpetrators, the best evidence of which, of course, will be the actual infliction of punishment, we fail to recognize any dereliction in the performance of international obligations [...].”³⁹⁴

Similarly, the tribunal in the *Noyes case* argued when deciding whether Panama had incurred liability after an American citizen had been attacked:

“The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals.”³⁹⁵

³⁹² See for a different approach of applying two categories instead of three categories, H.E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 12, and R. Pisillo-Mazzeschi, ‘State Responsibility in International law’, in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 134-138.

³⁹³ See e.g. E. Borchard, *Diplomatic Protection of Citizens Abroad*, Banks Law Publishing (1915), p. 220 et seq and C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 125 et seq.

³⁹⁴ J.B. Moore, *A Digest of International Law*, Vol. III, Government Printing Office (1906), p. 3041.

³⁹⁵ *Walter A. Noyes (USA) v Panama*, VI RIAA (1933), p. 311.

Therefore, the principle of due diligence that deals with prevention presupposes two obligations different in nature. First, a state must have established and maintain a system which enables it to prevent occurrences against aliens within its borders. Second, a state has to use that system to prevent harmful occurrences and protect aliens and their property.³⁹⁶ This point became particularly clear in the *Iran Hostages case* where the International Court of Justice took note that Iran was not only under the treaty obligation to provide “most constant protection and security” according to a 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, but was also obliged to respect “...obligations of Iran existing under general international law...” to provide protection to the hostages. Having stated, in addition, that Iran had the obligation to use all appropriate means according to the Vienna Convention on Diplomatic Relations, it concluded, after having taken into account that Iranian authorities had prevented similar attacks in the past by employing its security forces, that “the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.”³⁹⁷

The matter of prevention has played a role in arbitral practice within the context of duty to protect investors in particular. In *Wena Hotels* the tribunal took note that the government had knowledge that an investment project would be seized by an entity controlled by the government and that it did nothing to prevent the seizure nor to prevent damage from being inflicted on the investment while it was under the control of the government-controlled entity. The tribunal argued:

“Although it is not clear that Egyptian officials other than officials of EHC directly participated in the [...] seizures, there is substantial evidence that Egypt was aware of EHC’s intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both *the police and the Ministry of Tourism* took no immediate action to restore the hotels promptly to [...]”³⁹⁸ [emphasis added]

It can therefore be stated, within the context of the duty to prevent, that a state has the obligation to have under its control a system, e.g. a police force, a court system, which enables the state to act or react to a certain occurrence threatening or damaging an alien’s interest or property. However, the principle of due diligence seems not to concern itself with whether these systems should be of a certain design

³⁹⁶ R. Pisillo-Mazzeschi, ‘State Responsibility in International law’, in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 114-115.

³⁹⁷ *Case Concerning United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), paras 61-68.

³⁹⁸ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), para 84.

or consisting of certain parts, but rather how a state *uses the resources* at its disposal.³⁹⁹ Thus, an investor is not entitled to a large police force or a high tech court system protecting his investment, but rather that to the assurance that his investment is sufficiently protected taking into account the circumstances relevant to his situation.⁴⁰⁰

(2) *Duty to restore the investor to his previous situation*

A state that commits an international wrong is under the obligation to wipe out the legal and material consequences of its action or inaction by re-establishing the situation that would have existed if the international wrong had not been committed. This principle of restitution, now stipulated in Article 35 of the Draft Articles of State Responsibility, was promulgated in the *Chorzów Factory case* by the Permanent Court of International Justice. The court argued first for restitution before acknowledging the obligation for compensation:

“This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking – the expropriation of which is prohibited by the Geneva Convention – then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.”⁴⁰¹

The state’s reaction to the actions which affect negatively the investor’s position is of considerable importance when assessing whether a state had acted with due diligence. A violation of the rights of an investor relating to his investment often takes place during a certain time span. An investor can lose control of his investment, but the host state has it within its capacity to influence the illegal state of affairs that has occurred. A state which does not take action to restore the investor by handing the investment over to the investor does not exercise sufficient due diligence and violates its obligation.

In the *Iranian Hostages case*, the International Court of Justice was faced with a flagrant treaty violation that began with mob violence, but later developed into state acceptance of an international wrong. The treaty violation consisted *inter alia* of failure to protect the inviolability of the premises and the consular staff of the US

³⁹⁹ See H.E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 12.

⁴⁰⁰ See *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para 360, and *Pantehnikai S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 76.

⁴⁰¹ See *The Factory at Chorzów (Germany v Poland) (Merits)*, (1928) PCIJ Rep., Ser. A. No. 17, p. 47-48.

embassy in Tehran according to the Vienna Convention on Diplomatic Relations. The Court argued:

“Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to *restore* the Consulates at Tabriz and Shiraz to the United States control, and in general to *re-establish* the status quo and to offer reparation for the damage.”⁴⁰² [emphasis added]

In *Wena Hotels v Egypt* the tribunal acknowledged that the state had not seized the investment, but that it had been seized by an independent entity established by the government to supervise foreign investment in the country’s tourism industry. However, the tribunal was critical about the state’s inaction to assist the investor before and after his investment was seized. The tribunal argued:

“Even if the Tribunal were to accept this explanation for Egypt’s failure to act *before* the seizures, it does not justify the fact that neither the police nor the Ministry of Tourism took any immediate action to protect Wena’s investment *after* EHC had illegally seized the hotels [...] Egypt could have directed EHC to return the hotels to Wena’s control and make reparations. [...] Instead, neither hotel was restored to Wena until nearly a year later [...]”⁴⁰³

Therefore, the state was not only under the obligation to prevent the seizure before it happened, but had also an obligation to restore the investment after it had been illegally seized by the government-controlled entity.⁴⁰⁴

(3) Duty to investigate, charge and punish the parties responsible for the violation

Arbitral practice shows that tribunals have emphasized that the fact that an alien suffers aggression does not suffice to establish an international wrong, not unless “special circumstances” lead to the conclusion that a state is responsible.⁴⁰⁵ Therefore, a state can be in a position where it is unable to prevent an occurrence because it does not have knowledge of the disturbances which result in the aggression or that the situation escalates so rapidly that the state is unable to react to the aggression. In the event that the state is unable to prevent an attack, the obligation to investigate, charge and punish the perpetrators responsible arises.

⁴⁰² *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 69.

⁴⁰³ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 88, 90-91.

⁴⁰⁴ See also *Waghib Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448, where the tribunal emphasizes the duty of the host state to return the investment to the investor when state courts have concluded that the taking was illegal.

⁴⁰⁵ *Walter A. Noyes (USA) v Panama*, VI RIAA 308 (1933), p. 311.

In the *Janes case* a widow of an American citizen claimed compensation for the failure of the Mexican state to apprehend and punish her husband's murderer. Her husband, a superintendent at a mine company, had been murdered in view of many persons, near the company office. The tribunal distinguished between the liability of the perpetrator and that of the Mexican state which failed to prosecute him. In addition, it noted with regards to the state's obligation to apprehend and punish that:

"...the person who killed Janes, was well known in the community where the killing took place. Numerous persons witnessed the deed. The slayer, after killing his victim, left on foot. There is evidence that a Mexican police magistrate was informed of the shooting within five minutes after it took place. The official records with regards the action taken to apprehend and punish the slayer speak for themselves. Eight years have elapsed since the murderer, and it does not appear from the records that [...] has been apprehended at this time. Our conclusions to the effect that the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes is based on the record before us consisting of evidence produced by both governments."⁴⁰⁶

In terms of investment protection *Wena Hotels v Egypt* provides, again, guidance with regards to what effect the failure of a state to investigate, charge and punish the perpetrators has on the assessment whether an international wrong has been committed. The tribunal took note that neither the government entity, EHC, which dealt with investment in Egypt's tourism industry, nor its senior officials, e.g. Mr. Kandil and Mr. Munir, had been punished for forcibly expelling the investor and illegally possessing the hotel (the investment). The tribunal argued:

"Finally, neither EHC nor its senior officials were seriously punished for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year. Although several representatives of EHC – including Messrs. Kandil and Munir – were convicted for their actions, neither Mr. Kandil nor Mr. Munir was sentenced to serve any jail time. Instead, both were fined only EGP 200, which Mr. Munir stated that he has never paid. Also neither official appears to have suffered any repercussions in their careers. As noted above, the Ministry of Tourism chose not to exercise its authority to remove Mr. Kandil as Chairman of EHC and, according to [...], he currently is serving as an advisor to a senior member of the Egyptian parliament. Since the seizures, Mr. Munir has been promoted to become the Head of the Legal Affairs Division at EHC and is expecting a further promotion in the near future. This absence of any punishment of EHC and its officials suggest that Egypt condoned EHC's actions."⁴⁰⁷

⁴⁰⁶ *Laura M.B. Janes (USA) v United Mexican States*, IV RIAA (1926), p. 86. See also similar cases *Sara Ann Gorham (USA) v United Mexican States*, IV RIAA (1930), p. 640 et seq and *John D. Chase (USA) v United Mexican States*, IV RIAA (1928), p. 337 et seq.

⁴⁰⁷ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), para 94.

In other cases, in particular where the investor has not lost control of his investment, but where continuous minor infringements of third parties negatively affect his interest in the investment, tribunals have been restrictive towards acknowledging a violation of the state. In *Parkerings v Lithuania* the investor argued that the host state had not provided the investor with full protection and security during repeated vandalism by third parties. The investor had entered into an agreement concerning the management of a parking system and had suffered damage due to that payment machines had been vandalized. The tribunal argued:

“The Claimant alleges damages to its materials due to vandalism. However, the Claimant does not show that such vandalism would have been prevented if the authorities had acted differently. The Claimant only contends that the police did not find the authors of this offence. Both parties agree that Lithuanian authorities started an investigation to find the authors of the vandalism [...] The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty.”⁴⁰⁸

So, similar to what applies in cases of prevention and protection it seems that due diligence does not influence what kind of a system, e.g. law enforcement system or court system, is available in the country, but how a state *uses its system and the resources at its disposal*. Thus, an investor is generally not entitled to special forces during peace time, but rather that offences are investigated and the offenders apprehended and punished.⁴⁰⁹

In summary, it is clear that the substantive framework, according to which a state’s obligation is determined, is far from being clear and simple. A state can violate its obligation towards the investor by a breach of a duty to abstain and the state can violate its obligation owed to the investor by breaching its duty to take action. The former entails that an action violates a negative obligation, whereas the latter entails that inaction violates a positive obligation. In order to better understand the obligation of due diligence, it is necessary to look at its substantive elements in greater detail.

⁴⁰⁸ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras 356-357.

⁴⁰⁹ See *Pantehniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 76.

5.4.3 Elements important for discharging due diligence

5.4.3.1 The state of state responsibility in general

The basic parameters of due diligence, as described within the context of positive and negative obligations of the state, can only play a limited role in understanding the nature of state responsibility. There are other factors that have been considered important in terms of deciding the nature of state responsibility. An expansive academic debate has taken place dealing with whether one of the most important elements of state responsibility – fault – should be considered a constituent element of state responsibility.

Scholars have generally been divided into two camps with regard to whether state responsibility should be fault based or based on an objective state responsibility principle. The first camp, consisting of Lauterpacht and others,⁴¹⁰ emphasized the role of fault stating that it is believed to correspond with the conception of states as moral entities and the concept must as such form the foundation of any legal theory of responsibility. The second camp, including Cheng and others⁴¹¹, acknowledged the principle of objective responsibility as the dominant rule when assessing state responsibility. It is safe to say that this discussion is of limited value when determining the full protection and security standard within the sphere of state responsibility for the simple reason that addressing the problem within the rubric of “either-or” does not provide an answer to the question of state responsibility. In addition, the cases dealing with violations of investment protection standards, including the full protection and security standard, are concerned with standards of conduct required by international law in a very particular context.⁴¹²

The ILC’s Draft Articles on State Responsibility did not acknowledge these different camps arguing either a subjective fault-based regime or an objective non-fault regime.⁴¹³ Therefore, a third approach was introduced in Articles 2 and 12 of the Draft Articles based on the argument that no single principle is universal concerning whether state responsibility should be based on subjective or objective approach.

⁴¹⁰ See H. Lauterpacht, *Private law Sources and Analogies of International Law*, Longmans, Green and Co. Ltd. (1927), p. 135 and C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 209.

⁴¹¹ See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 218-232 and G. Schwarzenberger, *International Law*, 3rd ed. Stevens & Sons Ltd. (1953), p. 632-641.

⁴¹² See I. Brownlie, *System of the Law of Nations, State Responsibility – Part I*, Clarendon Press (1983), p. 37-48, for an overview and a critique of the academic debate between these two different approaches to state responsibility.

⁴¹³ Scholars attempted to provide new approaches prior to the ILC’s adoption. See e.g. R. Pisill-Mazzeschi, ‘State Responsibility in International law’, in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 98 et seq.

Emphasis should, more importantly, be put on the context in question and on the content and interpretation of the relevant obligation:

“When scholarly debate bogs down around some dichotomy such as ‘responsibility for fault’/‘objective responsibility’, something has almost always gone wrong. Here the problem is one of level of analysis: there is neither a rule that responsibility is always based on fault, nor one that it is always independent of it – indeed, there appears to be no presumption either way. This is hardly surprising, in a legal system which has to deal with a wide range of problems and disposes of a limited armoury of techniques. But in any event circumstances alter cases, and it is illusory to seek for a single dominant rule. Where responsibility is essentially based on acts of omission [...] considerations of fault loom large. But if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded. Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached.”⁴¹⁴

Needless to say, general principles of the nature described above can be of limited use for arbitral tribunals deciding in particular cases whether a state has acted or not acted in a way resulting in a precarious situation of an investor. Still, it seems clear that this is the situation various tribunals find themselves in resulting in awards where neither fault nor strict liability plays a major role. Despite the obvious conclusion that the substantive elements of “full”, “protection” and “security” are paramount when deciding the legal position of a state *vis-à-vis* an investor, including whether the state has violated its obligation of protecting the investor’s investment, case law will show that tribunals have repeatedly applied the due diligence test depending on the specific context of the case being dealt with.

5.4.3.2 Elements of due diligence

Arbitral tribunals seem to apply the due diligence principle at times without much analytical reasoning. Despite the fact that neither fault-based responsibility nor objective responsibility has been considered the overriding principle when deciding the general requirements of state responsibility, several elements concerning the due diligence obligation are of importance. It does come as a surprise, taking into account the fauna of arbitral cases with which the due diligence has mostly dealt with, that their approach often consists of a facile application of the principle.

⁴¹⁴ J. Crawford and S. Olleson, *The Nature and Forms of International Responsibility*, in M.D. Evans, *International law*, 2nd ed., OUP (2006), p. 465.

1) *The importance of diligence or vigilance*

Numerous cases can be found where states have been found responsible for not exercising due diligence when providing for protection to aliens. However, the concept of due diligence is not always used in this context, but other similar concepts, including the concept of vigilance.

The umpire Huber who served as the rapporteur in the *Spanish Zone of Morocco case* recognized that a state could not be held responsible for actions of third parties unless a treaty or customary international law so prescribed. He argued:

“The principle of non-responsibility in no way excludes the duty to exercise a certain degree of vigilance. If a state is not responsible for the revolutionary events themselves, it may nevertheless be responsible, for what its authorities do or not do toward the consequence, within the limits of possibility.”⁴¹⁵

What this obligation entails in practical terms is that the state must take *reasonable measures* or *appropriate measures* within the context of prevention, restoration and investigation, prosecution and punishment as any well-administered government could be expected to take in similar circumstances.⁴¹⁶ Thus, under ordinary circumstances a state is to exercise active vigilance by providing police force, administrative tribunals and courts and other institutions necessary in order to fulfil its obligation under the rubric of prevention, restoration and investigation, prosecution and punishment. In some instances the obligation can be extended to extraordinary circumstances, e.g. when a state is in control of a territory of another state. The ICJ held in the *Armed Activities on the Territory of the Congo case* that an occupying power had an obligation of vigilance while in control of a territory of another state:

“The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC’s natural resources committed by members of the UPDF in the territory of the DRC, for violating its *obligation of vigilance* in regard to these acts and for failing to comply with its obligations [...] as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.”⁴¹⁷ [emphasis added]

⁴¹⁵ See *Spanish Zone of Morocco case* as cited by B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 229.

⁴¹⁶ For the formulation “reasonable measures” see A. V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 88 RCADI 267 (1955), p. 277, but for the formulation “appropriate measures” see *Armed Activities on the Territory of the Congo, (Democratic Republic of Congo v Uganda)* ICJ, Decision rendered on 19 December 2005, ICJ Reports (2005), para 248.

⁴¹⁷ See *Armed Activities on the Territory of the Congo, (Democratic Republic of Congo v Uganda)* ICJ, Decision rendered on 19 December 2005, ICJ Reports (2005), para 250.

So, generally the obligation owed to the investor is *due* diligence or *active* vigilance. A state might be subjected to a stricter obligation in individual cases, e.g. when providing for protection and security of other states and their representatives according to the Vienna Convention on Diplomatic Relations. Similarly, in the event a BIT provides for full protection and security, a state must provide for a higher level of security than otherwise would be the case, not unless the treaty-based standard would be formulated in a particular way.⁴¹⁸ If, for example, a BIT would prescribe that a state should provide for protection and security not less than those recognized by international law, the state should not afford the investor inferior treatment compared to “the minimum standard of vigilance and of care required by international law”.⁴¹⁹

2) Knowledge as an objective presupposition for state action

Knowledge plays a considerable role as to whether or when a state is obliged to take action to protect the investor and his investment. The concept of knowledge – what the state knows or ought to have known – leads to a situation where the assessment whether a state has acted with diligence or vigilance cannot but be casuistic depending on the facts of each case.

Interestingly, the question of knowledge was asked and answered even before Grotius’ treatise on international law. In 1598, Alberico Gentili concluded the following when addressing whether a community should be responsible for a private act of one of its members:

“One who knows a wrong is free from guilt only if he is not able to prevent it. Therefore, the State, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime it does not do so.”⁴²⁰

If state officials have knowledge that an attack will take place, the obligation arises to take active measures to prevent or provide protection. This was acknowledged in the *Chapman case* that dealt with the obligation of Mexico to protect an American consul in the city of Puerto Mexico. The consul had received death threats that were to be

⁴¹⁸ See e.g. Article 1105 of NAFTA and NAFTA Free Trade Commission Clarification Related to NAFTA Chapter 11, Decision 31 July 2001.

⁴¹⁹ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.06.

⁴²⁰ A. Gentili, *De Jure Belli Libri Tres*, Carnegie Endowment for International Peace, Vol. II, Chapter XXI, Clarendon Press (1933) p. 100.

carried out if two Mexican nationals, who had been sentenced to death in the United States, would be executed. The consul communicated those threats to the authorities and requested that he be provided with adequate protection. Although instructions were given concerning his protection, they were not carried out. The consul was attacked and seriously injured. A claims commission recognized that a government could not be an insurer of aliens; it had a duty to use its means of protection within its capacity, especially when public officials of another state were involved, and protect them against illegal “acts of which it has notice”.⁴²¹

While it is generally accepted that a state has an increased level of diligence after having received information about an impending illegal act, the question becomes more problematic about what the state should have known. Here, the *Corfu Channel case* is illustrative of the various problems dealing with due diligence. The case dealt with a dispute between United Kingdom and Albania following an incident where Royal Navy ships struck mines in the North Corfu Strait.⁴²² In a case brought by the United Kingdom, the Court could not find Albania responsible for having laid the mines (Albania did not have a navy) or that the minefield had been laid with the connivance of the Albanian government (lack of “decisive legal proof”). The Court then went on to assess whether the mines could have been laid with the knowledge of Albania. In that regard, the Court noted, that knowledge of the minelaying could not be imputed to Albania merely because the minefield was discovered in its territorial waters and exploded in that area. In this regard the Court stated:

“It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.”⁴²³

⁴²¹ *William E. Chapman (USA) v United Mexican States*, IV RIAA (1930), p. 623.

⁴²² It is important to note, first, that before the ship struck the mines, British Navy ships had come under fire from Albanian fortifications and, second, that following the incident where the ships were struck by mines, the Royal Navy cleared the Channel of any mines, including those in Albanian territorial waters. See further *The Corfu Channel Case (United Kingdom v Albania)* ICJ, Decision rendered on 9 April 1949, ICJ Reports (1949), p. 27 and 33.

⁴²³ *The Corfu Channel Case (United Kingdom v Albania)* ICJ, Decision rendered on 9 April 1949, ICJ Reports (1949), p. 18.

Following this statement, the Court examined whether it could be established by means of indirect evidence that Albania had knowledge of the minelaying. Despite basing its arguments on indirect evidence, the Court states that the “proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.”⁴²⁴ The Court acknowledged that the channel had been under close surveillance by the Albanian government – or in other words, had shown a high degree of vigilance. It was of particular relevance that the Albania had kept a close watch over the Channel and its vigilance sometimes “went so far as to involve the use of force”.⁴²⁵ Having taken into account this active vigilance, how Albania acted following the explosions and the fact that the mines were positioned very close to the coast, the Court concluded that the mines could not have been laid without the knowledge of the Albanian government.

3) *Foreseeability and the legal effect of time*

The due diligence obligation does not entail that a state should have knowledge of any petty crime or minor offences that might affect the investment.⁴²⁶ However, if a particular threat materializes, the state is bound to follow that threat as soon as it has knowledge of its existence. By doing so the foreseeability of the risk becomes known and a state is in a position to determine what “reasonable measures” are necessary. Here, the explanatory note to Article 13(1) of the Harvard Draft is illustrative:

“Among the factors to be taken into account in determining whether the duty of due diligence has been discharged is that of the foreseeability of the risk. It can be easily assumed that a State should have anticipated the possibility of an injury to an alien if mobs are actually engaged in riotous activity or are expected shortly to do so or if bands of robbers and brigands are allowed to operate in certain portions of a country. A State may also be put on notice of a special duty to protect an alien if there has been violence against him or against groups of aliens or against nationals of a particular State or against aliens in general in the recent past or if there have been threats of violence and criminal conduct. A request for protection from an alien may also serve to give notice to the State that it ought to take special precautions regarding that alien.”⁴²⁷

⁴²⁴ *The Corfu Channel Case (United Kingdom v Albania)* ICJ, Decision rendered on 9 April 1949, ICJ Reports (1949), p. 18.

⁴²⁵ *The Corfu Channel Case (United Kingdom v Albania)* ICJ, Decision rendered on 9 April 1949, ICJ Reports (1949), p. 18-19.

⁴²⁶ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras 356-357.

⁴²⁷ Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, 15 April 1961 reprinted in M.M. Whiteman, *Digest of International law*, Vol. 8, US Gov Washington DC (1967) p. 739.

Needless to say, this explanatory note was produced within the context of state responsibility in general, but there is nothing to suggest that it should not apply to investors and their investments, in particular if there is a treaty-based standard providing for full protection and security.

Here, time is also of some importance as that can affect the due diligence principle, namely what measures could be considered reasonable taking into account the time the government has in order to prevent an occurrence that might have adverse effect on an investment. Again, Iran serves as an example where a government gradually loses control of a country. The revolution began with civil disturbances that later escalated into mass demonstrations, civil unrest in the form of general strikes and finally full-scale revolution. It is only logical that the culmination of individual occurrences over time affects the level of due diligence owed to an investor and in doing so influences the responsibility of a government to act on threats and intimidation shown towards an investor. In *Sylvania v Iran*, the Iran-US Claims tribunal described the culmination of events that later lead to the return of the Ayatollah Khomeini on 1 February 1979:

“[B]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic *force majeure* conditions at least in Iran’s major cities. By ‘*force majeure*’ we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. The situation created in Iran at least during the time from December 1979 until 15 February 1979 by civil unrest, strikes, riots and a state of general upheaval was such that both the Claimant and the governmental authorities and agencies in this case were not able to perform certain of the contractual obligations that they had previously undertaken.”⁴²⁸

Time was also of importance in the arguments of the International Court of Justice when it assessed the actions of the students that occupied the US Embassy in Tehran in November 1979. In its assessment, the Court divided its approach into two phases depending on the time before and after 4 November 1979. Before that date the Iranian government failed to provide security for the Embassy and its personnel, but the actions of the students were not imputable to Iran. However, statements made by the Ayatollah Khomeini after that date translated the illegal acts of the students “into acts of State”.⁴²⁹

In summary, the elements of due diligence – active vigilance, knowledge and foreseeability – form the constituent elements that are necessary to assess whether

⁴²⁸ *Sylvania Technical Systems Inc. v Islamic Republic of Iran*, Award No. 180-64-1 rendered on 27 June 1985, reprinted in 8 Iran-US Claims Tribunal Reports 298, p. 308.

⁴²⁹ *Case Concerning United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 74.

the measures of the state suffice in order for it to fulfil its obligation of due diligence. Therefore, the diligence shown must be (i) *due* diligence or *active* vigilance, (ii) based on *knowledge* that the state had or should have had, as can be objectively ascertained, (iii) based on the *likelihood*, as can be objectively ascertained, that an impending threat would materialize and taking into account the *time* in which the state had to react.

5.4.4 Different levels of due diligence depending on the nature of disturbances

The vagueness of the concept of due diligence makes it important to describe further to what extent a state must employ its power, including police forces or army units, in order to protect an alien and his property; or within the context of foreign investment: the investor and his investment.

The principle that the duty of a state is not an absolute one is supported not only in academia but also in arbitral practice. At the same time it is well accepted that a government's failure to use due diligence to prevent an act of a private party that affects the investment in an adverse way is ground for international responsibility. But how much diligence or vigilance suffices to conclude that the state has fulfilled its obligation? Interestingly, the first case that dealt with due diligence is illustrative on this point. The tribunal in the Alabama case argued as follows concerning a state's obligation to prevent that third parties violate its neutrality:

“And whereas “due diligence” referred to [...] ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.”⁴³⁰

Umpires and academics alike have attempted to further describe due diligence in concrete terms, but no universally accepted formula has been accepted. An example is the following attempt in the *Salvador Prats case*:

“What is the degree of diligence required for the due performance of duty? [...] The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts.”⁴³¹

The most well known attempt is the attempt of Professor Freeman in his Lectures at the Hague Academy of International Law in 1955:

⁴³⁰ J.B. Moore, *International Arbitrations*, Vol. I, Government Printing Office (1898), p. 654.

⁴³¹ J.B. Moore, *International Arbitrations*, Vol. III, Government Printing Office (1906), p. 2893-2894.

“The “due diligence” is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances [...] So in international responsibility, the degree of danger measures the nature and amount of the diligence a Government must take to prevent injurious acts to another Government or its citizens.”⁴³²

Professor Brownlie acknowledged that examples could be found that supported the duty to exercise due diligence. In addition, he stressed that state responsibility arises when a state has failed to show due diligence, but that “a sliding scale of liability related to the standard of due diligence” based on a number of particular examples of state action or inaction.⁴³³

Thus, the importance of the subjective part of the standard in the form of fault or intent has decreased, but the influence of an objective standard focusing on to what extent a state should provide for protection and security has increased.⁴³⁴ Still, the subjective part remains important because the objective and subjective part of a state’s responsibility depend on the circumstances of the case in question.⁴³⁵ In conclusion, the due diligence principle varies depending “on the specific context and on the content and interpretation of the obligation said to have been breached.”⁴³⁶

5.4.5 Does the standard entail an obligation of conduct or obligation of result?

A distinction has been made in academic literature and in international practice between obligations of states depending on whether they can be considered obligations of conduct or obligations of result.⁴³⁷ While it has been recognized that these two concepts can have different meanings depending on the circumstances of

⁴³² A. V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 88 RCADI 267 (1955), p. 277-278.

⁴³³ I. Brownlie, *Principles of Public International Law*, 3rd ed., OUP (1979), p. 453, and same author, *System of the Law of Nations, State Responsibility – Part I*, Clarendon Press (1983), p. 162 and 168.

⁴³⁴ See K. Zemanek on ‘Responsibility of State: General Principles’ in *Encyclopedia of Public International Law*, Vol. IV, Elsevier (2000), p. 222.

⁴³⁵ J. Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries*, CUP (2002), p. 82.

⁴³⁶ J. Crawford and S. Olleson, *The Nature and Forms of International Responsibility*, in M.D. Evans, *International Law*, 2nd ed., OUP (2006), p. 465.

⁴³⁷ See e.g. I. Brownlie, *System of the Law of Nations, State Responsibility – Part I*, Clarendon Press (1983) p. 241, C. Tomuschat, “What is a ‘Breach’ of the European Convention on Human Rights?”, in *Essays in Honour of Henry G. Schermers*, Vol. 3, Martinus Nijhoff (1994) p. 315 and P. Dupuy, *Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, EJIL 1999, Vol. 10 No. 2, p. 371.

particular cases and jurisdictions,⁴³⁸ the difference between the concepts in civil law has been discussed substantively in the following way:

“[...] obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one’s power to achieve a result, but without ultimate commitment. Thus a doctor has an obligation of conduct towards a patient, but not an obligation of result; the doctor must do everything reasonably possible to ensure that the patient recovers, but does not undertake that the patient *will* recover. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove, than in the case of obligations of conduct or means.”⁴³⁹

Similarly, Professor Dupuy has expressed his views on the subject in the context of the *Iran Hostages case* by stating that if “Iran had been willing and able to demonstrate that it had actually taken all appropriate steps to avoid the taking of diplomats as hostages, then it would not have been held responsible by the Court.”⁴⁴⁰

However, the ICJ did not entertain the question in the *Iran Hostages case* whether the responsibility incurred due to the actions of the Iranian revolutionary guard were a violation of an obligation of conduct or result. The issue was addressed by Judge Schwebel in his dissenting opinion in the *ELSI case*. The dispute presented before the Court was whether Italy had violated its obligation according to an FCN treaty between the US and Italy. An American investor, ELSI, had decided to close down its plant due to severe losses. Thus, the investor started a process of closing down the factory according to a predetermined strategy. However, the mayor of Palermo decided with reference to the delicate economic situation to take over the plant. The actions of the mayor resulted in ELSI’s bankruptcy and subsequent forced sale of assets which led to lower prices than otherwise would have been the case. The requisition was held unlawful before Italian courts, but was not considered a breach of the FCN treaty by the International Court of Justice. Judge Schwebel noted in his dissenting opinion the distinction made between obligations of conduct and result:

⁴³⁸ The concept of guaranteeing a particular result is well known in some jurisdictions, e.g. EU-law. Member states of the EU are obliged according to Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes to set up a scheme which provides that the aggregate deposit of a depositor doing business with a European financial institution must be covered up to 20.000 euros in the event of deposits being unavailable. See further Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, para 48, and Case C-222/02 *Paul and others* [2004] ECR I-9425, para 26-27.

⁴³⁹ J. Crawford, *Second Report on State Responsibility*, Report on State Responsibility for the International Law Commission, UN Doc. A/CN.4/498, para 57.

⁴⁴⁰ P. Dupuy, *Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, EJIL 1999, Vol. 10 No. 2, p. 379.

“The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus, [...] the obligation of Article 1 would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are.”⁴⁴¹

In addition, Judge Schwebel referred to an issue which has at times been considered to undermine the importance of the division made between these two types of obligations, namely whether state action is the primary reason for a certain situation or whether the same situation is the reason for actions taken by a state:

“It may of course be maintained that, even in the absence of the requisition, ELSI would have gone bankrupt. That indeed is the essential conclusion of the Italian courts and of this Chamber. But his conclusion does not take account of the fact – or of what is believed to have been shown in this opinion to be the fact – that, if the requisition had not been imposed when it was imposed ELSI would have been enabled to realize materially more from its assets than in fact was realized, even if, at some point, ELSI might have been obliged to go into bankruptcy.”⁴⁴²

Despite the difficulty entailed in the categorization as to whether a specific action is an obligation of conduct or result, the distinction between these obligations can be used to classify them and to describe conclusions reached in individual cases.⁴⁴³

Arbitral tribunals have not subjected the host state to a due diligence test that focuses specifically on whether the actions of the state should result in a particular result or not, but rather used due diligence as a tool to assess the different nature of the obligation which is owed to the investor and whether action taken by a state suffices to fulfil that obligation.⁴⁴⁴ That is not to say that tribunals have not been hostile to the idea of applying such an assessment of whether the obligation owed is an obligation of result or an obligation of conduct.⁴⁴⁵ It is acknowledged that the due

⁴⁴¹ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), p. 117.

⁴⁴² *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), p. 121.

⁴⁴³ See e.g. Professor Crawford’s comments on the advantages and problems which the categorization entails in J. Crawford, *Second Report on State Responsibility*, Report on State Responsibility for the International Law Commission, UN Doc. A/CN.4/498, para 68.

⁴⁴⁴ See R. Pisillo-Mazzeschi, ‘State Responsibility in International law’, in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 118 and 136. See also H.E. Zeidler, *The Guarantee of “Full Protection and Security” in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 12.

⁴⁴⁵ See *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.08, where the tribunal entertained the idea of conducting such an assessment, but refrained due to the fact that Zaire did not take a single measure to ensure protection and security of any investments.

diligence test is not to be understood as an insurance policy against every loss due to various forms of civil strife. UNCTAD recognized this feature in its study on the investor-state disputes derived from investment agreements:

“while not an obligation of result, an obligation of good faith efforts to protect the foreign-owned property has been established [...] As a result, this standard should be understood as being very much a ‘living’ one. It places a clear premium on political stability, and the obligation of host countries to ensure that any instability does not have negative effects on foreign investors, even above the ability to protect domestic investors.”⁴⁴⁶

The ‘living’ nature of the due diligence test leads to a situation whereby a distinction has to be made depending on the different circumstances, as discussed in the previous chapter. Thus, in the event where a state is obliged to prevent a certain act towards an investor, the state should have a police force that will prevent damage to the investor or his investment. However, knowledge of the state plays a considerable role in this respect, in particular if it is objectively impossible to prevent a certain event. Thus, it is not sufficient for an investor, who has suffered e.g. random vandalism, to point out that the perpetrators were not found by the host state’s authorities. It is necessary for the host state to try to find and apprehend the individuals responsible for the vandalism, but if such an effort, which entails the diligent use of police force and other authorities, does not result in an arrest and conviction, the state has not violated its obligation according to the standard. If a state, however, is unable to prevent an occurrence, but is successful in apprehending the perpetrators after it has taken place, it has an obligation to charge them and subsequently punish them. As this part of the state obligation is curtailed by various factors, including the independence of the judiciary, various penal court procedures concerning burden of proof and human rights protection, the state is incapable of guaranteeing a particular result. Thus, the nature of the obligation is to establish and maintain a structure, e.g. a police force, judiciary, penal system etc. This first part of the obligation is objective in nature and entails an *obligation of result* due to the fact that the structure has to be in place. Another part of the obligation is to use the structure to fulfill the obligation owed to the investor. This second part of the obligation is, however, different in the sense that entails an *obligation of conduct*, namely the state has to use its best efforts to prevent, apprehend and punish the parties who intend to inflict or have inflicted damage to the investment.⁴⁴⁷

⁴⁴⁶ UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, United Nations (2005), p. 40-41.

⁴⁴⁷ See R. Pisillo-Mazzeschi, ‘State Responsibility in International law’, in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 114.

5.5 The application of the standard

5.5.1 Introduction

One of the most controversial aspects of the standard is its application. It is important to note that even though the standard is based on a simple idea, its application in practice is at times complex and subjected to numerous requirements.

It is necessary to take note at the outset that the application of the standard is limited in numerous ways. These limitations can be procedural and substantive in nature and some are more topical than others. In addition, the issue whether the standard should be limited to protection of physical safety or whether it should go beyond physical safety has divided arbitral tribunals. Still, the arguments that are used to conclude either way provide interesting clues as to how far tribunals might go in individual cases.

5.5.2 Procedural and substantive requirements for protection

The Washington Convention of 1965 – ICSID Convention – marks the starting point of any discussion addressing procedural issues in terms of investment arbitration, not least because the convention provides for the investor-state dispute mechanism that is most frequently used in international investment arbitration.

One of the fundamental requirements for protection is to be found in Article 25 of the ICSID Convention that describes the Centre's jurisdiction.⁴⁴⁸ The article deals with questions of jurisdiction concerning the nature of the dispute (*ratione materiae*) and the parties to the dispute (*ratione personae*). This article is designed to close a procedural gap that existed prior to the formulation of the treaty in terms of investor-state arbitration. The conventional model of dispute settlement was built upon the fact that individuals and companies would resolve their dispute before national courts, whereas states would seek adjudication before the International Court of Justice. Therefore, the lack of forum for investor-state arbitration was solved with the formulation and adoption of the ICSID Convention.⁴⁴⁹

However, Article 25 prescribes numerous requirements for a dispute to be resolved by a tribunal established according to the Convention – two of these are that the dispute must be a legal dispute and that the legal dispute must be between an

⁴⁴⁸ The ICSID Convention, 575 UNTS 159. Article 25(1) reads as follows: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

⁴⁴⁹ See C. Schreuer, *ICSID Convention – A Commentary*, CUP (2009), p. 82.

entity domiciled in a contracting state (investor) and a contracting state (host state).⁴⁵⁰ In addition, the ICSID Arbitration Rules govern more particular procedural matters, including the submission of evidence. Many of these provisions have particular importance in practice due to the nature of the disputes being adjudicated.

One of the issues mentioned in Article 25, which has particular importance in practice, is the concept of investment. While the concept of investment is central to the Convention, no definition of the concept is to be found there. In practice, tribunals rely either on an independent test to determine whether an investment has been made or follow a definition of the concept found in most BITs.⁴⁵¹ However, the concept of investment has particular meaning within the context of full protection and security as it has been used to argue, for and against, that the standard should not only entail physical protection and security of an investor and his investment, but also protection and security in the form of legal protection and stability of the regulatory framework.⁴⁵²

According to Article 34(1) of the Rules of Procedure for Arbitration Proceedings the tribunal shall judge the admissibility of any evidence adduced and its probative value. The general rule is that the claimant must prove that there has been a violation of the standard, the violation is a result of state action or can be attributed to the state and that he has suffered damage as a result. Similarly, the respondent carries the burden of proof with respect to the facts it alleges. However, cases involving the full protection and security standard are sometimes particularly complex as the main perpetrator is a third party, not the state itself or its agents. During the time of civil unrest or when revolutionary forces control parts of the host state, it can be almost impossible to gather conclusive evidence in order to assess whether the host state has fulfilled its obligation of due diligence.

In some cases arbitrators have decided that this situation can lessen the burden of proof that the claimant has to fulfil. This situation became an issue in the *AAPL v Sri Lanka* where the arbitrators argued, after having previously established that a tribunal may, in cases where proof of a fact present extreme difficulty, be satisfied with less conclusive proof:

⁴⁵⁰ See C. Schreuer, *ICSID Convention – A Commentary*, CUP (2009), p. 82.

⁴⁵¹ See N. Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in N. Horn and S. Kröll (eds.), *Arbitrating Foreign Investment Disputes*, Kluwer (2004), p. 283, and E. Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 403.

⁴⁵² See e.g. *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 308.

“Therefore, and faced with the impossibility of obtaining conclusive evidence about what effectively caused the destruction of the farm premises during the period in which the entire area was out of bounds under the exclusive control of the governmental security force, the Tribunal considers the state’s responsibility established in conformity with the previously stated international law rules of evidence.”⁴⁵³

The situation does not necessarily become less complex even though it is proven that governmental agencies have been shown to have harassed key personnel of the investor. In *Eureko v Poland*, the tribunal took note that authorities had harassed the investors’ management. The harassment was considered to be disturbing. In spite of that the tribunal concluded:

“However, in any event there is no clear evidence before the Tribunal that the [state] was the author or instigator of the actions in question. If such action were to be repeated and sustained, it may be that the responsibility of the government of Poland would be incurred by a failure to prevent them.”⁴⁵⁴

Even though the task of fulfilling the burden of proof seems to be challenging according to arbitral practice, it is not impossible by any means. In *Vecchi v Egypt*, an investor had bought a large part of oceanfront land on the Gulf of Aqaba on the Red Sea from the Egyptian Government. The investor argued that Egypt had through various acts and omissions expropriated the investment and violated the standard of full protection and security. The investor had learnt about it beforehand that the investment was to be expropriated and had requested protection. The tribunal noted:

“Claimants have provided detailed submissions and evidence that, upon learning that Resolution No. 83 was about to be implemented and Claimants’ investment seized, [...] made explicit requests of the Nuweibaa Police that Claimants’ investment be protected. [...] The requests for protection of [...] are recorded in verbatim transcripts made by the Nuweibaa Police and the El Tor district Attorney’s office [...] Egypt has not denied that the asserted requests for protection were made. Indeed Egypt, as Claimant noted, has not addressed Claimants’ evidence in this regard at all. Absent any evidence to the contrary the Tribunal accepts without reservation Claimants’ evidence and finds that these requests for protection occurred.”⁴⁵⁵

⁴⁵³ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 85.

⁴⁵⁴ *Eureko B.V. v Poland*, Ad hoc arbitration, Award rendered on 19 August 2005, para 237.

⁴⁵⁵ *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448. See also *Desert Line Projects v Republic of Yemen*, ICSID Case No. ARB/05/17, Award 6 February 2008, para 167, with regard to a host state’s obligation to provide an alternative explanation after having disputed a claimant’s description of events.

Subsequently, the tribunal concluded that numerous obligations according to the Italy/Egypt BIT had been violated, including the full protection and security standard.⁴⁵⁶

Finally, claimants have had difficulties in presenting their arguments – not least because of the often unclear substantive content of various investment standards that have not been interpreted uniformly in practice. It is imperative to argue with procedural clarity when arguing the legal effects of a state’s action or inaction, in particular when applying them to a particular investment standard. In the *Plama Consortium case*, the investor had purchased an oil refinery that had been privatized by the government. The investor alleged that the government had amended its laws and given statements that incited violence towards the investment. The tribunal considered that the arguments put forth by the investor lacked structure and a link to the established concepts of investment protection. It argued:

“Only in its Reply does Claimant introduce the claim that Respondent failed to create stable, equitable, favourable and transparent conditions. Claimant limited its arguments to claiming that it was constantly subjected to “haphazard and opaque” decisions by Respondent and that repeated “interventions” created “unstable, inequitable, unfavourable and non-transparent conditions for PCL-s investment.” [...] Claimant did not, however, set out the content of this standard or to explain precisely how it had been violated. The only specific reference in this regard is that the amendment of [...] allegedly created unstable and inequitable conditions.”⁴⁵⁷

Thus, even though the standard’s substantive content can at times be disputed, it is imperative to adhere to the alleged actions and inactions of the state when subjecting them to a particular standard.

⁴⁵⁶ See *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448. The case is also interesting with regard to submitting new arguments too late. After the jurisdictional phase of the proceedings had been concluded, Egypt submitted arguments which dealt with the nationality of the investor. The tribunal rejected arguments relating to these issues as inadmissible according to ICSID Procedural Rules due to their lateness. See for that matter same award, para 313.

⁴⁵⁷ See *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 169 et seq.

5.5.3 Protection of physical safety

Arbitral awards, old and new, provide a collection of examples whereby states are obliged to provide protection and security. This obligation applies to providing for physical protection and security from state organs or acts of private entities.⁴⁵⁸

With regards to state organs, in particular, tribunals have often concluded that direct action taken by a state or its entities has led to a situation whereby the investor has lost control of his investment or the investment has been severely damaged. In *AAPL v Sri Lanka*, the arbitral tribunal was faced with the repercussions of a counter-insurgency operation undertaken by the Sri Lankan military. The investment, a shrimp farm, had been completely destroyed during the operation. While it was unclear who exactly had destroyed the farm, the tribunal considered the state to have been in control of the territory where the investment was situated. The tribunal also assessed whether the military operation had been necessary or excessive taking into account the situation and concluded:

“Accordingly, the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.”⁴⁵⁹

In *AMT v Zaire*, the investor was the majority owner of a company that owned a cell-battery production plant. The investor suffered considerable damage due to looting in September 1991 and January 1993, some of which was conducted by Zairian armed forces. The tribunal concluded that it did not matter whether state entities or third parties conducted the looting. The state’s failure to provide protection and security sufficed to establish its responsibility.⁴⁶⁰ In addition to concluding that the state had failed to provide protection and security, the tribunal also decided that the

⁴⁵⁸ In some cases, tribunals have concluded that the standard does not deal with violations perpetrated by the state. See e.g. *Eastern Sugar B.V. v Czech Republic*, SCC Award, 27 March 2007, paras 203-207. This contention, however, has foundation neither in theory nor in practice. See e.g. R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP (2008), p. 150. As for arbitral practice see e.g. *Amco Asia Corporation and Others v Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413, para 178, and *Bivater Gauff Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para 730.

⁴⁵⁹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 85.

⁴⁶⁰ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997) paras 6.05-6.10.

state had violated an additional obligation that dealt specifically with damage caused during riots or acts of violence.⁴⁶¹

In *Wena v Egypt*, the tribunal addressed the take-over of the investment, a hotel, orchestrated by a government owned entity that was responsible for the country's relationship with foreign investors in the hotel industry. The hotel was seized despite assurances to the contrary that had been given by the Ministry of Tourism. Based on substantial evidence the tribunal found that (i) Egypt was aware of the hotel seizures before they happened and did not prevent them, (ii) Egyptian police forces did nothing to protect the investment, (iii) Egypt did not restore the hotels during the one year the seizures lasted, (iv) Egypt failed to prevent damage to the investment while it was under its control, (v) Egypt failed to sanction the government entity that executed the seizure and its senior officials, and (vi) Egypt refused to compensate the damage caused. The tribunal concluded that the full protection and security standard had been violated.⁴⁶²

When the state compromises the investment by direct action, is the use of force a presupposition for a violation? Arbitral practice does not seem to be uniform whether use of force is necessary to violate the physical safety of an investment. In *Saluka v Czech Republic*, the state privatized a part of its banking system whereby the investor had succeeded in acquiring shares in publicly owned bank. After the investment had been made, the state amended its regulations that negatively affected the investment. The tribunal emphasized that the full protection and security standard was limited to protecting physical integrity threatened with the use of force:

“The practice of arbitral tribunals seems to indicate, however, that the “full security and protection” clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the *physical integrity* of an investment against interference by *use of force*.”⁴⁶³ (emphasis added)

In contrast, the tribunal in *Bivater Gauff v Tanzania* came to a different conclusion. The investor participated successfully in a tender to repair and expand the Dar es Salaam water and sewage system. After the investor commenced his activities, the government terminated contracts, repealed VAT exemptions and eventually took

⁴⁶¹ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997) paras 6.13-6.14.

⁴⁶² *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 82 and 95.

⁴⁶³ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para 484. See also similar arguments in *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award 7 December 2011, para 609.

over the investment. The tribunal dealt with whether use of force was a presupposition for a violation:

“In that perspective, even if no force was used in removing the management from the offices or in the seizure of City Water’s premises, these acts were unnecessary and abusive and amount to a violation by the Republic of its obligation to ensure full protection and security to its investors.”⁴⁶⁴

When it comes to acts of third parties that threaten the safety of the investment, such as social demonstrations of third parties due to the controversial nature of the investment, tribunals seem to be of the opinion that the investor must tolerate some disruption in connection to those demonstrations. In *TECMED v Mexico* and *Noble Ventures v Romania*, the arbitral tribunals dealt with demonstrations that, as pointed out by the investors, became troublesome following a change in political climate. In the former case, an investor had taken part in a privatization project and succeeded in acquiring rights over a landfill. However, the political climate towards the privatization project changed, resulting in a situation whereby the investment became a contentious issue in local politics. Demonstrations and disturbances ensued. The investor argued that the Mexican authorities had not provided protection and security against the demonstrations. In the latter case, the investor had purchased a government owned steel mill. Shortly thereafter, a change in government took place that was less open to the transaction. Local unions demonstrated against the investor and his ownership of the steel mill. In both cases the tribunals disagreed with the investors and in the latter case the tribunal stated that:

“Even assuming the correctness of the Claimant’s factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation [...] to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses.”⁴⁶⁵

In a more recent case, *Toto v Lebanon*, a tribunal was faced with a complaint based upon the notion that the host state had not prevented demonstrators, which were former owners of land that had been expropriated to construct a motor highway (the

⁴⁶⁴ *Bivater Gauff Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para 731.

⁴⁶⁵ *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, para 166. See also *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 177.

investment), to temporarily obstruct the investor in his operations. After having cited *inter alia* the *ELSI case*, the tribunal rejected this part of the complaint in the following way:

“In the present case, the temporary obstruction of some expropriated owners did not amount to an impairment which affected the physical integrity of the investment. Moreover, Toto did not demonstrate that Lebanon could have taken preventive or remedial action that it failed to take, and that it acted negligently in relation to the owners’ obstruction.”⁴⁶⁶

Other tribunals have followed a historical approach emphasizing that the standard has historically been limited to physical protection and security. In *Rumeli v Kazakhstan*, the investment was made in the telecom industry. The risk inherent in the investment was substantial as it entailed building up a certain type of telecom network that was unknown in the country. After the investment became successful, public officials allegedly orchestrated a scheme whereby the investor lost control of the investment. The tribunal argued that the standard only obliged the respondent to provide for a certain level of protection from “physical damage”.⁴⁶⁷ In a similar approach, the tribunal in *BG Group Plc v Argentina* argued that the original meaning of the full protection and security standard had traditionally been associated with “physical security” of the investor and the investment.⁴⁶⁸ As allegations concerning physical violence or damage had not been made, the tribunal could not find a violation. However, the tribunal acknowledged that a number of tribunals had concluded that the full protection and security standard incorporated an obligation to provide for “a secure investment environment”, but did not find it appropriate to depart from the original meaning of the standard.⁴⁶⁹

The reasoning for limiting a state’s obligation to physical protection and security is, needless to say, of crucial importance. However, the arguments used to deny an investor any further protection, i.e. legal protection or obligation to maintain a stable

⁴⁶⁶ *Toto Costruzioni Generali S.P.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Award 7 June 2012, para 229.

⁴⁶⁷ *Rumeli Telekom v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 668.

⁴⁶⁸ *BG Group Plc v Argentine Republic*, UNCITRAL Arbitration, Award 24 December 2007, para 324.

⁴⁶⁹ *BG Group Plc v Argentine Republic*, UNCITRAL Arbitration, Award 24 December 2007, paras 326-327. Argentina later filed suit before US courts to have the award vacated because the arbitral tribunal had exceeded its authority by ignoring the terms of the relevant BIT. This motion was denied by the District Court for the District of Columbia. However, the Court of Appeals for the District of Columbia vacated this award on the basis that BG Group did not commence arbitration after having first filed a claim before Argentine courts as required by the UK-Argentine BIT. See US Court of Appeals for the District of Columbia, Opinion No. 11-7021 of 17 January 2012, available at <[http://www.cadc.uscourts.gov/internet/opinions.nsf/5D6C3A833731DA72852579880056CC38/\\$file/11-7021-1352802.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/5D6C3A833731DA72852579880056CC38/$file/11-7021-1352802.pdf)>.

legal framework, is of equal importance as they often include elements that a tribunal considers necessary to extend the protection further.

5.5.4 Protection beyond physical safety

A number of tribunals have gone further and contemplated whether the full protection and security standard entails an obligation to provide legal security, or to maintain a legal framework that is stable and secure in terms of both physical, commercial and legal security. However, arbitral awards are particularly non-uniform in this context. At the same time, some tribunals have had reservations that widening the scope of the standard would lead to an overlap with fair and equitable treatment and some forms of expropriation.⁴⁷⁰ Different patterns appear in arbitral tribunals as to how extensive the legal protection should be in individual cases.

1) Legal system available to investor

Tribunals have often concluded that when a state provides the investor access to its legal system, regardless of whether it is access to the administrative or judicial part of the system, the state has fulfilled its obligation even though it has not been able to prevent an occurrence that has had adverse effect on the investment. Here, the *ELSI case* is illustrative on two different points. The case dealt with efforts of an American investor to liquidate his investment after having realized that it would not be profitable. Thus, the investor set out a scheme for the purpose of “orderly liquidation” of the investment. The situation was delicate as the company employed about 800 Italian workers. Shortly after the company had dismissed all the workers, the mayor of Palermo ordered the company to be requisited for six months. In addition to this action, workers occupied the company plant. The company instigated legal proceedings in order to reverse the order of the mayor. The appellate body, which dealt with the appeal, did not pass judgment on the order until 16 months later. At that time the mayor’s order had expired. Before that period, the company was forced to declare bankruptcy. This led the United States to bring a case before the International Court of Justice. Firstly, the United States argued that the Italian state had failed to provide most constant protection and security when it failed to prevent workers from occupying the company’s plant shortly after it had been taken over by public authorities as ordered by the Mayor of Palermo. Secondly, the United States argued that it had taken an appellate body 16 months to rule on the order

⁴⁷⁰ See e.g. *Enron Corporation v Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, paras 286-287, and *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award 30 July 2010, para 172.

which enabled the state to take over the plant – that in itself constituted a violation of the protection and security standards stipulated in Article V, paragraphs 1 and 3. The Court concluded that no violation of Article V, paragraphs 1 and 3, had taken place.⁴⁷¹ As to the first issue, the ICJ argued that even though the FCN treaty between the United States and Italy prescribed that nationals of the contracting states should enjoy “most constant protection and security” that could not be construed as guaranteeing that property should never in any circumstance be occupied or disturbed.⁴⁷² With regard to the second issue, the ICJ agreed that while the time taken by the appellate body was undoubtedly long it did not constitute a violation of the international minimum standard of full protection and security.⁴⁷³

The *Lauder* and *CME* cases are particularly interesting because there the tribunals dealt with the same facts, the same standard, but reached different conclusions. The facts of the cases were that an American investor made an investment in the media business in the Czech Republic. In 1993, the investor established a business relationship with a Czech counterpart – a relationship that enabled him to launch a successful TV station. From the very start of the business a Czech regulatory body made comments as to how the investment should be structured and thus affected the relationship of the investor with its Czech counterpart. In order to accommodate these comments the investor and the Czech entity decided to organize their relationship in a certain way – a two tier structure was adopted in which the Czech entity was the license holder, but the investor was the operator. Under this structure the investor had exclusive use of the broadcasting license granted to the Czech entity. In 1996 the Czech media law was changed which eventually convinced the regulatory body to alter its original position. The regulatory body informed the parties concerned that it thought that the structure should be altered. Despite some

⁴⁷¹ Article V, paragraphs 1 and 3, of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948 stated the following:

“1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the *most constant protection and security* for their persons and property, and shall enjoy in this respect the *full protection and security required by international law*.

3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the *protection and security* which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country.”

⁴⁷² *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 108.

⁴⁷³ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 111.

opposition the parties altered their two-tier structure in a way that the exclusive use of the investor was not guaranteed in the same way as it had been previously. Subsequently, an ongoing commercial dispute ensued between the investor and his Czech counterpart in 1999. That dispute eventually led to the termination of the relationship by the Czech entity and made it impossible for the investor to continue his participation in the Czech media market as it did not have access to a broadcasting license. The investor instigated arbitral proceedings in which he argued that changes made to the Czech media law, government interference with regard to the structure of his investment and the termination of the business relationship by his Czech business partner was tantamount to a violation of *inter alia* the standard of full protection and security.

The tribunal in *Lauder v Czech Republic* rejected the claims of the investor by pointing out that changes made to the media law did not have adverse effects on the business of the investor, in fact, the changes were considered to his favour at the time. Moreover, the tribunal pointed out that the main cause for the loss of the investor were not the actions or inactions of the Czech authorities but the termination of a contractual relationship between the investor and his Czech counterpart. No obligation of due diligence existed which obliged the Czech authorities to intervene in a dispute between two companies over the nature of their legal relationship. It then stated:

“The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent’s only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law. There is no evidence - not even an allegation - that the Respondent has violated this obligation.⁴⁷⁴

As the investor had made use of the Czech judicial system, the tribunal could not find a violation of the standard of full protection and security. In contrast, the tribunal in *CME v Czech Republic* concluded that the legal security of the investment had been removed, as will be discussed below.⁴⁷⁵

Arbitral tribunals have not considered social demonstrations, which have according to investors had adverse effect on the investment, to be violations of the standard as such. Following such unrest, the government often implements measures that also affect the investment in a negative way. If the host state grants the investor

⁴⁷⁴ *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, para 314.

⁴⁷⁵ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award 13 September 2001, para 613.

access to his judicial system or administrative system, it might have fulfilled its obligation in terms of full protection and security. In *Tecmed v Mexico*, the tribunal emphasized that the investor had had access to the judicial system in order to guard his interest against government measures.⁴⁷⁶ Similarly, in *Saluka v Czech Republic*, the tribunal dealt with two measures that affected the investment – first, a freezing order that prohibited the sale of shares of the newly privatized company and, second, a search and seizure operation undertaken by the host state’s police. The tribunal held on both counts that the investor had had access to an appellate body and a revision before the constitutional court. Therefore, no violation of the full protection and security standard occurred:

“Even assuming that the freezing of the IPB shares held by Saluka may be State conduct within the scope of the “full security and protection” clause, the Tribunal [...] fails to see a procedural denial of justice that would violate the Czech Republic’s Treaty obligations. The absence of further appeals against decisions of the last instance for appeals is not *per se* a denial of justice. The alleged denial of Saluka’s right to be heard is the basis for the petition lodged with the Constitutional Court. Nothing therefore emerges from the facts before the Tribunal that would amount to a manifest lack of due process leading to a breach of international justice and to a failure of the Czech Republic to provide “full protection and security” to Saluka’s investment.”⁴⁷⁷

“The Claimant furthermore complains of the search of [...] Prague Representative Office and the seizure of [...] documents. According to the Claimant, these police actions were illegal and violated [...] fundamental rights to the inviolability of privacy and home, to the protection against unauthorized interference with its privacy and unauthorized gathering of data, and to the protection of ownership rights. [...] Saluka [...], however, successfully lodged a petition with the Czech Constitutional Court which in a decision of 10 October 2001 held in favour of Saluka.”⁴⁷⁸

Surprisingly, a broad definition of the full protection and security standard has not always been considered to establish an obligation to maintain a stable legal and commercial environment. In *Suez and Vivendi v Argentina*, a tribunal was faced with the task of interpreting the standard that prescribed that an investment should be “fully and completely protected and safeguarded”. The dispute concerned infrastructure projects that had been privatized but later taken over by the government during economic difficulties. The tribunal held that this expansive formulation of the standard in treaty law could not be applied without taking into

⁴⁷⁶ *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Additional Facility Case No. ARB(AF)/00/02, Award of 29 May 2003, para 177.

⁴⁷⁷ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para 493.

⁴⁷⁸ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para 496.

account the historical application of the standard. That approach led to the conclusion that the standard entailed a due diligence obligation to protect the investor from physical harm, but excluded an obligation to maintain a legal and commercial environment. Still, the obligation to protect an investment from physical harm included an obligation to provide “adequate mechanisms and legal remedies for prosecuting State organs or private parties responsible for the injury caused.”⁴⁷⁹

2) *Can physical security of an intangible asset be achieved?*

Before addressing arbitral awards that deal with the issue of whether the obligation to provide protection and security entails protection beyond physical security, it is necessary to address one problem in particular which was raised by the tribunal in *Siemens v Argentina*. As noted by the tribunal, the definition of the concept of investment has expanded considerably following the ever increasing number of BITs – an evolution that has led to the inclusion of more types of assets than before and, in effect, expanded the level of protection. Therefore, the full protection and security standard also provides protection for intangible investments, including contract claims, according to most BITs.⁴⁸⁰ It is, however, questionable to see, as stated by the tribunal in *Siemens v Argentina*, in what way full protection and security beyond physical safety can be provided to an intangible investment:

“As a general matter and based on the definition of investment, which included tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.”⁴⁸¹

It is obviously correctly stated by the tribunal that the physical security of an intangible asset is difficult to implement – a principle containing these substantive provisions comes close to an oxymoron. However, the reason for protecting investments that take an intangible form, e.g. various contract rights, shareholder rights or copyrights, can be as great as protecting tangible investments. In addition, the fact that the investment is intangible does not change the fact that the investment is to be protected, but only the way in which the investment is to be protected. So, the protection owed to the investor cannot be physical in the literal sense, but must be in the form of providing structures to the investor that protect the investment,

⁴⁷⁹ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 173.

⁴⁸⁰ *Wena Hotels Ltd. v Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, para 98, and *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 98.

⁴⁸¹ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 303.

e.g. police force, court system, administrative system, etc. In these cases a state's obligation can take the form of providing police protection to the investor in the sense of securing the premises of a venue where a shareholder meeting is being held or closing down criminal business operations which have the aim of interfering with the investment. Other forms would also become part of a state's obligation, including providing the investor with remedies to address violations against his intangible property, such as providing for a legal system that enables the investor to instigate legal proceedings before a court. That would apply *inter alia* in cases where e.g. a patent is stolen, copied or imitated – the state must provide for remedies that enable the investor to take action and enforce any awards that are necessary to protect the investment.⁴⁸² It is important to emphasize that this does not entail an overlap with the fair and equitable treatment standard because the state's participation does not entail treatment, but is a reaction to adverse effects caused by third parties to the investment.

3) *Legal security – Legal protection*

Tribunals have noted that the wide definition of the concept of investment leads to the conclusion that the protection of the investment cannot be limited to physical security alone. In individual cases tribunals are in a particular position because they are faced with a wide formulation of the full protection and security standard, namely “full legal protection and legal security”, “fully and completely protected and safeguarded” or “full legal protection to investments of investors of the other Contracting Party”.⁴⁸³

In contrast to the conclusion of the tribunal in the *Lauder v Czech Republic*, the tribunal in *CME v Czech Republic* decided that the host state had violated the full protection and security standard. The claimant in these arbitration proceedings was CME, a company domiciled in the Netherlands and in the ownership of Mr. Lauder, the party to the former arbitration proceedings. Here, the assessment of the same circumstances, in particular the role the regulatory body played during the beginning of the business in 1993 and proposed amendments to the investment structure in 1996, and how its role affected the investment, was very different. The state's inaction during a commercial dispute in 1999 – a dispute which later led to the

⁴⁸² See e.g. A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, Kluwer Law International (2009), p. 311-314, and H.E. Zeitler, ‘Full Protection and Security’, in S. Schill (ed.), *International Investment Law and Comparative Public Law*, OUP (2010), p. 196.

⁴⁸³ See *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 303, *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 170, and *Pausbok et al v Mongolia*, UNCITRAL Arbitration, Award of 28 April 2011, para 322-327, respectively.

termination of the business relationship – was thought to be of considerable importance with regard to the standard of full protection and security. The tribunal argued, when assessing whether the state had violated the standard of full protection and security, the following:

“The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the *security and legal protection* of the Claimant’s investment in the Czech Republic. The Media Council’s (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued. This is not the case. The Respondent is therefore in breach of this obligation.”⁴⁸⁴ (emphasis added)

In *Azurix Corp v Argentina*, the investor had invested in a utility that distributed drinking water and disposed of sewerage water. The investor argued that the host state had failed to implement a tariff regime and that the host state had not completed certain works related to the infrastructure necessary for the concession. After having cited *Wena v Egypt* and *Occidental v Ecuador*, the tribunal concluded that the standard ought not be limited to physical security and that:

“[...] full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a *secure investment environment* is as important from an investor’s point of view. [...] However, when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”⁴⁸⁵ (emphasis added)

In *Siemens v Argentina*, the investor participated successfully in a bid to design and maintain a personal identification and electoral information system. However, the host country later requested that the investor postpone the implementation of the system and eventually demanded that the contract concerning the investment be renegotiated. The tribunal was faced with the task of interpreting an unusually wide formulation of the standard.⁴⁸⁶ The tribunal argued that protection was not limited to physical protection alone due to the fact that BIT applicable to the dispute contained a very broad definition of the concept of investment. The tribunal further stated that the concept of “legal security” had been defined as being “the quality of the legal

⁴⁸⁴ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award 13 September 2001, para 613.

⁴⁸⁵ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para 408.

⁴⁸⁶ Article 4(1) of the Germany-Argentina BIT states: “Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genießen im Hoheitsgebiet der anderen Vertragspartei vollen rechtlichen Schutz und volle rechtliche Sicherheit.”

system which implies certainty in its norms and, consequently, their foreseeable application.” Having discussed these issues, the tribunal stated:

“To conclude, the Tribunal finds that the initiation of the renegotiation of the Contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens’ investment.”⁴⁸⁷

In *Vivendi v Argentine* a dispute arose over the privatization of a provincial water and sewage system. A concession agreement for 30 years was awarded to the investor. Shortly after the investor took over the system, problems arose with the provincial authorities concerning a number of issues relating to the investment. The tribunal concluded after having cited the cases of *ELSI*, *Wena Hotels*, *Rankin* and *Eureka* that protection and security can “apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.”⁴⁸⁸

One authority has gone particularly far with regard to arguing for an obligation incumbent on the host state of securing a stable legal framework and economic stability. In *Bivater Gauff v Tanzania*, the investor had been awarded a contract to repair and expand a water and sewage system. However, the state later terminated the contract, repealed tax exemptions and took over the investment. The tribunal argued the following concerning how far-reaching the host state’s obligation should be:

“The Arbitral Tribunal adheres to the *Azurix* holding that when the terms “protection” and “security” are qualified by “full”, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of “full security” only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”⁴⁸⁹

The dispute in *National Grid v Argentine Republic* concerned an investment of the claimant in a formerly state-owned company that had been accorded a ninety-five year concession agreement to provide high-voltage electricity transmission service. The tribunal assessed whether actions of the government, which were a reaction to an economic crisis, constituted a violation of the full protection and security standard. The tribunal concluded by arguing:

⁴⁸⁷ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 308.

⁴⁸⁸ *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para 7.4.17.

⁴⁸⁹ *Bivater Gauff Ltd. v Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, para 729.

“The Tribunal concludes that the phrase “protection and constant security” as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets. This conclusion is reinforced by the inclusion of this commitment in the same article of the Treaty as the language on fair and equitable treatment. In applying this standard of protection to the facts of the instant case, the Tribunal finds that the changes introduced [...], which effectively dismantled it, and the uncertainty reigning during the two years preceding [...], with respect to any possible compensation on account of the impact of the measures on Claimant’s investment, are contrary to the protection and constant security which the Respondent agreed to provide for the investments under the Treaty.”⁴⁹⁰

One category of awards is of particular interest, namely the awards that reject the claimants’ case of extending protection beyond physical safety, but recognise at the same time that the scope of the standard can, in individual cases, be extended. In *Sempre Energy v Argentina*, the tribunal argued the following:

“There is no doubt that historically this particular standard has been developed in the context of physical protection and the security of a company’s officials, employees and facilities. The Tribunal cannot exclude as a matter of principle the possibility that there might be cases in which a broader interpretation could be justified. Such situations would, however, no doubt constitute specific exceptions to the operation of the traditional understanding of the principle. [...] In this case, there has been no allegation of a failure to give full protection and security to officials, employees or installations. The general argument made about a possible lack of protection and security in the broader ambit of the legal and political system has in no way been proven or even adequately developed.”⁴⁹¹

One of the latest cases dealing with protection and security, *Vecchi v Egypt*, touched upon actions of the state that violated what would generally be considered legal security. The host state took over the investment despite the investor’s repeated requests for police protection. The investor successfully challenged the resolution that provided legitimacy for the seizure of the investment before Egyptian courts. On these issues the tribunal concluded that the conduct shown by the host state had fallen well below the standard of protection owed to the investor “both in allowing the expropriation to occur and in [...] failing to take steps to return the investment

⁴⁹⁰ *National Grid Plc. v Argentine Republic*, UNCITRAL Award, 3 November 2008, para 189. Other awards have reached similar conclusions when the full protection and security standard is linked to fair and equitable treatment. See e.g. *Total SA v Argentine Republic*, ICSID Award, 27 December 2010, para 343.

⁴⁹¹ *Sempre Energy Int. v Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, paras 323-324. See almost an identical argument in *Enron Corp. v Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, paras 286-287.

[...] following repeated rulings of Egypt's own courts that the expropriation was illegal.”⁴⁹²

5.5.5 Conclusion concerning application

Various cases included in this study reveal two different approaches of tribunals when dealing with the standard's application – one group adheres to the principle that the standard's scope is limited to physical protection whereas the other group is of the opinion that protection goes beyond physical safety alone. Which group is right? As in any legal dispute, both groups have some merit in the context in which they present their arguments. The former group is right that the standard has traditionally applied to physical security alone. The latter group is also correct in arguing that the standard has also been applied in ways to include legal security.

With regard to the first arguments which builds upon the presupposition that the standard has historically only been subjected to physical protection, it is important to note two distinct issues: (i) the general obligation to protect has historically not always been limited to physical protection and (ii) international law has changed considerably since the argument of the former group was universally accepted in arbitral practice.

Arbitral awards stemming from the inter-war period seem to show that the obligation to provide protection and security was not limited to physical protection alone. Here, it is important to differentiate between different parts of the obligation to provide protection and security depending on whether they entail a *duty to prevent*, a *duty to restore* or a *duty to investigate, prosecute and punish*.⁴⁹³ When a state failed to provide physical protection, e.g. because it was impossible for the host state to have any knowledge that the security of an alien was jeopardised, its obligation became one of investigating, prosecuting and punishing those responsible. This part of the obligation was, first and foremost, an obligation to provide for the necessary legal framework and use that framework in order to protect the alien and his property.⁴⁹⁴ As has already been discussed, this last part of investigation, prosecution and

⁴⁹² *Waguib Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448.

⁴⁹³ See Chapter 5.4.2.

⁴⁹⁴ Arbitral awards from the interwar period show that if a state fails to prevent an attack on an alien it has the obligation to investigate, prosecute and punish the perpetrators. See e.g. *Lillian Greenlaw Sewell, (USA) v United Mexican States*, IV RIAA (1930), p. 631-632, *John D. Chase (USA) v United Mexican States*, IV RIAA (1928), p. 339 and *Gertrude Parker Massey (USA) v United Mexican States*, IV RIAA (1927), p. 162. Further examples are mentioned in R. Pisillo-Mazzeschi, 'State Responsibility in International law', in R. Provost (ed.), *State Responsibility in International law*, Ashgate/Dartmouth (2002), p. 117.

punishment is an obligation of best efforts, as opposed to an obligation of result, due to the various external effects, such as the independence of the judiciary. However, that does not provide the host state with unlimited discretion in that regard, such as not preventing the xenophobic arguments be used against the alien in question or not implementing court decision's that have concluded that particular state action is in violation of constitutional rights.⁴⁹⁵

With regard to the second argument, it is important to note that a structural change has been taking place amongst the sources of international investment law – the dominant source of law in investment disputes is not customary international law or principles contained in FCN treaties, but BITs, most of which have been concluded in the last fifty years.⁴⁹⁶ Those agreements have influenced this sphere considerably. One of the most fundamental changes is the ever-widening definition of the concept of investment. A case in point is the different definition of the concept of investment in the Germany-Pakistan BIT of 1959 compared to the definition of the same concept in the Germany-Bosnia Herzegovina BIT of 2001. In Article 8 of the Germany-Pakistan BIT⁴⁹⁷ the concept of investment is defined in a simple way compared to the more elaborate definition of investment in Article 1 of the Germany-Bosnia-Herzegovina.⁴⁹⁸

⁴⁹⁵ See e.g. *Loeven Group et al v United States of America*, Additional Facility Case No. ARB(AF)/98/3, para 132, and *Waguib Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448.

⁴⁹⁶ See Chapter 2 for a general historical overview and Chapter 3 with regard to how the sources have changed structurally.

⁴⁹⁷ Article 8 of the Germany-Pakistan BIT is as follows:
“(1) (a) The term “investment” shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term “investment” shall also include the returns derived from and ploughed back into such “investment”.

(b) Any partnerships, companies or assets of similar kind, created by the utilisation of the above mentioned assets shall be regarded as “investment”.

⁴⁹⁸ Article 1 of the Germany-Bosnia-Herzegovina BIT is as follows:
“1. The term “investments” comprises every kind of asset, in particular:
(a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
(b) shares of companies and other kind of interests in companies;
(c) claims to money which has been used to create an economic value or claims to any performance having an economic value;
(d) intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;
(e) business concessions under public law, including concessions to search for, extract and exploit natural resources;
any alteration of the form in which assets are invested shall not affect their classification as investment.”

These developments are of importance as they influence the content of the rules that govern investment protection, including full protection and security. This evolution should make it more difficult to apply a “historical approach” to limit a treaty-based standard that provides for “full protection and security” or “full legal protection and legal security”. Or as famously noted in the *Mondev case* where the tribunal addressed the relevance of arbitral awards of the 1920s within the context of investment protection:

“[...] *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of “fair and equitable treatment” and “full protection and security” of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien.”⁴⁹⁹

To conclude, it seems that the standard should, as an absolute minimum, provide for physical protection and security of the investment, not unless the relevant BIT is formulated in a way to increase the level of protection. In the event that a BIT explicitly states that the investment should be accorded “legal security”, a tribunal must approach the legal dispute taking into account that the contracting parties have indicated a higher level of protection. If, however, no such provision is to be found, the conclusion must be that protection in the form of legal security is limited to structures dealing with either investigation, prosecution and punish those responsible and a legal framework that enables the investor to vindicate his rights. It is safe to say, given the frequent rate of legal disputes being adjudicated before arbitral tribunals, that more detailed criteria will emerge in the future.

5.6 Does the host state’s level of development affect application?

5.6.1 Investors in less developed countries

It is not self-evident that a state would be susceptible to admitting foreign direct investment into its territory. The state has no obligation under international law to do so.⁵⁰⁰ However, foreign direct investment is generally considered advantageous to states as it increases productive capacity of a country’s economy.⁵⁰¹ The benefits of

⁴⁹⁹ *Mondev International Ltd. v United States of America*, Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002, 6 ICSID Reports 192; 42 ILM 85 (2003), para 116.

⁵⁰⁰ C. Schreuer and R. Dolzer, *Principles of International Investment Law*, OUP (2008), p. 7.

⁵⁰¹ See OECD, *Policy Framework for Investment*, Paris 2006, p. 7.

foreign direct investment can serve as a powerful tool to increase level of development. Investment can, in a similar way as international trade, have beneficial effects to a country's economy. However, the parallels are only limited to the beneficial effects of investment and trade due to the different nature of these two transactions. Therefore, it is important to differentiate investment from trade – the former entails a long-term relationship between the investor and the host country, whereas the latter usually consists of a one-time exchange of goods and money.⁵⁰²

The reasons why a national of a particular state decides to seek opportunities in another state are manifold. One of the reasons can be that the national comes from a developed country and intends to enter a less developed country to capitalize on its resources, which are not being explored. Such a scenario has advantages for an investor; he could provide the host state with expertise and funding and have the possibility of earning a rate of return on his investment in excess of what would be possible in a more developed country. In such cases the investor enjoys an advantage due to his expertise and access to funding. However, the investor should realize that he enters a less developed country – a situation that entails that he cannot expect to enjoy the same protection and security as in his home country.⁵⁰³

5.6.2 Protection reasonable under the circumstances

Examples can be found in academia and arbitral practice alike that the host state's development could possibly play a role when determining a state's obligation to provide protection and security.

The different capabilities of states to provide protection and security have not gone unnoticed by commentators. It is appropriate to revert to Elihu Root on the importance of an international standard:

“If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of aliens [...] It is a practical standard and has regard always to the *possibilities of government under existing conditions*. The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps.”⁵⁰⁴ [emphasis added]

⁵⁰² C. Schreuer and R. Dolzer, *Principles of International Investment Law*, OUP (2008), p. 3-4.

⁵⁰³ See N. Gallus, *The Influence of the Hosts' State's Level of Development on International Investment Treaty Standards of Protection*, *The Journal of World Investment & Trade*, Vol. 6, Number 5, October 2005, p. 711-712, concerning the different questions of interpretation which need to be addressed depending on whether the investment is made in a developed country or a developing country.

⁵⁰⁴ E. Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AJIL 517 (1910), p. 523.

International law has developed considerably after the composition of Root's passage. However, commentators and arbitrators still maintain the position that the application of the minimum standard, when deciding on a state's international responsibility, should be proportional to its resources. Borchard recognised that violence towards aliens could occasionally happen in well-ordered, as well as less well-ordered states, despite ordinary precaution and due diligence exercised by governments to prevent it. In addition, he argued that a state could not be held liable for mob violence that it was unable to prevent.⁵⁰⁵ This position was reflected in the Harvard Draft on The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners of 1929. In comments to Article 4, which dealt with a general duty to maintain a minimum amount of governmental organization, "means at [a governments] disposal" were addressed in this way:

"The failure to perform the duty, under normal conditions, may make it impossible for a state to avoid responsibility in certain cases where responsibility otherwise would not have existed. It is to be recognized, however, that in every state temporary abnormal conditions may result in the dislocation of the governmental organization, and such possibility is to be taken into account in determining whether responsibility exists in a given case. Even in abnormal times, however, a state has a duty to use the means at its disposal for the protection of aliens, and a failure to perform this duty may result in its becoming responsible to another state injured in consequence thereof. The term "means at its disposal" is employed because it is desired to emphasize the instrumentalities of government that may be available for use."⁵⁰⁶

Similar arguments were acknowledged in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens of 1961. The explanatory note to Article 13(1), which addressed due diligence, stated:

The means which a State has available to protect an alien must also be taken into account. In a thinly populated area, it cannot be expected that large police forces be mobilized in order to render safe those aliens who may wish to enter the area. It is, however, quite clear that a State must not stop at affording protection through police but must, if necessary, attempt to maintain order through the intervention of military forces as well. In sum, the duty of state to afford protection may vary with the character of the territory in question in the very same manner that the acts necessary for the exercise of sovereignty may vary with the nature of the terrain, the population and the degree of civilization of the area claimed."⁵⁰⁷

⁵⁰⁵ E. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing Co. (1915), p. 220-223.

⁵⁰⁶ Harvard Draft on The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners reproduced in 23 AJIL 1929, Special Supplement, p. 133, at 146.

⁵⁰⁷ Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, 15 April 1961 reprinted in M.M. Whiteman, *Digest of International law*, Vol. 8, p. 739-740.

An additional example would be O'Donnell's treatise on international law where he argued that the obligation should take into account the resources available to the state in question. However, if it could be established that a "...situation called for more police which could have been provided in time and were not..." the situation would be different. Thus, a state would violate its obligation if the facts were known to its authorities and no action was taken or the action which was taken is inadequate taking into account available resources.⁵⁰⁸ This view has been supported by other writers, most recently by Newcombe and Paradell:

"Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."⁵⁰⁹

Arbitral practice supports the notion that the resources of the state should be taken into account when assessing the obligation of a state to provide protection. The *British Claims in the Spanish Zone of Morocco case* dealt with claims by British subjects against Spanish authorities for damage to life or property suffered in the course of riots and civil unrest during the insurrection of a tribe, the Rifkabyls, in the Spanish Zone of Morocco. Arbitrator Huber argued that even though a state could not be made responsible for a particular occurrence, it could not be free from every responsibility. To the contrary, a state would be obliged to exercise due diligence during a period of civil unrest. The degree of diligence would in this context be important and could be characterized as an analogy of the principle of *diligentia quam in suis*, namely that the obligation of a state in terms of degree of vigilance should correspond to the means at its disposal – in other words, the state would be obliged to do only what it could reasonably be expected to do.⁵¹⁰

Here parallels can be drawn between the general obligation of states to provide protection, as described in the *British Claims in the Spanish Zone of Morocco case*, and

⁵⁰⁸ D. P. O'Donnell, *International Law*, Vol. II (1970), p. 968 et seq.

⁵⁰⁹ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, Kluwer Law International (2009), p. 310.

⁵¹⁰ See *British Claims in the Spanish Zone of Morocco*, II RIAA (1923), p. 644 and also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd. (1953), p. 220.

arbitral practice within the context of investment protection. The approach in these disputes is similar, in particular with regard to what the state could reasonably be expected to do. While a balancing of interests between states and investors is necessary, based on an assessment undertaken on a case-by-case basis, arbitration awards seem to favour that investor's expectations should have an additional relevance in that assessment. The *Alex Genin v Estonia* case dealt with an investor who chose to purchase a financial institution privatized by the Estonian state. The investor's banking license was later revoked and his employees allegedly harassed. The tribunal denied the claims of the investor and took note that the transaction was a part of an effort by a former communist country to reorganize its economy and change it into a market-based economy. Having pointed this situation out, the tribunal argued "[t]his is the context in which Claimants knowingly chose to invest in an Estonian financial institution."⁵¹¹ Similarly, the tribunal in the *Generation Ukraine v Ukraine* case dismissed the arguments of a US investor. The investor had invested in commercial property by acquiring a 49-year leasehold in downtown Kyiv. However, the investor argued that local authorities had obstructed and interfered with the realisation of the project in a way that was tantamount to expropriation. The tribunal argued, after having found that despite frustration and delay caused by bureaucratic incompetence of Ukraine authorities, that the investment standard had not been breached:

"Finally, it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties. The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls."⁵¹²

Thus, an investor who invests in a developing country cannot expect to enjoy the same level of protection as if the investment would be made in a developed country as the application of absolute investment standards, which are formulated in a relevant BIT, might be affected by the host state's development. So, even though the host state has an obligation to protect the investment according to international law, the state is not necessarily obliged to provide a structure that is the same or

⁵¹¹ *Alex Genin v Estonia*, ICSID Case No. ARB/99/2, Award 25 June 2001, para 348. The dispute concerned whether the fair and equitable treatment standard had been violated and whether the investment had been impaired in an arbitrary and discriminatory way. It is worth noting that the investor argued the full protection had not been granted, but that argument was not addressed by the tribunal. See, in particular, para 70.

⁵¹² *Generation Ukraine v Ukraine*, ICSID Case No. ARB/00/9 Award 16 September 2003, para 20.37.

equivalent of a similar structure in a more developed country – instead the host state is obliged to employ all necessary means at its disposal to discharge its obligation of providing for investment protection, including full protection and security. However, it is important to emphasize here that this does not mean that the state’s resources will never be taken into account. Examples can be found where the efforts of a developing state to protect foreign investment has been assessed without special regard for the resources available to do so, in particular when the state has taken action that either creates the circumstances that enable third parties to damage the investment or when the state action itself damages the investment.⁵¹³

This leads to the conclusion that the balancing of interest between the investor and the host state can prove to be challenging in practice. If the level of development of a host state is to play a role in determining its obligations within the context of absolute investment standards, such standards would face the risk of becoming too casuistic in practice. The end result would be that these standards, such as the full protection and security standard, would become diluted, as their application would depend on a case-by-case assessment of a country’s level of development. Needless to say, such a scenario would not encourage states to increase their level of development as that might incur a stricter obligation to provide for investment protection. Here, the due diligence principle becomes particularly important as it could serve as a tool to determine, taking into account all relevant facts, including the resources available to a state to prevent a particular threat to an investment, the obligations of a state to provide full protection and security. In such a way opposing interests could be reconciled without departing from the substantive elements of the standard.

5.6.3 How could development affect adjudication of investment disputes?

If the host state’s development is to have an effect in a legal dispute that is being adjudicated before an arbitral tribunal, the effect can manifest itself in two different ways – either it can have an effect on the legal assessment that determines the host state’s obligation to provide protection and security or it can affect the determination of damages in the event that a violation of an investment standard has been found.

⁵¹³ These examples include *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991), *AMT v Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, 36 ILM 1531 (1997) and *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002). See further UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, United Nations (2005), p. 40-41.

Surprisingly, the two cases that reached different conclusions concerning the full protection and security standard – *Lauder v Czech Republic* and *CME v Czech Republic* – applied similar arguments when discussing to what extent a state is obliged to provide investment protection.⁵¹⁴ Both tribunals stated that the host state was to provide investment protection reasonable under the circumstances despite reaching opposite conclusions.⁵¹⁵

One of the cases, where an arbitrator posed the question whether the state's level of development should play a role when determining its obligations to provide full protection and security, is *Pantechniki S.A. Contractors & Engineers v Albania*. The case dealt with a Greek investor who was selected after a tender to work on bridges and roads in Albania. After having worked for three years in the country, the investor suffered setbacks due to riots that spread throughout the country following numerous ponzi scheme failures.⁵¹⁶ Violent incidents led the investor to abandon his work site where all equipment was stolen and everything else destroyed. The arbitrator discussed that the even though the host state is required to exercise due diligence, the level should be determined taking into account particular circumstances, including whether an investor was aware that civil strife and poor governance affected the host state's government. After having referred to the testimony of the investor's employees, which confirmed a scenario of "desolation and lawlessness" upon the investor's arrival three years before the riots took place, and that the police had informed the investor that they were unable to provide protection, the arbitrator refused the investor's claims in the case.⁵¹⁷

⁵¹⁴ *Lauder v Czech Republic*, UNCITRAL Arbitration Award of 3 September 2001, argued at para 308: "The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment *as reasonable under the circumstances*." [emphasis added] Similarly, *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, argued at para 353 in fine: "[...] an obligation to provide the nationals of the other Contracting State to a BIT with "full protection and security" is not an absolute obligation in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State. A government is only obliged to provide protection which *is reasonable in the circumstances*." [emphasis added]

⁵¹⁵ See also *CME v Czech Republic*, UNCITRAL Arbitration, Final Award of 14 March 2003, paras 72-80, in particular the Separate Opinion of Professor Brownlie that includes criticism on the "commercial" approach taken when determining damages.

⁵¹⁶ Following the failure of the ponzi schemes in November 1996 and January 1997, the country descended into anarchy. In March 1997, the government had lost control of the southern part of the country. Before order was restored some 2,000 people had been killed. See further C. Jarvis, *The Rise and Fall of Albania's Pyramid Schemes*, Finance and Development – A quarterly magazine of the IMF, March 2000, Vol. 37, No. 1, p. 46 et seq.

⁵¹⁷ *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 82.

In contrast, the tribunal in *AMT v Zaire* did not seem sympathetic to that line of argument in principle, but took note of the country's lack of development when deciding on damages. In the case, an investor, who had invested in the production and sale of automotive and dry cell batteries, claimed compensation for looting in September 1991 and later destruction of its industrial complex in January 1993. When addressing the issue of what it meant that the provisions of the BIT should not be any less than those recognized by international law, the tribunal emphasized that this entailed an "objective obligation" which obliged Zaire not to apply inferior treatment compared to the "minimum standard of vigilance and of care required by international law".⁵¹⁸ After having reached its conclusion on the merits, the tribunal turned to the claim for compensation. AMT claimed compensation in the amount of 21,9 million US dollars, namely fair market value including interest at a rate equivalent to international rates from the date of incurred losses, in addition to all cost and expenses. However, the tribunal took note when deciding on the amount of damages that compensation should not be decided in the abstract:

"AMT would have liked to adopt a method of calculating compensation including interests practicable in the normal circumstances prevailing in an ideal country where the climate of investment is very stable, such as Switzerland or the Federal Republic of Germany. The Tribunal does not find it possible to accede to this way of evaluating the damages with interest in the circumstance under consideration, in which it is apparent that the situation remains precarious [...]. It would be neither practical nor reasonable to apply the method of assessment of compensation in a way so far removed from the striking realities of the current situation [...]. Preferably, the tribunal will opt for a method that is most plausible and realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by so doing the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever."⁵¹⁹

The tribunal awarded the investor an all-inclusive total sum of 9 million US dollars carrying an annual interest from the date of the award. In addition, the parties were to bear an equal share of the cost of the arbitral proceedings and entirely its own fees of counsel.

⁵¹⁸ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.06.

⁵¹⁹ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), paras 7.14-7.15.

5.7 Does the standard overlap with other investment standards?

The full protection and security standard is by no means the only standard in international investment law that provides for protection for foreign investors. Other standards include the standard against uncompensated expropriation, the fair and equitable treatment standard, arbitrary and unreasonable and/or discriminatory measures and national treatment.⁵²⁰ Due to the considerable number of investment standards and the vagueness of their substance and non-uniform application, the question arises whether the full protection and security standard overlaps with these other standards and to what extent that overlap might be.⁵²¹

The standards are generally independent but interrelated. The first evidence of the independence of individual standards is the distinction made between them in the BITs themselves. All of the numerous standards are usually mentioned independently in the BITs. It would be rather illogical to mention these standards, but then argue that all these stipulations are to be understood as the same standard, especially when the treaty text suggests otherwise.⁵²² This has, however, not kept arbitrators from equating the full protection and security standard to the fair and equitable treatment standard entirely⁵²³ or from covering the issues of the full protection and security standard when addressing the fair and equitable treatment standard substantively.⁵²⁴ Yet, other tribunals acknowledge the independence of the standard, in particular the part which provides physical protection and security, but refrain from recognizing it in the broader ambit of protection and security of a legal or political system.⁵²⁵ With regards to other standards, tribunals have not distinctively commented on where the standards might overlap, but made a distinction when applying them substantively *ratione materiae*.

⁵²⁰ Some authors would argue that there are other standards. That will, however, not be addressed as the most consensus seems to be about those mentioned here. See e.g. C. Schreuer, 'Introduction: Interrelationships of standards', in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 1-7.

⁵²¹ The relationship between the BIT regime and EU law has also been topical, especially after the accession of Eastern European countries, many of which had entered into BITs with EU member states prior to their accession to the Union. See e.g. *Eastern Sugar B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award 27 March 2007, SCC, paras 115-139.

⁵²² See this view in C. Schreuer, 'Introduction: Interrelationships of standards', in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 4. This has also been acknowledged in arbitral practice, see e.g. *Jan de Nul v Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, para 269.

⁵²³ See *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 303.

⁵²⁴ See *Occidental Exploration and Production Company v Ecuador*, LCIA Administered Case No. UN 3467, Award 1 July 2004, para 187.

⁵²⁵ See e.g. *Enron Corporation v Argentine Republic*, ICSID Case No. ARB/01/03, Award of 22 May 2007, para 287, and *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para 324.

The standards can be divided into two categories. The first category consists of absolute standards, namely standards that have certain substantive content, which in part do not overlap. This category includes *inter alia* expropriation, fair and equitable treatment and full protection and security. The second category consists of relative standards. They do not have a substantive content in the same way as the standards in the former category, but prescribe that an alien cannot be treated any different from the citizens of the state with which the alien is compared or aliens of a third country. The former example relates to the national treatment standard, but the latter to the MFN standard.

5.7.1 Fair and equitable treatment

The obligation of a state to provide fair and equitable treatment has become one of the most commonly violated obligation by states when dealing with foreign investors.⁵²⁶ At first sight the interrelationship between the fair and equitable treatment standard and the full protection and security standard seems to be considerable. That does not necessarily come as a surprise, in particular taking into account the fact that these two standards are often mentioned in the same provision dealing with the treatment of investments and investment protection. The Germany-Hong Kong BIT can be seen as an example of this practice:

⁵²⁶ From 1997 to 2007, arbitral tribunals concluded that the fair and equitable treatment standard had been breached in the following cases: *AMT v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997); *Metalclad Corporation v Mexico*, ICSID Case No. ARB (AF)/97/1, 30 August 2000; *SD Meyers Inc. v Canada*, UNCITRAL Arbitration, First Partial Award, 13 September 2000; *Emilio Agustín Maffezini v Spain*, ICSID Case No. ARB/97/7, 13 November 2000; *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002); *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001; *Middle East Cement v Egypt*, ICSID Case No. ARB/99/6, 12 April 2002; *Pope & Talbot v Canada*, UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 ILM 1347 (2002); *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB/00/2, Award of 29 May 2003; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award 21 May 2004; *OEPC v Republic of Ecuador*, LCIA UN3467, Award of 1 July 2004; *CSOB v Slovak Republic*, ICSID Case No. ARB/97/4, Award 29 December 2004; *Petrobart Ltd. v Kyrgyz Republic*, Award rendered 29 March 2005, SCC; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award rendered 25 May 2005; *Bogdanov v Republic of Moldova*, SCC Award of 22 September 2005; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1 Award rendered on 3 October 2006; *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006; *PSEG Global Inc. and Konya İlgün Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007; *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007 and *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007.

“Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting party.”⁵²⁷

Formulations in other BITs, in particular various US treaties, increase the level of complexity as they do not only mention the fair and equitable treatment standard and the full protection and security standard, but include a reference to the minimum standard of international law. Article 3(a) of the US-Latvia BIT states:

“Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded less treatment than that required by international law.”⁵²⁸

Thus, not only are the two standards of fair and equitable treatment and full protection and security mentioned in the same sentence, but also a reference to the international minimum standard is made. This has led commentators to argue that the relationship between these three standards seems to be “characterized by a fair amount of contradiction and uncertainty”.⁵²⁹

Arbitral practice reveals that most tribunals acknowledge the close interrelationship between the fair and equitable treatment standard and the full protection and security standard.⁵³⁰ Other tribunals have equated the fair and equitable treatment standard with other standards, including the full protection and

⁵²⁷ See Art. 2(2) of the Germany-Hong Kong BIT. Other similar examples could be mentioned, e.g. Art. 2(2) of the UK-Singapore BIT, Art. 3(1) of the Austrian-Mexico BIT, Art. 3(1) of the Denmark-Bulgarian BIT.

⁵²⁸ See also the 2004 US Model BIT that contains language designed to limit the power of arbitrators to interpret the standards therein. It states in Article 5:

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

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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

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

⁵²⁹ See S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 17 BYIL 99 (1999), p. 143, and I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, OUP (2007), p. 183 et seq.

⁵³⁰ See e.g. *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 163, where the tribunal argued that the standards were closely interrelated: “This interrelation will surface when analysing the Parties’ factual allegations. It does not mean, however, that each standard could not be defined autonomously.”

security standard, and thus subsumed other standards under the fair and equitable treatment standard.⁵³¹ One of the more far-reaching approaches can be seen in *Occidental v Ecuador* where the tribunal argued:

“In the context of this finding the question of whether in addition there has been a reach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.”⁵³²

This approach, however, seems to be a minority view not only in arbitral practice but also within academia.⁵³³

In various cases, tribunals have assessed jointly whether the fair and equitable treatment standard and the full protection and security standard have been breached without making a distinction and without mentioning that the standards are the same. In the *Wena v Egypt* the tribunal assessed jointly whether these two standards had been breached without making a distinction between the standards. After having described that the host state was aware of intentions to seize the investment, did not protect the investment, did not return the investment back to the investor or punish the public officials that orchestrated the seizure of the investment, the tribunal concluded that “Egypt violated its obligations under Article 2(2) [...], by failing to accord [...] investments ‘fair and equitable treatment’ and ‘full protection and security.’”⁵³⁴ Still, cases can be found where a tribunal will assess separately the possible treaty violations of the fair and equitable treatment standard and the full

⁵³¹ See e.g. *Petrobart v the Kyrgyz Republic*, Award 29 March 2005, p. 76, in particular the following argument: “The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.” available at <http://www.encharter.org/fileadmin/user_upload/document/Petrobart.pdf> and *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, in particular the following argument at para 182: “Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.”

⁵³² *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Administered Case No. UN 3467, Award 1 July 2004, para 187. See also *Impregilo S.p.A v Argentina*, ICSID Case No. ARB/07/17, Award 21 June 2011, para 333.

⁵³³ See e.g. *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 407-408 and *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award 30 July 2010, para 172 and C. Schreuer, ‘Introduction: Interrelationship of Standards’, in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 4.

⁵³⁴ *Wena Hotels Ltd. v Republic of Egypt*, Award, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002) para 95.

protection and security standard despite the fact that the same set of circumstances have given rise to the legal dispute at issue.⁵³⁵

Tribunals have in individual cases acknowledged the distinct nature of the standard of full protection and security but also commented on the close relationship between the standard and the fair and equitable treatment standard. In *Azurix v Argentina*, the tribunal noted the following:

“In some bilateral investment treaties, fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. The BIT falls in the last category; the two phrases describing the protection of investments appear sequentially as different obligations in Article II.2(a) [...] The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security.”⁵³⁶

Similarly, in *Jan de Nul v Egypt* the tribunal argued that a distinction had to be made between the two standards due to the fact that they were placed in two different provisions of the Belgian-Egypt BIT. However, the tribunal also mentioned that this distinction had to be made even if the two standards could overlap.⁵³⁷

Finally, tribunals have commented on the close relationship between the two standards in cases when the legal dispute concerns the question of whether the full protection and security standard entails an obligation to provide for legal security. In *Suez Vivendi v Argentina*, the tribunal discussed in detail the nature of the obligation to provide full protection and security within the context of due diligence. The tribunal noted the following with regard to how the two standards should be interpreted:

“The fact that the French BIT employs the fair and equitable treatment standard and the full protections and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things. Thus, in interpreting these two standards of investor treatment it is desirable to give effect to that intention by giving the two concepts distinct meanings and fields of application.”⁵³⁸

⁵³⁵ *Oostergetel v Slovak Republic*, UNCITRAL Arbitration, Award 23 April 2012, para 192. However, even though the tribunal made the distinction between the two standard, it later stated that “given that the BIT full protection and security appears as a specific application of the general FET standard, the Tribunals considers it unnecessary to analyze these allegations again separately under Article 3.2.” See further same award, para 308.

⁵³⁶ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, paras 407-408.

⁵³⁷ *Jan de Nul v Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, para 269.

⁵³⁸ *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/03/19, Award 30 July 2010, para 172. See also *Suez and Inter.Aguia v Argentine Republic*, ICSID Case No. ARB/03/17, Award 30 July 2010, para 166.

The result of this analysis is that the fair and equitable treatment and full protection and security deal with two different aspects of investment protection, namely the treatment of investments and the protection of investments. As a result their content can be distinguishable in general with certain particular exceptions where an overlap can be established.⁵³⁹ Here, Professor Schreuer's portrayal provides a description that illustrates the core issues: "The FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable. By contrast, by assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and action by private persons as well as State organs. In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms or the effective vindication of investors' rights."⁵⁴⁰

5.7.2 Expropriation

The full protection and security standard does not overlap with the concept of expropriation. That concept has generally been thought to entail the taking of a property by the state that means the transfer of ownership to the state or a third party.⁵⁴¹ According to customary international law states have the right to expropriate property if the expropriation: (i) is undertaken for a public purpose; (ii) is non-discriminatory; (iii) complies with the principle of due process of law; and (iv) is compensated.⁵⁴² Other forms of expropriation, which can not be characterized as taking in the traditional sense, but are considered indirect expropriation or creeping expropriation, include transfer of management of a company or intense interference by state authorities to the extent that the investment loses any economic value despite the fact that ownership is unchanged.⁵⁴³ Moreover, expropriation does not have to entail complete expropriation, but expropriation has at times also been

⁵³⁹ See e.g. I. Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment*, OUP 2007, p. 157, where she argues: "This [fair and equitable treatment] obligation requires from the State similar behaviour as that required by the more specific standard of 'full protection and security', in the sense that the State is also obliged to physically protect the Investors and their investments in case of riots or demonstrators of the population which may result in the destruction of the investments."

⁵⁴⁰ C. Schreuer, *Full Protection and Security*, Journal of International Dispute Settlement, OUP (2010), p. 14.

⁵⁴¹ I. Brownlie, *Principles of Public International Law*, 7th ed., OUP (2008), p. 532 et seq.

⁵⁴² It is of importance how the expropriated property is compensated. The words of Cordell Hull, US Secretary of State, have been considered to describe the accepted principle. He stated in 1938: "[I]t has been stated with equal emphasis that the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation", cited in M. Whiteman, *Digest of International Law*, Vol. 8 (US Gov, Washington DC 1967), p. 1020.

⁵⁴³ A. Reinisch, 'Expropriation' in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook on International Investment Law*, OUP (2009), p. 408.

considered partial in arbitral practice.⁵⁴⁴ However, regardless of what kind of measures are used in order to expropriate, the result is usually a total loss of business or economic value for the entity that loses control of its property. In contrast, a violation of the full protection and security standard usually does not result in a total loss of business, although exceptions can be found.⁵⁴⁵

It is important to point out that the action, which is more relevant in the context of the obligation to provide protection and security, is the action committed by the state that is considered tantamount to expropriation. It should be noted that it does not matter whether the expropriation or actions tantamount to expropriation lead to the taking of a property for governmental purposes or entail transfer of management to government officials. Government interference of a certain intensity (often justified under the auspices of the regulatory power of the host state) or complete lack of protection (often as a result of non-use of the host state's police force) can be considered actions tantamount to expropriation.

It is, in addition, important to stress that while it is accepted in international law that expropriation must be compensated,⁵⁴⁶ it is also widely accepted that the state has at its discretion police powers that derive from its sovereignty and necessity to regulate human behaviour amongst its subjects and aliens who reside there. Thus, the state can in some cases apply police powers to take private property and – in some cases – without compensation, e.g. when applying general taxes, confiscate property as a result of criminal behaviour, regulating public health or the environment.⁵⁴⁷ However, these actions can be implemented in such a way and under certain circumstances that they can be considered actions tantamount to expropriation. The assessment then becomes where to draw the line between expropriation (or creeping expropriation) and non-compensable regulation or use of police powers.⁵⁴⁸

⁵⁴⁴ Still, arbitral practice is divided on the issue. See further U. Kriebaum, *Partial Expropriation*, 8 *Journal of Investment and Trade* (2007), p. 69, in particular p. 73-82.

⁵⁴⁵ See *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002) and *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001.

⁵⁴⁶ The classical international decisions on the subject and that contract rights are also protected from expropriation are *Norwegian Shipowners' Claims (Norway v US)*, I RIAA 307 (1922), p. 332, and *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926) PCIJ Reports, Series A, No. 7, p. 42.

⁵⁴⁷ See L.Y. Fortier and S.L. Drymer, *Indirect Expropriation in the Law of International Investment: I know it when I see it, or Caveat Investor?*, 19 ICSID Review – Foreign Investment Law Journal (2004), p. 293, and A. Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review – Foreign Investment Law Journal (2004), p. 1.

⁵⁴⁸ The two theories, namely the “effects doctrine” and the “police powers doctrine”, will not be discussed here, but I refer to V. Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, *Journal of World Investment and Trade* (2007), p. 216-217.

Earlier cases, which predate current investment awards, dealt with issues in which the claimant argued not only that property had been expropriated indirectly, but also that the protection and security had not been provided. Interestingly, two cases brought before the Iran-US Claims Tribunal serve as examples where a claim is argued as an indirect expropriation (or taking) claim, but could have been discussed within the context of the obligation to provide full protection and security.⁵⁴⁹

In *Emanuel Too v Greater Modesto Insurance Associates* an Iranian national living in the United States sought damages for the seizure of his liquor license by the United States Internal Revenue Service (IRS). In addition, compensation was sought for loss of property due to a forced sale. The tribunal stated concerning the seizure of the liquor license and real property:

“With respect to the liquor license, the Respondent has conceded that the IRS did, in fact, seize the Claimant’s California general eating place liquor license in order to satisfy over USD 70,000 worth of overdue withholding taxes. Nevertheless, a State is not responsible for taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price. [...] The IRS’s action was a result of the Claimant’s failure to pay taxes withheld by him on his employees’ salaries. Nowhere does the Claimant suggest that this tax levy was imposed against him because he was an Iranian national. Nor has the Claimant proved that the IRS deliberately intended to cause him to abandon the property to the State or to sell it at a distress price. [...] This claim is dismissed because the Claimant has failed to show that the IRS’s action was anything other than a lawful levy for overdue taxes, for which there is no State Responsibility.”⁵⁵⁰

However, the claimant’s argued also that he had not been provided protection and security from attacks and acts of plunder. The tribunal argued:

“The Claimant argues that the Respondent failed to protect his property [...] from the depredations of anti-Iranian Americans. The Claimant suggests that a State is responsible for injuries resulting to a foreign national or his property from the State’s failure to provide protection. Nevertheless, the State cannot guarantee the safety of an alien or of alien property. Responsibility is incurred only when police protection falls below a minimum standard of reasonableness. [...] What constitutes reasonable police protection depends on

⁵⁴⁹ The Iran-US Claims Tribunal was established to resolve disputes, which concerned claims of US citizens against Iran and Iranian citizens against the United States, following the revolution of 1979. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, issued 19 January 1981, reprinted in 1 Iran-US Claims Tribunal Reports, 9. Despite the fact that its jurisdiction is limited to only a certain classes of claims, its awards have had profound influence in international law. See further M. Shaw, *International Law*, 6th ed., CUP (2008), p. 111, and C.N. Brower and J.D. Brueschke, *The Iranian-United States Claims Tribunal*, Martinus Nijhoff Publishers (1998), p. 669.

⁵⁵⁰ *Emanuel Too v United States of America*, Award No. 460-880-2 rendered on 29 December 1989, reprinted in 23 Iran-US Claims Tribunal Reports 378, p. 387-388.

all the circumstances, including the State's available resources. Ordinarily, the standard of police protection for foreign nationals is unreasonable if it is less than is provided generally for the State's nationals. [...] By these standards, the Claimant has failed to show that local [...] authorities failed to exercise due diligence in the protection of his property."⁵⁵¹

The tribunal rejected all claims made after having discussed that the regulatory action was taken according to procedures not only guaranteed the claimant due process, but were implemented in a non-discriminatory manner.

With regard to investment cases in particular, arbitral practice provides numerous examples. The dispute in *Biloune v Ghana* concerned an investment in the form of a resort complex. The investor entered into an investment agreement with a government entity that articulated the investment's structure. Shortly after work on the resort complex commenced, the government issued a stop work order and later took action and demolished the work which had already been done. The investor was arrested and detained for 13 days before being deported. The investor instigated arbitral proceedings and based his claims on the investment agreement, not on a bilateral investment treaty. The tribunal came to the conclusion that these actions had been unfounded and unjustified. Therefore, the investment had been "constructively expropriated".⁵⁵² In *Wena v Egypt* the issue in question was similar. The investment was in the form of a hotel complex, which was seized by a government entity after the investor's relationship with the entity deteriorated. In contrast, though, the investor based his claims on that the investment had been expropriated and that the full protection and security standard had been violated. The tribunal concluded that the investment had been expropriated and that the full protection and security standard had been violated.⁵⁵³ In *Middle East Cement Shipping v Egypt* the dispute concerned an annulment of a government authorization to import and store cement. In addition, a ship was seized and auctioned off. The tribunal noted:

⁵⁵¹ *Emanuel Too v United States of America*, Award No. 460-880-2 rendered on 29 December 1989, reprinted in 23 Iran-US claims Tribunal Reports 378, p. 385-386.

⁵⁵² *Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability rendered 27 October 1989, 95 ILR 183, p. 210. The investor did not refer to the minimum standard of international law. However, the investor argued that his human rights had been violated, a claim rejected by the tribunal as it lacked jurisdiction. However, the case, which concerned whether the investment had been expropriated, dealt with government action which could have been argued as a violation of an obligation to provide protection and security to foreign property. Such cases were not unheard of in the 1980s, cf *Amco Asia Corporation and Others v Indonesia*, Award 20 November 1984, 1 ICSID Reports 413 (1993).

⁵⁵³ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 95 and 99.

“Art. 2.2 of the BIT requires that “Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security, in the territory of the other Contracting Party.” This BIT provision must be given particular relevance in view of the special protection granted by Art. 4 against measures “tantamount to expropriation” and in the requirements for “due process of law” in Art. 4.a.”⁵⁵⁴

The tribunal found that the procedure, which had been followed in connection with the seizure and auction of the investor’s ship, violated the requirements in Article 2.2 of the BIT.

Two cases, which arose out of the same dispute, are of particular interest. In *CME v Czech Republic* and *Lauder v Czech Republic* the dispute concerned an investment in TV NOVA, a Czech television station. In both cases claims were made *inter alia* that the investment had been expropriated and that the full protection and security standard had been violated – the former case was based on the Netherlands-Czech BIT, whereas the latter was based on the US-Czech BIT. The investment was set up in a particular way and in cooperation with the Czech Media Council. Two companies would be involved where one company, CET 21, would be the holder of the broadcasting license and the other, CNTS, would be the operating company. The business relationship between these two companies was guaranteed as CET 21 contributed to CNTS the right to use the license “unconditionally, unequivocally and on an exclusive basis”.⁵⁵⁵ This materialized in 1993, when the business agreement which established this structure of exclusivity was approved by the Czech Media Council which stated they would be considered an “integral part of the license terms”.⁵⁵⁶ Both companies were directed by the investor’s business partner, a Czech national, and TV Nova became one of the most popular television stations in the country. However, foreign control of the media became a contested issue in domestic politics – a situation that later led to amendments on the country’s media law. Due to this new situation the structure was changed in 1996 and the agreements that had established the intimate business relationship between CET 21 and CNTS revised. According to the new structure CET 21 would not be obliged to give CNTS an exclusive right to the broadcasting license, but its obligation would consist of providing CNTS with the “use of the know-how of the license”.⁵⁵⁷ In addition to this turn of events, a newly elected Media Council instigated administrative proceedings against CNTS for conducting television broadcasting without authorization. After this amendment had been finalized, the Czech counterparty of the investor began to

⁵⁵⁴ *Middle East Cement Shipping and Handling Co. C.A. v Egypt*, ICSID Case No. ARB/99/6, Award 12 April 2002, para 143.

⁵⁵⁵ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, para 12.

⁵⁵⁶ *Lauder v Czech Republic*, UNCITRAL Arbitration Award of 3 September 2001, para 70.

⁵⁵⁷ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, para 8.

exercise more influence and took the view that CET 21 would not necessarily have to cooperate with CNTS concerning broadcasting. In effect, CNTS could seek new business partners to provide the facilities necessary for operating a television station. This finally led to the situation where CET 21 decided in 1999 to terminate the agreements between the company and CNTS. Thus, the investor was now in possession of facilities to operate a television station but was unable to broadcast its material as he was not the holder of a broadcasting license.

One of the fundamental issues in both arbitration cases was the participation of the Media Council concerning the amendment in the business relationship between CET 21 and CNTS, which took place in 1996, and its termination in 1999. The tribunal in the *CME case* took the view that actions of the Media Council had played a role when the exclusivity arrangement, which guaranteed CNTS an exclusive right to the broadcasting license from CET 21, was changed and the part dealing with exclusivity dropped. The Media Council, which had previously declared that the structure was an integral part of the license terms, reneged on its prior position. That made it possible for the former business partner of the investor to terminate his business relationship and destroy the investment's commercial value. Thus, the investment had been indirectly expropriated and the full protection and security standard violated.⁵⁵⁸

In contrast, the tribunal in the *Lauder case* came to the opposite conclusion. The tribunal relied on various points in supporting its conclusion. The main argument was that the Czech Media Council had merely used its regulatory powers. In addition, the tribunal stressed that the investor had not objected to the disputed actions when they were implemented but had cooperated with the Media Council. That argument was used against the investor with regard to his claims of expropriation and violation of the full protection and security standard.⁵⁵⁹

As these cases have revealed, there is a link between actions tantamount to expropriation and actions that can be construed as a violation of the full protection and security standard. However, the reason why an investor would argue for violation of both standards by citing the same actions is tactical rather than relating to any direct link between the standards themselves. It is logical to argue at first for the most erroneous violation – direct or indirect expropriation – due to the fact that if a violation is proven, the investor has a much easier task before him when arguing quantification and valuation as expropriation usually leads to the total loss of the

⁵⁵⁸ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, paras 602-604 and 613.

⁵⁵⁹ *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, paras 201-204 and 309-312.

investment. Other standards, e.g. fair and equitable treatment and full protection and security, usually follow as violations of these standards do not necessarily result in total loss of business.⁵⁶⁰ Thus, these standards cover various distinct fields and are complementary in practice, including when individual actions or omissions are assessed within the context of individual standards.

5.7.3 Denial of justice

Denial of justice is usually understood as gross miscarriage of justice. This violation of international law usually manifests itself when a system, which is established by a particular state for the purpose of administering justice, is considered not to work properly, at best, or does not function at all, at worst.

Historically, academics and practitioners have been divided with regard to what constitutes the substantive elements of denial of justice and how expansively the concept should be applied. The broadest view was stipulated by Professor Hyde and Commissioner Nielsen which entailed that denial of justice had occurred when a state had failed to observe concerning an alien “any duty imposed by international law or by treaty with his country.”⁵⁶¹ However, Professor Eagleton criticised this approach as too broad with the immediate result that no distinction could be made between the concept and a breach of international law. In contrast, he stressed the importance that the concept described a particular type of international illegality, distinguishable from other illegal actions of state, and due to that fact had practical importance:

“In this sense it serves a valuable purpose [...] It has been seen that responsibility may occur either before local remedies are sought, because of an international illegality; or afterwards, as the result of the failure of these remedies, thus constituting a separate delict. In the one case the international illegality may perhaps be repaired by the local remedies offered; in the other, such reparation is impossible because it is the failure of the local remedies themselves which constitutes the delict. Here are two types of cases to be differentiated, the one a failure of due diligence, or other international illegality precedent to appeal to the courts the latter a denial of justice. Either is an illegality; and either produces responsibility. But they differ: every denial of justice is a violation of international law; but not every violation of international law chargeable to the state is a denial of justice. The obligation which a state bears toward aliens includes other duties than mere regularity of action on the part of its local courts.”⁵⁶²

⁵⁶⁰ V. Heiskanen, ‘Arbitrary and Unreasonable Measures’, in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008), p. 93.

⁵⁶¹ C.C. Hyde and F.K. Nielsen, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. I, Little, Brown and Co. (1922), p. 491.

⁵⁶² C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 112-113.

Thus, denial of justice has enjoyed a relationship with a state's obligation to provide protection to an alien and his property. An alien has been able to refer to a state's action or inaction under the rubric of denial of justice or protection owed to the alien according to the due diligence standard.

Early arbitral awards reflected this reality. The interrelationship between denial of justice and full protection and security could be described at that time as not being a matter of either/or situation in the sense that conduct by a state constituted either a violation of full protection and security or a denial of justice. Examples can be found where a state was considered to violate its obligations during the process of prevent, investigate and punish. In, for example, the *Sewell case*, bandits killed two Americans during a course of a payroll robbery on May 1, 1920. An investigation was subsequently launched but was allowed to lapse. It was not until 10 months later that efforts were made to ascertain the names of the employees who were working when the robbery took place. About a year after the murders, arrests were made of persons who could not be identified as the culprits. Finally, just over 15 months after the murders took place persons were arrested who confessed to participation and implicated others, but they were not to be found. The commission held, taking into account that the Mexican government could not explain this delay, that there had been "some lack of diligence in the pursuit and apprehension of the culprits" and the "imposition of a penalty inadequate to the crime committed constitutes a denial of justice."⁵⁶³ In the *Massey case*, a case similar to *Sewell*, the claims commission also dealt with the killing of an American subject. The culprit was subsequently arrested and imprisoned. However, a jail-keeper unlawfully permitted the accused to escape and no evidence was shown that the Mexican authorities took effective measures to apprehend the murderer after the escape. The commission concluded that there had been a denial of justice because of the "failure of Mexican authorities to take proper measures to punish the slayer of Massey."⁵⁶⁴

The question remains what constitutes denial of justice. It is rather challenging to locate with accuracy the concept's substantive elements due to its rather non-descriptive stipulation. The description of the Harvard Research Draft of 1929 describes numerous elements:

⁵⁶³ *Lillian Greenlaw Sewell, (USA) v United Mexican States*, IV RIAA (1930), p. 631 and 632. See also *George A. Kennedy (USA) v United Mexican States*, IV RIAA (1927), p. 194, where the commission found that the obligation to provide protection had not been violated, but there had been denial of justice due to irregularities in court proceedings which were instigated after an alien had been attacked.

⁵⁶⁴ *Gertrude Parker Massey (USA) v United Mexican States*, IV RIAA (1927), p. 162.

“A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or manifestly unjust, judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”⁵⁶⁵

The substantive elements of this articulation can be divided into, first, a procedural requirement which entails access to courts, and, second, a substantive requirement referring to a court’s decision. The first element deals with access to courts or tribunals or access to appeal a decision of a lower court/tribunal. This entails, in practical terms, that an alien shall have the right to appear before the courts to seek justice as a plaintiff or defend himself as a defendant. He is also entitled to introduce counterclaims and appeal any judgment rendered in accordance with national law.⁵⁶⁶ The second element relates to substantive issues where only decisions, which can be considered to produce manifest injustice, are considered denial of justice. This is of importance in practice as this prerequisite – manifestly unjust – must be fulfilled. Therefore, it does not suffice if a national court errs in applying national law if that does not render the judgment manifestly unjust. It is important to stress that despite the substantive element of denial of justice, which shall, among other standards, provide investment protection, a tribunal adjudicating an investment dispute does not serve as appellate tribunal.⁵⁶⁷ However, if a national court, which is competent to apply international law, errs in its application, a tribunal that is competent to apply international law is required to substitute the national decision with its own.⁵⁶⁸

In terms of current arbitral practice, the concept was described in the *Loewen case* as being “a sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”.⁵⁶⁹ In addition, the tribunal in the *Mondev case* referred to the concept of denial of justice in the following way within the context of the fair and equitable treatment standard:

⁵⁶⁵ See Article 9 of the Draft Convention on Responsibility for Damage Done in their Territory to the Person or Property of Foreigners, Harvard Law School, published in 23 AJIL 133 (1929), p. 173 [Special Supplement]. The convention was drafted in anticipation of the 1930 Codification Conference of the League of Nations. However, no convention was adopted due to disagreement on the minimum standard. See further J.W. Cutler, *The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929*, 27 AJIL 225 (1933), p. 230.

⁵⁶⁶ See a descriptive illustration of the right to “free access to courts” in *Ambatielos claim (Greece v United Kingdom)*, Award rendered 6 March 1956, XII RIAA 83 (1956), p. 111.

⁵⁶⁷ See e.g. *Robert Azinian v United Mexican States*, Additional Facility Case No. ARB(AF)/97/2, Award of 1 November 1999, 39 ILM 537 (1999), para 99, and *Mondev International Ltd. v United States of America*, Additional Facility Case No. ARB (AF)/99/2, Award 11 October 2002, para 127.

⁵⁶⁸ J. Paulsson, *Denial of Justice in International Law*, CUP (2005), p. 84.

⁵⁶⁹ *Loewen Group et al v United States of America*, Additional Facility Case No. ARB(AF)/98/3, para 132.

“In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subject to ‘unfair and inequitable treatment’.”⁵⁷⁰

However, the scope of the concept of denial of justice, in its modern form, has narrowed further when compared to its application in older cases dealing with denial of justice. As of late, a claim would be made within the context of illegal takings of property or violations of the obligation to provide protection to an alien and his property in addition to denial of justice. A case in point is the *Amco II case*. In 1968, an agreement was made between a US company and an entity owned by the Indonesian government concerning the running of a hotel and office block. The agreement presupposed that the investor would provide capital whereas the investment would enjoy various tax concessions. After the relationship between the investor and the government-owned entity turned sour, the management of the hotel was taken over with the assistance of the Indonesian army and police officers. Subsequently, the investor’s license to engage in business in Indonesia was revoked by the president of Indonesia. The investor instigated arbitral proceedings and claimed denial of justice by asserting, firstly, that the army and police had acted in breach of international law and, secondly, that its license had been wrongly revoked. The arbitral tribunal sided with the investor and awarded damages.⁵⁷¹

It is important to emphasize that while the concept has narrowed in scope by differentiating between the obligation to protect and an alien’s right to justice, its scope has also widened in another sense, as it is no longer the prevalent view to limit the concept to courts alone. Instead, the concept has been considered to include whatever state system administers justice regardless of whether it is a part of the executive, legislative or judicial branch of the state. Two cases illustrate the different approaches taken by tribunals in the first half and second half of the 20th century. In the *Chattin case* the US-Mexican Claims Commission dealt with a case concerning the arrest and detention of an American who was suspected of defrauding his employer, a railway company operating in Mexico, and was later sentenced to serve time in prison. However, civil unrest in Mexico made it possible for him to escape and return to the United States. The commission concluded that the legal

⁵⁷⁰ *Mondev International Ltd. v United States of America*, Additional Facility Case No. ARB (AF)/99/2, Award 11 October 2002, para 127.

⁵⁷¹ See *Amco Asia Corporation and Others v Indonesia*, Award 20 November 1984, 1 ICSID Reports 413 (1993), para 172, with regard to actions of army and police forces and the violation to provide protection.

proceedings instigated by the Mexican authorities had been faulty. During its argumentation the commission emphasized a narrow understanding of denial of justice stating “state responsibility should be limited to judicial acts showing outrage, bad faith, wilful neglect of duty or manifestly insufficient governmental action.”⁵⁷² In contrast, the tribunal in the *Amco II case* came to the conclusion that even though the arbitral awards cited in the *Chattin case* did concern at some phase judicial decisions, the tribunal saw “no provision of international law that makes impossible a denial of justice by an administrative body.”⁵⁷³

It might seem illogical to make a state responsible for the adjudication of cases by the judiciary taking into account that the latter acts independently as prescribed by a state’s constitution. However, that proposition is not sustainable in international law where the state is and must be considered a single entity. This was acknowledged in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts:

“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”⁵⁷⁴

This is relevant because, as we have seen before, the full protection and security standard, in particular its concept of due diligence, has been considered to entail an obligation by a state to protect aliens within its border. That protection has been considered to include, first, an obligation to prevent that attacks be made on a foreigner’s person or property, second, an obligation to restore (if possible) the situation as if the violation had not occurred and, third, an obligation to investigate, prosecute and punish those who are responsible. The third part of this obligation falls under the rubric of “administration of justice”. Any violation of this obligation regardless of whether the violation stems from actions of the legislature, executive or judiciary comes close to the concept of denial of justice but could also be considered a violation of the full protection and security standard.

The relationship between the concept of denial of justice and full protection and security is also interesting in terms of how treaty law might influence the customary standard of the denial of justice. As has been discussed, treaty law has led to a structural change to the standard of full protection and security strengthening its

⁵⁷² B.E. *Chattin (USA) v United Mexican States*, IV RIAA 282 (1927), p. 288.

⁵⁷³ See *Amco Asia Corporation and Others v Indonesia*, Resubmitted case, Award 5 June 1990, 1 ICSID Reports 569 (1993), para 137-139, concerning the revocation of the investment license which entailed denial of justice.

⁵⁷⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Article 4(1).

foundation.⁵⁷⁵ In contrast, that seems not have been the case in terms of the denial of justice – treaty-based standards, including the fair and equitable treatment, which have expanded treaty protection for investors due to their vague and unclear substance, have negatively affected the customary international law standard of the denial of justice. This is the case in one BIT in particular, the 2004 US Model Treaty. After having prescribed in its Article 5(1) that each contracting party should accord to investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security, Article 5(2) then defines further the meaning of fair and equitable treatment as:

“Fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”⁵⁷⁶

Here, denial of justice is included under the concept of fair and equitable treatment. Such a treaty-based reference cannot but influence the customary principle of denial of justice. This development of increased influence of treaty law has led commentators to conclude that the concept of denial of justice, as perceived through treaty law, will contribute to the modern understanding of the customary principle of denial of justice:

“[T]he application of treaty provisions will contribute to a modern understanding of the old doctrine. The reason for this inevitable cross-pollination is that the elements of the delict of denial of justice tend to reappear as treaty provisions, for example when they proscribe “discrimination” or when they require “fair and equitable treatment”. Thus, a complainant before an international tribunal may allege that a treaty has been breached by reference to its terms without invoking the doctrine of denial of justice by name. When the alleged breach has been committed by a judicial body, however, an assessment of *discrimination*, or *unfairness*, or *protection* immediately invites reference to the way such general notions have been understood in the context of denial of justice.”⁵⁷⁷

The interaction between treaty law and the “old doctrine” – here the relationship between the denial of justice and the full protection and security standard – is documented in the *Mondev case*. The dispute, which was subjected to Article 1105 and does not mention denial of justice as such, dealt with an agreement between the investor and a public authority which enjoyed statutory immunity. The project failed because planning consent was not secured. The investor filed suit where he claimed

⁵⁷⁵ See Chapter 2 and Chapter 3.

⁵⁷⁶ The latest revision of the US Model BIT did not lead to changes on this point. See Article 5.2(a) (Minimum Standard of Treatment) of the US Model Treaty 2012, available at the following website: <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

⁵⁷⁷ J. Paulsson, *Denial of Justice in International Law*, CUP (2005), p. 6.

inter alia that the statutory immunity violated the standard of full protection and security in Article 1105 of NAFTA and that there had been denial of justice. The tribunal noted with regard to the immunity issue that a general immunity from suit granted to a public authority could be considered a violation of Article 1105. However, due to the fact that the immunity relevant to the case was a limited one and served a rational purpose that corresponded to the authority's purpose, the full protection and security standard was not violated. The tribunal took a restrictive approach to whether denial of justice had been violated. The main reason for its restrictive approach was related to the particularities of the case, namely that the investor pursued to have the national judgments reviewed substantively. However, as the tribunal observed, if the investor's approach would be adopted, "NAFTA tribunals would turn into courts of appeal, which is not their role."⁵⁷⁸ Therefore, no violation of Article 1105 could be found.

5.7.4 National treatment and most-favoured-nation treatment

Even though there seems to be overlap in certain areas with regard to absolute standards, the full protection and security standard enjoys a close relationship with the national treatment standard and the most-favoured-nation standard. However, generally there can be no overlap due to the relative nature of these standards. They do, in contrast to the substantive standards of fair and equitable treatment and full protection and security, not include defined substantive elements, but rather refer to other additional protections provided in BITs for nationals of the host state or nationals of third states.

Almost all treaties that have provisions providing for protection and security, both FCN treaties and modern investment treaties, also include provisions prescribing the national treatment standard and the most favoured nation standard. These standards are often formulated with the full protection and security standard. The US-Italy FCN stated in Article V(3):

"The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, *no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country.*"⁵⁷⁹ (emphasis added)

⁵⁷⁸ *Mondev International Ltd. v United States of America*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42 ILM 85 (2003), para 154.

⁵⁷⁹ Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948 and the 1951 Supplement to that Treaty.

The UK Model BIT mentions both standards, but in a different way. This formulation includes the standards as stand alone standards. Article 3 states:

“(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to *treatment less favourable than that which it accords to investments or returns of its own national or companies or to investments or returns of nationals or companies of any third State.*

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to *treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.*

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”⁵⁸⁰ (emphasis added)

Here, the contracting parties incorporate principles that provide a *tertium comparationis* as a relative footing. As a result, parties to these BITs will grant freedom to invest, but only that which is equal with third states (most-favoured-nation standard) or equal to its own nationals (national treatment). However, these different anti-discrimination standards enjoy a distinct relationship with the full protection and security standard due to their different approach of comparison.

National treatment and full protection and security

The national treatment standard prescribes that a state – the host state – shall extend to foreign investors and their investments treatment that is at least as favourable as the treatment accorded to its own nationals. The standard has a long history – it has been traced to trade treaties of the Hanseatic League dating from the twelfth and thirteenth centuries.⁵⁸¹

⁵⁸⁰ Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [...] for the Promotion and Protection of Investments (2005).

⁵⁸¹ For a general discussion on the history of the most favoured nation standard and the national treatment standard G. Schwarzenberger, *The Principles and Standards of International Law*, 117 RCADI 7 (1966) p. 71 et seq. In addition, see UNCTAD, *National Treatment*, Series on Issues on International Investment Agreement Series, Vol. IV, UNCTAD/ITE/IIT/11 (1999), p. 7 et seq and UNCTAD, *Most-Favoured Nation Treatment*, Series on Issues on International Investment Agreement Series, Vol. III, UNCTAD/ITE/IIT/10 (1999), p. 5 et seq.

In addition, the standard has a long history in FCN treaties,⁵⁸² intellectual property rights treaties⁵⁸³ and multilateral⁵⁸⁴ and regional trade agreements.⁵⁸⁵ The standard has been described as one of the most important standards of treatment, but yet problematic in implementation:

“The national treatment standard is perhaps the single most important standard of treatment enshrined in international agreements [...] at the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues.”⁵⁸⁶

The fact that the standard is considered to ensure that an investor should be treated in the same way as the host country’s nationals does not always result in favourable treatment. Investors often base their decisions on a certain level of treatment – a presupposition often distorted by their background. The reason for this situation is that there can be considerable difference between the treatment which an investor enjoys compared to the treatment which the investor is accustomed to in his home country, in particular if that country is a developed country. That fact cannot but influence the level of protection that the investor can expect to enjoy. An investor, needless to say, invests in a developing country to enjoy the comparative advantage which that country enjoys *inter alia* in terms of being available to offer a work force enjoying lower wages than in a developed country. However, the reason for its comparative advantage is lower development which can permeate the entire legal environment in which the investment is scheduled to operate. That often results in different forms of development, e.g. bad governance, economic uncertainty, etc. These factors are known to the investor and must affect his presuppositions as to the level of protection he expects.⁵⁸⁷

⁵⁸² See e.g. Article II of the Treaty of Friendship, Commerce and Navigation and Consular Convention between Germany and Hawaii (1879), Article III of the Treaty of Friendship, Commerce and Navigation between Spain and Siam (1925), Article X(3)-(4) of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (1955).

⁵⁸³ See Article 2 of the Paris Convention for the Protection of Industrial Property, signed 20 March 1883.

⁵⁸⁴ Article III of the General Agreement on Tariffs and Trade (GATT), Article XV of the General Agreement on Trade in Services (GATS); Marrakesh Agreement Establishing the World Trade Organization (1994), Annex IB, Annex IC and Article 3 on Trade-Related Aspects of Intellectual Property Rights (1994).

⁵⁸⁵ Article 1102 of the North American Free Trade Agreement (1992).

⁵⁸⁶ UNCTAD, *National Treatment*, Series on Issues on International Investment Agreement Series, Vol. IV, UNCTAD/ITE/IIT/11 (1999), p. 3.

⁵⁸⁷ This factor played a role in the umpire’s assessment in *Pantechniki S.A. Contractors & Engineers v Republic of Albania* when deciding whether the investor’s loss should be compensated. The investor had suffered damage due to mass riots in the host country. See further *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para 82.

The implications of this situation is that the national treatment standard does not guarantee that an investor is satisfied with the treatment provided or is in fact treated well by the host country. However, the minimum standard of customary international law will provide a floor for the investor which the host state will not be able to violate. Earlier tribunals recognised this scenario as can be seen in the *Hopkins case* by the US-Mexican Claims Commission:

“It not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws [...] The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law, aliens may enjoy rights and remedies which the nation does not accord to its own citizens.”⁵⁸⁸

Thus, in many developing countries a minimum standard of customary international law will raise the national treatment standard whereas in many developed countries the national treatment standard will do the opposite. This interrelationship must be taken into account when interpreting the two standards.⁵⁸⁹

This interrelationship was recognized by the ICJ in the *ELSI case* when the court commented on Article V(1) of the US-Italy FCN treaty. While referring to the full protection and security standard as the primary standard, it also noted that this standard was “supplemented by the criteria of national treatment and most-favoured-nation treatment.”⁵⁹⁰ In contrast, NAFTA tribunals have not considered the relationship supplementary. Their approach has held different opinions as to the relationship’s nature – one group of tribunals has argued that a violation of the national treatment standard in Article 1102 of NAFTA automatically includes a violation of the full protection and security standard in Article 1105, whereas other groups have viewed the two obligations as independent.⁵⁹¹ The Free Trade Commission’s interpretative note influenced this discussion as cited by the tribunal in the *Loewen case*.

⁵⁸⁸ *George W. Hopkins (USA) v United Mexican States*, IV RIAA 41 (1926), p. 47.

⁵⁸⁹ See R. Lillich, *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press (1984), p. 17, and H.E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 23.

⁵⁹⁰ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 111.

⁵⁹¹ See *SD Meyers Inc. v Canada* UNCITRAL, Award of 13 September 2000, para 266, holding that a breach of Article 1102 (national treatment) entailed a violation of Article 1105 (fair and equitable treatment and full protection and security). See, in contrast, *Methanex Corporation v United States of America*, UNCITRAL Award rendered 3 August 2005, Part IV, Chapter C, Page 8, para 17, which held that a breach of 1102 would not trigger a violation of Article 1105.

“The effect of the Commission’s interpretation is that “fair and equitable treatment” and “full protection and security” are not free-standing obligations. They constitute obligations only to the extent that they are recognised by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in *Metalclad, S.D. Myers and Pope & Talbot*, may have expressed contrary views, those views must be disregarded.”⁵⁹²

However, it must be considered somewhat special, as a matter of policy, that two obligations, which are stipulated in two different parts of an investment treaty, be considered so overlapping that a breach of one obligation automatically entails a violation of the other. As discussed earlier, this has also been topical concerning the relationship between the standards of fair and equitable treatment and full protection and security. Such automatic reasoning within the context of national treatment could lead, as in the case of other standards, to a dangerous situation of oversimplification in important investment disputes.

Most-favoured-nation treatment and full protection and security

The most-favoured-nation standard has been considered to be a “core provision of international investment agreements”.⁵⁹³ Its origin can be traced back to the treaty practice of King Henry V of England which ensured that English vessels were granted the right to use harbours of Flanders “in the same way as French, Dutch, Sealanders and Scots.”⁵⁹⁴ This standard later evolved into a standard whereby vessels were ensured a right to a particular activity without naming certain countries, but with reference to any third state. It was included early on in provisions dealing with protection of foreign merchants. Article XVII of the Treaty of Commerce between Great Britain and Russia of 1766 prescribed that Russian merchants were to enjoy protection and justice and should be treated as the subject “of the most favoured nation.”⁵⁹⁵

The standard entails that a host country is obliged to extend to foreign investors of a particular country treatment no less favourable than it accords to investors from another foreign country. Its application is far from being simple in practice as well documented in various cases. In the *Anglo-Iranian Oil case*, the United Kingdom sought to use a most-favoured-nation provision in its treaty with Iran in order to

⁵⁹² *Loeven Group et al v United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, para 137.

⁵⁹³ UNCTAD, *Most-Favoured Nation Treatment*, Series on Issues on International Investment Agreement Series, Vol. III, UNCTAD/ITE/IIT/10 (1999), p. 3.

⁵⁹⁴ UNCTAD, *Most-Favoured Nation Treatment*, Series on Issues on International Investment Agreement Series, Vol. III, UNCTAD/ITE/IIT/10 (1999), p. 13.

⁵⁹⁵ See *A Collection of All the Treaties of Peace, Alliance and Commerce between Great-Britain and Other Powers from the Revolution in 1688 to the Present Time*, Vol. II (1771), p. 318-327.

benefit from more preferential treatment accorded to Danish nationals – or in other words, Iran’s conduct toward the Anglo-Iranian Oil company constituted a breach of “the principles and practice of international law which, by her treaty with Denmark, Iran promised to observe towards Danish nationals.” The International Court of Justice did not agree with the United Kingdom’s position on jurisdictional grounds,⁵⁹⁶ but emphasized the importance of the “basic treaty” within the context of the most-favoured-nation standard:

“...in order [to] enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom and Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.”⁵⁹⁷

With regard to the scope of the most-favoured-nation standard, the principles to which the standard is applied, including their substantive elements, are of considerable importance. In the *Ambatielos case*, a case that dealt with a dispute between Greece and the United Kingdom, a legal dispute arose about whether a Greek ship-owner should enjoy certain guarantees relating to the administration of justice. Here, Greece argued, with reference to a most-favoured-nation clause in Article X of the United Kingdom-Greece Treaty of Commerce and Navigation of 1886, that its national should enjoy certain treatment that had been accorded to other nationals in treaties made after 1886. The claims commission that adjudicated the dispute emphasized that the most-favoured-nation clause in Article X was limited to matters of “commerce and navigation” and could as such only apply to matters belonging to the same category of subject as that to which the clause itself relates. However, the tribunal also noted:

⁵⁹⁶ The treaties, to which the United Kingdom referred in the proceedings, were the Treaty between the United Kingdom and Persia on 4 March 1857 and the Commercial Convention between the United Kingdom and Persia on 9 February 1903. However, Iran had limited its acceptance of the Court’s compulsory jurisdiction to disputes arising after the ratification of its declaration. The declaration was signed on 2 October 1930 and ratified on 19 September 1932. See *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Preliminary Objection, Judgment 22 July 1952, ICJ Reports (1952), p. 103 and 108.

⁵⁹⁷ See *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Preliminary Objection, Judgment 22 July 1952, ICJ Reports (1952), p. 109.

It is true that the ‘administration of justice,’ when viewed in isolation, is a subject-matter other than ‘commerce and navigation,’ but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds place among the matters dealt with by treaties of commerce and navigation. Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most favoured nation clause, when the latter includes ‘all matters relating to commerce and navigation.’ The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.”⁵⁹⁸

This arbitral award shows that when a state has agreed to a most-favoured-nation clause the clause’s subject-matter determines to what extent the standard is applicable – or, in other words, the standard should only be applicable to beneficiaries in similar situations.⁵⁹⁹

The standard’s application has not only been topical in general international law, but also in international investment law. Here, two aspects have been particularly relevant for this discussion, namely whether the most-favoured-nation standard can be used to expand the level of investment protection or whether it can be used to expand the investor’s access to more favourable dispute resolution regimes.

The first issue can be described in the following way: can an investor refer to a most-favoured-nation clause to enjoy a higher level of protection, e.g. if another BIT omits provisions that curtail the full protection and security standard in the basic treaty? This issue was addressed in *AAPL v Sri Lanka* where the tribunal sought to interpret two provisions of the UK-Sri Lanka BIT that applied to the protection of the investment. The former clause was conventional in the sense that it prescribed that an investor should enjoy full protection and security. The latter clause prescribed two principles, namely that if the investor would suffer losses (i) owing to *inter alia* war or other armed conflict, the investor should be accorded treatment no less favourable than that accorded to a contracting party’s own nationals or nationals of any third state; (ii) resulting from requisition or destruction of property perpetrated by forces or authorities, the investor should be adequately compensated, if the destruction was not required by the necessity of the situation.⁶⁰⁰ Due to this latter

⁵⁹⁸ *The Ambatielos Claim (Greece v United Kingdom)*, Judgment 6 March 1956, XII RIAA (1956), p. 107.

⁵⁹⁹ This principle is usually referred to as the *ejusdem generis* principle. See further ‘The Most-Favoured Nation Clause’, Report of the Commission to the General Assembly on the Work of its Thirteenth Session, Yearbook of the International Law Commission 1978, Vol. II, Part 2, p. 27 et seq.

⁶⁰⁰ Article 4 of the UK-Sri Lanka BIT reads:
(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or

provision, which was curtailed by a national treatment and most-favoured-nation clause, the investor sought to invoke the Swiss-Sri Lanka BIT as that BIT did not contain a similar clause. The tribunal did not agree and refused such attempts, as it could not be proven that the Swiss-Sri Lanka BIT contained rules that were more favourable than the rules of the UK-Sri Lanka BIT.⁶⁰¹

In another case, *ADF v United States*, the claimant argued that measures implemented by the US Government violated Article 1105(1) NAFTA. Here, the claimant was faced with the FTC Interpretative Note, which narrowed the scope of application of Article 1105 NAFTA to customary international law, published following arbitral awards that had widened the scope of the Article to such an extent that the contracting parties decided to intervene. The claimant sought to counter this strict interpretation of Article 1105 by referring to similar provisions in the US-Albania and US-Estonia BITs. Needless to say, the claimant pointed out that these BITs were not subjected to the FTC Interpretative Note and argued that these treaties “establish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment.”⁶⁰² However, the tribunal rejected this, as it had not been proven that these treaties had more favourable standards than the standards contained in Article 1105 NAFTA.⁶⁰³

The second issue can be described in the following way: Can an investor on the basis of a most-favoured-nation clause enjoy preferential treatment accorded to nationals of third states in scenarios dealing with whether he is obliged to seek redress before municipal courts prior to resorting to arbitration? In addition, can an investor expand the jurisdiction of an arbitral tribunal so that it can address legal

other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third state.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation.

⁶⁰¹ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of 21 June 1990, 30 ILM 577 (1991) para 54.

⁶⁰² *ADF Group Inc. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Reports 470, 527, para 194.

⁶⁰³ *ADF Group Inc. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Reports 470, 527, paras 195-198.

disputes not included in a BIT's arbitration clause?⁶⁰⁴ Claimants have made attempts to this effect, but with different results.⁶⁰⁵

As to the former scenario, i.e. whether an investor needs to seek redress before municipal courts before resorting to arbitration, the majority of tribunals adhere to the opinion that an investor should not be obliged to, even if there is a treaty provision that establishes a “cooling off period”. The main reason for enabling an investor to use the most-favoured-nation clause to circumvent such jurisdictional requirements was described as follows in the *Maffezini case*:

“Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude *that today dispute settlement arrangements are inextricably related to the protection of foreign investors*, as they are also related to the protection of rights of traders under treaties of commerce.”⁶⁰⁶ (emphasis added)

Tribunals have followed this approach to a large extent.⁶⁰⁷ In a similar fashion, the tribunal in *Siemens v Argentina* argued the following with regard to the dispute settlement arrangements in the Germany-Argentina BIT:

“[T]he Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. *Access to these mechanisms is part of the protection offered under the Treaty*. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”⁶⁰⁸ (emphasis added)

⁶⁰⁴ Other cases could also be mentioned. In *TECMED v Mexico*, the claimant sought, with reference to a most-favoured-nation clause, to apply the Spain-Mexico BIT retroactively – or in other words to circumvent the BIT's provision that prescribed that the treaty only applied to investments after its entry into force by referring to a more preferential provision in the Austria-Mexico BIT. The tribunal did not concur with the claimant's claim by stating that provisions dealing with the treaty's application over time “go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.” See *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award of 29 May 2003, para 69.

⁶⁰⁵ This has also been extensively debated in academia. See e.g. G.S. Tawil, ‘Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration’, in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 9, and K. Hobér, ‘MFN Clauses and Dispute Resolution in Investment Treaties: Have We Reached the End of the Road?’, also in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, OUP (2009), p. 31.

⁶⁰⁶ *Emilio Agustín Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, para 54.

⁶⁰⁷ See e.g. *Gas Natural S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005, paras 24-49, *Suez and Inter-Agua v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 20 May 2006, paras 52-66, and *National Grid Plc. v Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006, paras 80-93.

⁶⁰⁸ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para 102.

As to the latter scenario, i.e. whether an investor is able through a most-favoured-nation clause to expand the jurisdiction of arbitral tribunals, tribunals have remained consistently opposed to such attempts – at least until recently. The issue here is particularly difficult due to the fact that it affects directly the host states’ consent to arbitration. In some cases states have limited the jurisdiction of arbitral tribunals to determine the amount of compensation only in the event that a violation has occurred. However, the issue of whether there has been a violation falls outside the jurisdiction of the tribunal. Needless to say, investors have sought to circumvent this limitation through the most-favoured-nation standard by referring to more open clauses in BITs made with third states. In *Plama v Bulgaria*, the investor submitted the legal dispute to arbitration before an ICSID tribunal with reference *inter alia* to the Cyprus-Bulgaria BIT. As that BIT only provided for arbitration “in cases of dispute with regard to the amount of the compensation”, the investor argued through a most-favoured-clause that the tribunal should employ a wider clause to be found in the Finland-Bulgaria BIT. The tribunal rejected this contention in the following way:

“The “context” may support the Claimant’s interpretation since the MFN provision is set forth amongst the Treaty’s provisions relating to substantive investment protection. However, the context alone, in light of the other elements of interpretation considered herein, does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise.”⁶⁰⁹

“The present Tribunal agrees with that observation, albeit that the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”⁶¹⁰ (emphasis added)

This line of argument was followed rather consistently until recently.⁶¹¹ In *RosInvest v Russia*, the investor was faced with a consent that was limited to disputes “concerning the amount or payment of compensation [...], or concerning any other matter consequential upon an act of expropriation.”⁶¹² The tribunal argued that whilst a most-favoured-nation clause could be used to expand substantive protection, i.e. fair

⁶⁰⁹ *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision of Jurisdiction of 8 February 2005, para 192.

⁶¹⁰ *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision of Jurisdiction of 8 February 2005, para 223.

⁶¹¹ See e.g. *Vladimir Berschader and Moïse Berschader v Russia*, SCC, Award of 21 April 2006 and *Telenor Mobile Communications AS v Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006.

⁶¹² See Article 8 of the UK-USSR BIT as reprinted in *RosInvestCo v Russia*, SCC, Award on Jurisdiction of 3 August 2004, para 23.

and equitable treatment and full protection and security, the investor should be able to expand the jurisdiction of the tribunal through a most-favoured-nation clause:

“While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that *protection* not accepted in one treaty is widened by transferring the *protection* accorded in another treaty. [...] If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to ‘only’ procedural protection. However the Tribunal feels that this latter argument cannot be considered as decisive, but that rather [...] an arbitration clause, at least in the context of expropriation, is of the *same protective value as any substantive protection afforded by applicable provisions* [...] of the BIT.”⁶¹³ (emphasis added)

As these cases show, tribunals remain open to the argument that an investor be able to circumvent procedural requirements that hinder his direct access to international investment arbitration. In contrast, tribunals seem not as sympathetic to the argument that an investor use the most-favoured-nation standard to circumvent substantive requirements that determine what legal disputes a tribunal can adjudicate. This last principle, however, includes an exception, namely that tribunals are at times willing to agree with an investor that seeks to increase the jurisdictional scope of an arbitral tribunal if such an exercise is to increase investment protection, which is not included in the basic treaty, but accorded in another treaty.

With regard to investment protection within the context of the full protection and security standard, in particular, tribunals have not had an opportunity to address the matter in great detail. In one case – *AMT v Zaire* – the respondent attempted to employ arguments related to the most-favoured-nation standard. It is important to stress from the outset that the most-favoured-nation standard was not included in the treaty-based full protection and security standard applicable to the dispute. However, the tribunal addressed an argument submitted by the respondent that touched upon national treatment. The case concerned looting that had taken place on two occasions, but it was disputed whether the perpetrators had been government entities or third parties. The respondent argued that it had not violated its obligation to provide protection and security because the claimant had not adduced evidence to show that the state had “accorded in like circumstances a treatment less favourable [...] than that accorded to its own nationals or companies.” The tribunal rejected this argument in the following way:

⁶¹³ *RosInvestCo v Russia*, SCC, Award on Jurisdiction of 3 August 2004, para 132.

“If the argument advanced by Zaire does not seem altogether unfounded, the fact remains that Zaire has manifestly failed to respect the minimum standard required of it by international law. It should be added that Zaire has equally failed to perform a similar obligation with regard to a third state or all other third States. In effect, the argument advanced by Zaire that it has not accorded to nationals and companies of these States any protection or reparation, is not pertinent to the Tribunal. Since the repetition of breaches and failures to perform similar obligations it owes to third States will not in any way exonerate the objective responsibility of the State of Zaire for the breach of its obligation of the treatment of protection and security it owes to AMT by virtue of Article II paragraph 4 of the BIT.”⁶¹⁴

However, while the tribunal was not susceptible to this line of argument, it did take into account the respondent’s position within the context of its level of development.

5.8 Conclusion

This chapter focused on the content of the full protection and security standard. It is important to address from the very beginning what effect the concept of a standard has on full protection and security. The study revealed that the concept is an old one in international law and was discussed in some detail in the early 1920s, but its influence later decreased during the interwar period and following the Second World War. It became also clear that some aspects of the standard, as a concept, including the part that emphasized the experience and intuition of an umpire, are difficult to align with the current state of affairs of international law. An umpire cannot but be bound by the sources of international investment law and cannot adopt its own idiosyncratic standard of “full protection and security”.

Despite the expanding scope of treaty law in international investment law, arbitral tribunals have not shied away from applying customary international law when addressing issues concerned with full protection and security – an approach heavily influenced by the applicable law clause in the relevant treaty instrument or arbitration agreement. This is particularly true with regard to the concept of due diligence. That concept poses a different set of positive and negative obligations to the host state. In addition, the due diligence principle entails a three-pronged obligation that consists of (i) a duty to prevent that damage be inflicted upon the investor, (ii) a duty to restore the investor to his previous position, and (iii) a duty to investigate, charge and punish the parties responsible for a violation against the investor and his investment. In that context a state must apply its sovereign power with a certain level of intensity – or, in other words, diligence will not suffice when providing for protection and security to an investor, only *due diligence*. In that regard

⁶¹⁴ *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.10.

the knowledge of the state entities responsible for providing protection plays a considerable role. Moreover, the foreseeability of a particular risk within a certain time span affects the legal assessment that is necessary to determine whether the host state has discharged its duty to provide protection and security.

The standard's application is one of the most topical parts of the standard. As with rules in any legal system – municipal or international – the full protection and security standard depends on procedural and substantive requirements that must be fulfilled prior to the standard's application. It is here that the legal issues on which the investor and the host state differ often have a level of individuality which is difficult to address with application of general rules. Procedural principles dealing with the burden of proof and other rules of evidence have affected the way in which the standard is applied in individual cases.

One of the most controversial aspects of the standard is whether it is limited to physical security or whether it also provides for protection beyond physical security. As discussed, arbitral tribunals have remained divided on the issue. It is, however, clear that there is authority to conclude that the standard must provide for physical security as an absolute minimum. However, if treaty law is formulated in a way to increase the level of protection, the host state has an obligation to provide for legal security for the investor and the investment.

In exceptional cases the host state's level of development can play a role in a tribunal's application of the standard – however, the balancing of interests between the host state and the investor is particularly challenging as such an approach could lead to a scenario where the standard could become too casuistic in practice. If the level of development is to play a role in an investment tribunal's application, it will either affect its assessment pertaining to the state's obligation to provide full protection and security or the assessment that deals with determining the damage of the investor.

The full protection and security standard has a close relationship with other international investment standards, absolute and relative standards alike, including expropriation, fair and equitable treatment, national treatment and most-favoured-nation. It is, however, clear that the relationship differs considerably depending on the standard in question. In addition, treaty law has led to cross-pollination between standards due to the fact that various treaty standards often incorporate different concepts of international law.

PART III
Violations of the Full Protection and Security
Standard and their manifestations

6. VIOLATIONS OF THE STANDARD AND THEIR MANIFESTATIONS

6.1 Introduction

So far, this dissertation has focused primarily on issues describing the history of the full protection and security standard, identifying its sources, describing its content, including outlining the way in which it is applied and how it overlaps with other standards. Having described these parts of the standard, it seems appropriate to focus on what consequences a state might face after having violated the various obligations inherent in the standard and that are owed to the investor.

This chapter will describe violations of the standard and their manifestations. Any discussion about the standard and its concepts through the prism of its sources can only give a partial picture of the standard because its application is first and foremost influenced by certain types of facts or fact-based scenarios as revealed in judgments and arbitral awards. After having discussed these judgments and awards, it is possible to identify certain fact situations where arbitral tribunals have applied the full protection and security standard. Further examination of these situations and scenarios will provide a clearer picture of the standard's content and as a result justifies further discussion.⁶¹⁵

According to the Draft Articles on the Responsibility of States a state is responsible if it is found having violated its obligations according to international law. After having violated its obligations, a state is required to make full reparation for the injury caused by the internationally wrongful act. This chapter will not, however, deal with consequences of violations of international law according to general international law, but focus on the subject within the context of violations of the full protection and security standard.⁶¹⁶ That will first and foremost include an examination of the fact-based situations where the standard has been applied and what kind of acts or omissions will lead to a violation of the standard. Therefore, the chapter will deal with which claims are most relevant within the context of investor-

⁶¹⁵ See comments made by Professor Christoph Schreuer at the conference held by the Investment Treaty Forum on 9 September 2005, printed in F. Ortino et al (eds.), *Investment Treaty Law – Current Issues II; Nationality and Investment Treaty Claims and Fair and Equitable Treatment in Investment Treaty Law*, British Institute of International and Comparative Law (2007), p. 93, regarding the importance of identifying certain fact based scenarios when dealing with investment standards that contain broad legal concepts.

⁶¹⁶ As of late, scholarly writings have addressed damages in international investment law in great detail. See e.g. S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law (2009) and I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, OUP (2010).

state arbitration, the effect of different formulations, such as “war clauses” within the context of compensation.

During the time period from June 1990 to June 2012, the full protection and security standard became a contentious issue in 51 investor-state cases.⁶¹⁷ Investors claiming violations of the standard were successful in 13 cases, but unsuccessful in 34 cases. In four cases, the issue of full protection and security was not addressed by the arbitral tribunal despite being claimed by the claimant. The reason why the standard was not addressed in this last category of cases was mainly because of procedural reasons⁶¹⁸ or because the standard was addressed under the prism of fair and equitable treatment.⁶¹⁹

6.2 Disparate behaviour constituting a violation of the standard

Violations of the full protection and security standard come in many different forms and can be perpetrated by action and inaction – or in other words violations of full protection and security occur as a result of state action or state inaction, action by third parties or a combination of these factors. The broad legal concepts included in various investment standards, including the full protection and security standard, cannot be applied in the abstract, but rely heavily on facts of individual cases – a scenario that influences the interpretation and application of the standard.⁶²⁰

The fact-based scenarios in arbitral awards evidence that the state can be the main perpetrator of the damage caused to the investment⁶²¹ or a private party (parties).⁶²² In addition, the state can, by using its legislative action, create a scenario that enables a private entity to cause damage to the investment.⁶²³ However, these fact-based scenarios are often complicated as they usually evolve over a certain period of time. Due to this complexity, a state’s obligation is a mixture of obligations different in nature. On one hand a state’s obligation is negative which entails the absence of action. Thus, a state is to refrain from taking action which could have

⁶¹⁷ See Annex IV; Analytical table of investor-state cases during June 1990 – June 2012.

⁶¹⁸ See *Mondev International Ltd. v United States of America*, ICSID Case (Additional Facility) No. ARB(AF)/99/2, Award of 11 October 2002, 42 ILM 85 (2003), p. 58.

⁶¹⁹ See e.g. *Eastern Sugar B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 27 March 2007, SCC, para 207 and *MCI Power Group LC and New Turbine Inc. v Ecuador*, ICSID Case No. ARB/03/6, 31 July 2007, paras 361-371.

⁶²⁰ *Mondev International Ltd. v United States*, ICSID Additional Facility Case No. ARB(AF)/99/2, Award 11 October 2002, 42, ILM 85 (2003), paras 95 and 118.

⁶²¹ See *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 46 ILM 896 (2002).

⁶²² *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989) and *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007.

⁶²³ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001.

adverse effects on the investor and his investment. On the other hand the state's obligation is positive, i.e. the state is obliged to take action in the event that the investor and his investment suffer adverse effects stemming from the action or inaction of a third party or the agencies of the state itself. As discussed in Chapter 5.4.2, this latter obligation becomes partly relevant after the fact and establishes an obligation which the state has to fulfil, namely to (1) prevent the damage which is being caused, (2) to restore the investor to his previous situation or to (3) investigate the authors of the infringement of the investor's rights, charge them accordingly and punish them, if found guilty.

It is important to emphasize that "the state", as a concept, applies here to the state and its agencies. This adds further to the complexity of the legal disputes that arise between states and investors. The perpetrator could possibly be the central authority in a particular state, namely legislature, executive or judiciary.⁶²⁴ In some cases that deal with federal states, the perpetrator is a part of a state that is only one of the many states that form the federal state.⁶²⁵ Moreover, specialized state organs or entities at either level could be the "state" in this context, e.g. agencies that deal with foreign investors or armed forces.⁶²⁶ These issues are at times dealt with in arbitral practice with reference to the ILC's Draft Articles on State Responsibility. According to Article 4, the conduct of any state organ, regardless of whether it is a part of the central government or of a territorial unit of the state, is considered an act of the state under international law. Even though the article only includes the concept of "conduct", it is safe to say that the provision covers both acts and omissions of the state within the context of the full protection and security standard.

Here, it is particularly important to differentiate between the state and a private party within the context of the way in which the investment is affected or damaged. It is obvious that both parties are capable of causing damage to the investment, e.g. by taking or harassment, but only the state can cause damage to the investment by making changes to the regulatory framework to which the investment is subjected or by failing to provide for a legal system capable of ensuring protection and security. It is important to note that the following chapters are based on a categorization where

⁶²⁴ For examples of violations perpetrated by the legislature, executive or judiciary see *CME v Czech Republic* (legislative amendment made it possible for a private entity to destroy the investment), *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009 (failure to enforce judicial rulings of state courts) and *Loeven Group et al v United States*, Additional Facility Case No. ARB(AF)/98/3, Award of 26 June 2003 (trial judge failed to ensure a fair trial).

⁶²⁵ An example of a violation perpetrated by a state court (as opposed to a federal court), see *Loeven Group et al v United States*, Additional Facility Case No. ARB(AF)/98/3, Award of 26 June 2003.

⁶²⁶ See e.g. *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 46 ILM 896 (2002) and *Amco Asia Corporation and Others v Indonesia*, Award 20 November 1984, 1 ICSID Reports 413 (1993).

this distinction is made. The first two subchapters will deal with violations that both parties are capable of perpetrating whereas the last two subchapters include factual scenarios where the state is the only entity able to cause harm to the investment.

6.3 Violations of the standard

6.3.1 Taking of investment or destruction of investment

An investment can be taken over by either the state or a third party. However, a distinction has to be made between these two types of cases because taking by a private party is always unlawful while taking by the state is not always unlawful. The majority of BITs include provisions which prescribe that the state can expropriate the investment if the measure is (i) done for a public purpose, (ii) carried out under due process of law, (iii) non-discriminatory and (iv) followed by prompt, adequate and effective compensation to the investor.⁶²⁷ Regardless of whether the taking of the investment is lawful or unlawful, the state will either keep control of the investment or it will hand the investment over to another private entity. However, such a distinction does not have any practical importance to the investor in most cases – he has lost the investment.

6.3.1.1 Taking or destruction caused by state organs

In the *ELSI case*, the investor decided to withdraw his investment, a factory, due to heavy financial losses. The investor decided upon a structural approach that entailed “orderly liquidation” of various parts of the investment and laying off its personnel that would finally lead to the closing of the factory. The factory was later requisited by the Mayor of Palermo and temporarily taken over by its employees. The United States Government argued that the requisition violated constant protection and security as prescribed in the US-Italy FCN treaty of 1948. While it was not denied that the requisition had taken place, the International Court of Justice entered into a discussion as to whether the investor had had control of the investment when the government measure was executed. The Court discussed the company’s (investment’s) financial position when the Mayor of Palermo decided to seize the investment. The Court emphasized the fact that when the investment was taken over, it was so under-capitalized that it had become questionable whether the investor’s decision to “orderly liquidate” the investment would succeed and whether

⁶²⁷ For the legal requirements see S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law (2009), p. 66, but for interpretation of these requirements in investment treaties, see A. Reinisch, ‘Legality of Expropriations’, in A. Reinisch (ed.), *Standards of Investment Protection*, OUP (2008) p. 176-199.

the company had entered into a state of insolvency according to Italian bankruptcy law. The Court stated the following:

“If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management.”⁶²⁸

Does the fact that an investor has limited control over an investment due to its loss lead to the conclusion that the host state has the right to take over the investment? It is difficult to see that an arbitral tribunal would reach the same conclusion on a government measure that circumvented the pre-determined legal regime (Italian bankruptcy laws) in order to interfere with a particular investment.⁶²⁹ One of the main arguments in support of that contention is that the reason for the government interference was not to deal with whether the management of the ELSI was obliged to declare the company bankrupt according to Italian bankruptcy laws, but to address the fact that about 800 employees of the company were to lose their jobs.

If a state follows the pre-determined legal regime, a tribunal will most likely deny most claims, not unless some discrepancies can be found that deviate from that regime. In *Emanuel Too v United States*, an Iranian national living in the United States sought compensation for damage caused by the revocation of his liquor license by the IRS and the lack of protection and security from attacks and acts of plunder. The Iran-US Claims Tribunal noted that the reason for why the government revoked his liquor license was based on his unwillingness to pay lawfully levied withholding taxes.⁶³⁰ With regards to the claim pertaining to lack of protection, the Iran-US Claims Tribunal argued that the responsibility was incurred only when police protection fell below a minimum standard of reasonableness. As the claimant had not shown that local authorities failed to exercise due diligence, the tribunal could not find a violation.⁶³¹ The investor in *SAUR v Argentina* argued that the brutality

⁶²⁸ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 101.

⁶²⁹ See separate opinion of Judge Schwebel which criticized numerous points in the Court's judgment. While Judge Schwebel agreed with the judgment on various points, he criticized the legitimacy of the presupposition that the investors' had little control of the company (the creditors of the company had not decided to force the company into bankruptcy) when it was requisitioned and addressed points that supported the notion that the management of the company had control of the company. See *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), p. 89 et seq.

⁶³⁰ *Emanuel Too v United States of America*, Award No. 460-880-2 rendered on 29 December 1989, reprinted in 23 Iran-US Claims Tribunal Reports 378, p. 387-388.

⁶³¹ *Emanuel Too v United States of America*, Award No. 460-880-2 rendered on 29 December 1989, reprinted in 23 Iran-US Claims Tribunal Reports 378, p. 385-386.

shown by the host state during an “administrative intervention”, namely by using the police force and acts of physical violence entailed a violation of the standard of full protection and security. Here, the tribunal considered the use of the host state’s police force during the take over of the investment not a violation by itself, as the use of the police was based on statutory or regulatory authority:

“Sauri’s argument is based on the fact that “the decree of the notification procedure was performed with a large police presence and deployment of police vehicles, police officers and about thirty people who literally landed in the company.” Faced with this argument, the Republic has shown, convincingly, that the decree of intervention itself authorized the notary office to “ask for the help of the police, until the appointed receiver had taken possession of the post, “which justifies the presence of the police force in accordance with the regulations.” [...] The Tribunal considers that the mere presence of police at the intervention of a company is part of measures that public officials can legitimately take to ensure a smooth takeover.”⁶³²

In contrast, in *Middle Eastern Cement v Egypt*, a ship owned by the investor was seized by the host state port authorities and auctioned off in accordance with its laws and regulations. However, the investor was not been sufficiently informed about the proceedings that led to its auction. The tribunal concluded that the fair and equitable treatment standard and the full protection and security standard had been violated.⁶³³

In some cases, the state in question sets in motion a set of events that concern the investment directly and these events ultimately lead to the taking or destruction of the investment. Under such circumstances, the state should take any precautionary measure, if possible, that would minimize the loss of human life and property damage. In *AAPL v Sri Lanka*, the government decided to execute a counter-insurgency operation that led to fighting between its armed forces and revolutionary groups. The investment was destroyed during the fighting. The tribunal argued that the government “should have undertaken important precautionary measures to get peacefully all suspected persons out of [the] farm before launching the attack, either through voluntary cooperation with the Management of the company or by ordering the Company to expel the suspected persons.”⁶³⁴ In *Wena v Egypt*, a company responsible for dealing with foreign investors in the host state’s tourism industry requisited the investment and controlled it for one year before returning it to the

⁶³² *SAUR International S.A. v Argentina*, ICSID Case No. ARB/04/4, Award 6 June 2012, para 510. It must be noted that the tribunal found that the host state had expropriated the investment and violated the fair and equitable treatment standard.

⁶³³ *Middle East Cement Shipping and Handling Co. C.A. v Egypt*, ICSID Case No. ARB/99/6, Award 12 April 2002, para 143.

⁶³⁴ *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 85.

investor. The tribunal concluded, despite assurances from the respondent that the operation was not undertaken with consent from the Ministry of Tourism, that the respondent had violated the full protection and security standard by not preventing the requisition, returning the investment to the investor in operating condition, punish those responsible or paying compensation for the damage caused.⁶³⁵

6.3.1.2 Taking or destruction caused by private parties

In the *ELSI case*, the investor's decision to "orderly liquidate" the investment caused considerable unrest in the local community that eventually lead to a takeover of the factory by its employees.⁶³⁶ The International Court of Justice stated with regard to this scenario:

"The reference [...] to [...] "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance [...] In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below "the full protection and security required by international law" [...].⁶³⁷

This approach has been followed in cases where private parties have obstructed construction of the investment temporarily.⁶³⁸ In other cases, private parties might damage the investment during a period of civil unrest, riots and other scenarios of lawlessness. In *AMT v Zaire*, the investor suffered during two occasions of civil unrest and looting by the general public. It was claimed that soldiers participated in the latter occurrence that lead to the investment eventual collapse and as a result the host state was obliged to compensate for the damage caused. The arbitral tribunal argued that the nature of the looting showed "clearly that it was not "the army" or

⁶³⁵ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 88-93.

⁶³⁶ The factory and related assets were also requisitioned by the Mayor of Palermo for six months. See *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 30.

⁶³⁷ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 108.

⁶³⁸ *Toto Costruzioni Generali S.P.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Award 7 June 2012, para 228.

“the armed forces” that acted as such in the circumstance.”⁶³⁹ It also did not accept the host state’s argument that it was unable to prevent the occurrence and noted that the treatment of protection and security required by the BIT in question was not to be “any less than those recognized by international law”⁶⁴⁰ and that this last obligation was not to be less than the minimum standard of vigilance according to international law. Thus, the state is to provide protection and security for private entities (including soldiers not operating in their official capacity) by exercising due diligence in protecting the investment.

If the state can show that it has executed due diligence by referring to its preventive measures, it has fulfilled its obligation, including scenarios that have reached revolutionary proportions.⁶⁴¹ In *LESI et al v Algeria*, an investor succeeded in a tender for the construction of a dam for the purpose of providing the City of Algiers with drinking water. The project eventually failed and the investor subsequently claimed that the host state had not exercised enough diligence in protecting the investment, especially taking into account that the dam was to be constructed in an area that suffered from repeated assaults of Islamist extremists. The host state submitted evidence to the tribunal that showed numerous security measures undertaken in order to protect the investment from attacks. The tribunal concluded that the host state had taken “several security measures” to provide protection and as a result fulfilled its obligation. So, if the state can show that it has exercised due diligence by referring to its preventive measures, it has fulfilled its obligation.⁶⁴²

When the host state is unable to prevent an occurrence that inflicts damage on the investor and his investment, the state is under the obligation to investigate the occurrence. In *Parkerings v Lithuania*, the investor argued that the host state had not prevented damage caused by random vandalism. The tribunal noted that the authorities had conducted an investigation, but no culprits had been found. It noted that the case file did not show “in which way the process of investigation amounted to a violation” and concluded that the full protection and security standard had not

⁶³⁹ See *AMT v Zaïre*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997), para 7.09.

⁶⁴⁰ See *AMT v Zaïre*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997), para 6.06.

⁶⁴¹ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para 356.

⁶⁴² See *LESI et al v Algeria*, ICSID Case No. ARB/05/3, Award of 12 November 2008, para 182. It should be noted that Islamist extremists did not destroy the investment. The parties decided to change the way in which the dam was to be constructed, but the earlier method posed particular security threats. As the parties were unable to agree on a new approach for its construction, the project was discontinued. See further same award, para 14 et seq.

been violated. In *GEA v Ukraine*, the investor complained about a shooting incident that was directed at one of its officials. It further argued that the host state had not investigated the matter. The host state submitted evidence that showed that an investigation had been instigated which did not support the allegation that the shooting was directed at the investment. The tribunal concluded that "...even if the shooting could be considered as related to an investment, Ukraine's treatment of the shooting [...] does not amount to a violation of its obligations...".⁶⁴³

It must be noted that one case falls not only in this category, but also in the former category described above. In *CME v Czech Republic*, the main reason for the damage caused to the investment was a statutory amendment that made it possible for the business partner of the investor to terminate the investment relationship.⁶⁴⁴

6.3.2 Coercion and harassment of the investor and his personnel

Coercion and harassment of the investor has at times been addressed theoretically in individual cases. The lack of proof has played a role as the tribunal is faced with two different accounts of the various measures taken by the state agencies or private entities. With regard to private parties in particular, the issue of conflicting rights has at times played a role, e.g. the public's right to protest against a particular cause or occurrence.⁶⁴⁵

6.3.2.1 Coercion and harassment caused by state organs

While claims of harassment by state organs are frequently submitted by investors, they often face considerable challenges in substantiating claims of this nature.

The first challenge concerns the burden of proof. In *Alex Genin v Estonia*, the investor argued that he had been harassed following his purchase of an Estonian bank that had been privatized by the state. The tribunal was troubled by the claim due to lack of proof. It later found that "...Claimants have failed to prove that such contacts between Respondent's agents and Messrs. Genin and Dashkovsky as did take place amount to harassment."⁶⁴⁶ In another case, *Eureko v Poland*, the claimant argued that the organs of the state had harassed its personnel. The tribunal did not

⁶⁴³ *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award of 31 March 2011, paras 254-255.

⁶⁴⁴ *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001. This award is discussed in Chapter 5.5.4.

⁶⁴⁵ *Case concerning Elettronica Sicula SpA (ELSI)*, (*United States of America v Italy*) ICJ, Decision rendered on 20 July 1989, ICJ Reports (1989), para 108.

⁶⁴⁶ *Alex Genin v Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, para 374.

dismiss the claimant's contention but noted that there was "...no clear evidence before the Tribunal...".⁶⁴⁷

The second challenge consists of legitimacy of the measures claimed to constitute the coercion or harassment in question. If the state acts upon general statutory authority or if the government measures can be challenged before a court, a tribunal will generally be reluctant to conclude that the investor is being targeted for the purpose of negatively influencing the investment. In *Saluka Investments v Czech Republic*, the investor was subjected to a search conducted by the police as a part of an investigation. The investor argued that the police searches, which had removed documents, had been illegal and violated his right to privacy and home. The tribunal denied the investor's claims as he had "lodged appeals or petition to the competent authorities or courts" after which documents were returned.⁶⁴⁸ In *Spyridon Roussalis v Romania*, the claimant's investment consisted of an initial investment that was to be complemented by further investment ("post-purchase" investment obligations). A disagreement arose as to whether the investor had fulfilled his post-purchase obligations and whether the investor had honoured his fiscal duties according to Romanian law. The police decided to investigate the investor's business operations and the state prosecutor later instigated criminal proceedings against the investor. A part of these proceedings was an interdiction order that temporarily limited the investor's freedom of movement. The arbitral tribunal rejected the investor's contention that he had been harassed by government agencies. It argued concerning the interdiction order:

"...such policies are commonplace in many countries and promote the rational public policy of preventing the accused of fleeing the country in avoidance of criminal prosecution. [...] The record shows that the orders were communicated to Claimant and he had an opportunity to contest them. Indeed, the orders were challenged and were ultimately lifted. And Claimant finally left the country."⁶⁴⁹

The tribunal concluded that the full protection and security standard had not been violated, as there had been no allegation that it compromised the physical integrity of the investment.

One case, in particular, is of interest with regard to coercion and harassment by the host state. In *Desert Line Projects v Republic of Yemen*, the investor entered into an

⁶⁴⁷ *Eureko B.V. v Poland*, Ad hoc arbitration, Award rendered on 19 August 2005, para 237.

⁶⁴⁸ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, paras 494-496 and 505.

⁶⁴⁹ *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award 7 December 2011, paras 607-609.

agreement with the host state to build roads. The host state later delayed payments to the investor that led to the investor's inability to pay local subcontractors responsible for road construction – one of which threatened the investor's personnel. In addition, the investor was threatened and attacked by local authorities and state agencies. Even though, the relevant BIT did not include a full protection and security clause, the tribunal concluded by referring *inter alia* to these occurrences that a settlement entered into by the investor and the host state was null and void as it was signed under duress. That decision of the tribunal reinstated an earlier arbitral award, which was concluded by an arbitral tribunal constituted in the municipal jurisdiction, that awarded the investor compensation.⁶⁵⁰

6.3.2.2 Coercion and harassment caused by private parties

Investment projects are often undertaken in areas that are susceptible to public pressure that can take various forms. Tribunals have not addressed such scenarios in a strict way, but argued that demonstrations or public protests are not, as such, to be prevented by the host state.

In *TECMED v Mexico*, the investor took part successfully in an auction that included the selling of property, buildings and other assets related to a controlled landfill of hazardous waste. In addition to purchasing the real property and facilities built there, the investor was to run the landfill for a certain period of time. The project became a contentious issue amongst the general public. The investor complained about (i) that the municipal and state authorities had encouraged the community to take action against the "...Landfill and its operation [...] as well as the transport [of] waste..." and (ii) that the "...Mexican authorities, including the police and the judicial authorities, did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations expressed through disturbances...".⁶⁵¹ The tribunal did not agree. With regard to the latter argument in particular, the tribunal held that:

"...there is not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a *democratic state*, to the direct action movements conducted by those who were against the landfill."⁶⁵² [emphasis added]

⁶⁵⁰ See *Desert Line Projects v Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, paras 166-167, 184-185 and 194-195.

⁶⁵¹ *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 175.

⁶⁵² *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 177.

In another case, *Noble Ventures v Romania*, an investor took part in a privatization project of a steel mill in Romania. The investor was successful and entered into a privatization agreement with a government agency. Shortly thereafter, a change in government took place that altered the state's position to the investment project. A number of problems arose, including social demonstrations following the mill's structural reorganization. The investor argued that the host country had violated the full protection and security standard by not providing "...reasonable measures of protection which a well-administered government would be expected to exercise under similar circumstances...".⁶⁵³ The respondent denied such claims by submitting that the two attacks, which were reported by the claimant, had been investigated and there was no attempt to prove that those incidences and others (unreported by the claimant but referred to during arbitral proceedings) had caused any damage to the investment. The tribunal concluded that the investor had failed to prove that the respondent had not acted with due diligence or that he had suffered damage due to the unrest. It also stated:

And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree.⁶⁵⁴

It is important to note that investment tribunals that deal with cases of social unrest have not had the opportunity to address the right of protesters of free speech and their freedom of assembly.⁶⁵⁵ However, one jurisdiction includes regional free trade and/or investment obligations and a high level of human rights protection, namely the European Union. Two cases before the European Court of Justice provide an interesting look at how such cases are dealt with in a jurisdiction that involves fundamental economic and human rights.⁶⁵⁶ In *Commission v France*, the ECJ was faced

⁶⁵³ *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, para 162.

⁶⁵⁴ *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005, para 166.

⁶⁵⁵ The reasons for this scenario are mainly procedural. First, human rights provisions are only applicable in investment arbitration to the extent that they are included in the BIT itself or included in the parties' choice of law. Second, a state is usually the respondent in arbitral proceedings and is, as a result, defending itself against claims pertaining to its action or inaction that have had adverse effects on the investment. Still, examples can be found where states have argued that action or inaction was to protect certain international human rights commitments. See further C. Reiner and C. Schreuer, 'Human Rights and International Investment Arbitration' in P. Dupuy, F. Francioni and E. Petermann (eds.), *Human Rights in International Investment Law and Arbitration*, OUP (2009), p. 84 and 89.

⁶⁵⁶ See here H.E. Zeitler, *The Guarantee of "Full Protection and Security" in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 24-25, and same author, 'Full Protection and Security' in S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, OUP 2010, p. 208 and 210.

with violent incidents perpetrated by various groups of French farmers. The groups undertook a systematic campaign to restrict the supply of agricultural products from other EU countries, most notably strawberries from Spain and tomatoes from Belgium. These attacks were at times lodged in the presence of police that took no action to provide effective protection. The ECJ acknowledged that while France had the obligation to guarantee the free movement of goods, it had wide discretion in choosing the appropriate measures in fulfilling that objective. However, it fell under the jurisdiction of the Court to determine whether France had adopted adequate and appropriate measures to deal with actions of private entities that created obstacles to the free movement of goods. After having assessed the action undertaken by French authorities in responding to attacks that had taken place for over ten years, the Court concluded that they had been “manifestly inadequate to ensure the freedom of intra-Community trade”.⁶⁵⁷

In contrast, in *Eugen Schmidberger*, the ECJ dealt differently with a demonstration in Austria that resulted in the complete closure of the Brenner motorway, a major transit route, for 30 hours. One of the transit companies affected instigated legal proceedings against Austria, arguing that the demonstration should not have been authorized and claimed for compensation due to damage suffered. Here, the ECJ noted that the issue was how to reconcile, firstly, the right to the free movement of goods and, secondly, the freedom of expression and assembly – the former being based on treaty law whereas the latter formed part of EU’s general principles at the time. The Court made several distinctions from its earlier ruling in *Commission v France*, including that the demonstration was notified to the relevant authorities before it took place, that the relevant authorities had contemplated what the effects of not authorizing the demonstration would have and that authorities in Austria and other countries took action to warn motorists of the demonstration. It concluded that even though the demonstration constituted measures having equivalent effect to a quantitative restriction, it was objectively justified in this particular case.⁶⁵⁸

Despite not dealing with investment arbitration, these cases could indicate how international human rights obligations of states, such as the freedom of expression and the freedom of assembly, could affect a tribunal’s assessment in cases dealing with human rights which they are obliged to honour.⁶⁵⁹

⁶⁵⁷ Case C-265/95, *Commission v France* [1997] ECR I-6959, paras 33-35, 40-52 and 65.

⁶⁵⁸ Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* [2003] ECR I-5694, paras 77 and 84-89.

⁶⁵⁹ See Article 19(2) [freedom of expression] and Article 21 [freedom of assembly] of the United Nations International Covenant on Civil and Political Rights. UNTS, Vol. 999, p. 171.

6.3.3 Changes to the regulatory framework after an investment is made

It is not uncommon that a state that either welcomes or is indifferent towards foreign investment becomes hostile towards it after it has been made. Usually such a development is the result of the adoption of a different government policy.

Two arbitral awards – one of the oldest and one of the more recent ones – give examples of how changes to government policy can lead to different scenarios which an investor needs to address after having made an investment. The former example is the *Lena Goldfields case*, a case adjudicated long before the establishment of the current BIT regime. After having entered into a concession agreement with the investor that was in line with its economic policy, the Soviet government later adopted the “Five-Year Plan” that was hostile towards foreign investment and capitalistic enterprises in general. That manifested itself in lack of police protection and attacks from unions and government agencies alike and resulted in various violations against the investor and his employees, such as theft of gold, loss of the employees’ political rights and prosecution of government officials for “counter-revolutionary activity and espionage”. The investor instigated arbitral proceedings against the host state and was awarded compensation.⁶⁶⁰

The latter example is the *AES Summit Generation v Hungary case*. In 1995, the host state privatized its energy sector. The following year, the investor acquired government entities that supervised power stations. In 2004, when the host state joined the European Union, all administrative pricing was abolished. Only two years later the host state approved an amendment to its Electricity Act where administrative pricing was reintroduced. This amendment allegedly seriously affected the investment. The investor instigated arbitral proceedings and claimed that the reintroduction of the administrative pricing through statutory amendments and pricing decrees had violated the most constant protection and security standard. The tribunal did not agree and noted:

“While it [the standard] can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state’s right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.”⁶⁶¹

⁶⁶⁰ See A. Nussbaum, *The Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 Cornell Law Quarterly (1950-1951), p. 31. This award is discussed in Chapter 3.3.5.

⁶⁶¹ *AES Summit Generation v Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010, para 13.3.2.

As discussed earlier, the full protection and security standard has been thought historically to focus on the physical protection of investments. Such an approach would entail considerable discretion for host states to legislate or implement regulatory amendments that could have detrimental effects on investments in their jurisdiction. Still, arbitral awards that have argued for a more expansive approach, at the expense of a state's discretion to regulate the framework to which the investment is subjected, have grown in number in recent years. If the host state implements amendments to the regulatory framework that are "aimed at, [or] suited to, destroying [the] investment" or "targeted to remove the security and legal protection" of the investment, it has violated the full protection and security standard.⁶⁶² In addition, there are authorities that argue that the full protection and security standard should extend beyond physical protection and include legal protection for investors and their investments.⁶⁶³ The late Thomas Wälde noted the following when discussing the standard in the Energy Charter Treaty:⁶⁶⁴

"This obligation would not only be breached by active and abusive exercise of state powers but also by the omission of the state to intervene where it had the power and duty to do so to protect the normal ability of the investor's business to function in a level playing field. If one links the [...] duty of the state [...] to supervise effectively its subordinated entities [...] with the [...] a duty to provide 'constant security and protection', one would arrive at reading this discipline as providing a duty, enforceable by investment arbitration, to use the powers of government to ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by [...] political and economic domestic powers [...]."⁶⁶⁵

When a state exercises its political and economic power to implement changes to the regulatory framework, it will either employ legislative power or executive power – or a combination of both. Needless to say, the risk of overlap with the fair and equitable treatment standard is considerable as the difference between arguments in favour of a violation of full protection and security and fair and equitable treatment is minimal. Examples of such an overlap are regulatory amendments implemented by the host state. In such cases, casuistic regulatory amendments targeting the investment violate full protection and security. Similarly, particular regulatory amendments that go against legitimate expectations or a stable legal and regulatory framework violate fair

⁶⁶² *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, para 311, and *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, para 613.

⁶⁶³ See C. Schreuer, *Full Protection and Security*, *Journal of International Dispute Settlement*, OUP (2010), p. 10.

⁶⁶⁴ See Article 10(1) of the Energy Charter Treaty in Chapter 3.3.2.3.2 and in Annex II.

⁶⁶⁵ T.W. Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues', in N. Horn (ed.), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects*, Kluwer Law International (2004), p. 213.

and equitable treatment. In such a scenario, arguments that do not necessarily succeed under the rubric of full protection and security might be employed to find a violation of fair and equitable treatment.⁶⁶⁶

6.3.3.1 Post-investment obligations of the host state not implemented

Legislative and regulatory amendments can in some circumstances increase the likelihood that a host state will violate the full protection and security standard. In some cases, the host state has a role to play after the investment has been made. This obligation of the state manifests itself in the responsibility to amend tariffs in infrastructure projects that were previously run by the host state or in a pledge not to alter its laws and regulations that might seriously damage the investment.

In some cases, where the investment is implemented in a single transaction, the state has a role to play with regards to how the investor is able to charge for its services. Here, it can happen that a state is not able or willing to follow through on its earlier statements as that might lead to public opposition. In *Azurix v Argentina*, the investor invested in a utility that distributed drinking water and disposed of sewage. The investment was not only handed over to the investor in poor condition, but the host state did not implement a new tariff regime due to political instability. The claimant argued that this failure to apply the regulatory framework of the concession agreement had destroyed the security provided therein.⁶⁶⁷ The tribunal held that this constituted a violation of fair and equitable treatment and full protection and security.⁶⁶⁸ In *National Grid v Argentina*, the investor purchased an electricity company privatized by the state. The decision to invest was made after the government had forwarded various statements to the investor in which a particular structure was to be provided. The host state later reneged on the promises made and amended the regulatory framework. The tribunal held:

“In applying this standard of protection to the facts of the instant case, the Tribunal finds that the changes introduced in the Regulatory Framework by the Measures, which effectively dismantled it, and the uncertainty reigning during the two years preceding the sale of its shares in [...], with respect to any possible compensation on account of the impact of the Measures on Claimant’s investment, are contrary to the protection and constant security which the Respondent agreed to provide for investments under the Treaty.”⁶⁶⁹

⁶⁶⁶ *PSEG Global Inc. and Konya Igin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, paras 246-254 and 257-259, *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Award of 27 December 2010, para 127 and *Impregilo v Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, para 334.

⁶⁶⁷ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 396.

⁶⁶⁸ *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006, para 408.

⁶⁶⁹ *National Grid Plc. v Argentine Republic*, UNCITRAL Award, 3 November 2008, para 269 et seq.

With regards to legislative amendments in general, which cannot be construed as being obligations related to the investment, the state has wider discretion to legislate. Legislation is, needless to say, not beyond the reach of the investment instruments to which the host state is a party. However, a democratically elected legislature has the sovereign power to pass legislation despite that it is amongst some considered to be ill-conceived and burdensome. That alone does not suffice to constitute a breach of a BIT or other instrument. In *Pausbok v Mongolia*, the investor owned gold mining, oil and gas companies in Mongolia. Due to considerable increase in gold prices, the Mongolian parliament introduced a tax law that introduced a 68% tax on any gold sales at prices in excess of USD 500 pr ounce. Following this amendment, the investor sought to have it repealed before various courts without any success. The investor received notices to pay taxes that had fallen due and were based on the new legislation. The investor's bank accounts were later seized as his relationship with Mongolian authorities deteriorated. The investor instigated arbitral proceedings. As the BIT provided for "full legal protection to investments", the tribunal thought that there was no reason to limit the protection to physical protection. However, the tribunal did not consider that the tax law violated the investor's "legal protection":

"Further, the Tribunal has not found, in relation to the [tax law], any reason to conclude that there has been a breach of such a clause or of the fair and equitable treatment through actions of the State or its agents. As a result, whether it would refer to "an objective requirement of stability, certainty and foreseeability" as argued by Claimants or to "a subjective standard reduced to the protection of Claimants' specific expectations" as argued by Respondent, the Tribunal cannot conclude that there has been a violation of the "full legal protection" guaranteed by Article 2 of the Treaty."⁶⁷⁰

It must be noted that the reason for the implementation of the tax amendment seems not to have been to target the investment as such, but to tax gold due to the exceptionally high price of gold on the world market.⁶⁷¹ If, however, the state has committed itself to not amend its laws and regulations, but implements statutory or regulatory changes, it could be held in violation of the full protection and security standard. A case in point is *Bogdanov v Moldova*, where the state went too far in subjecting the investor to excessive administrative charges. According to Article 2.2 of the Russia-Moldova BIT, capital investments were to be "guaranteed complete and unconditional legal protection". The investor had established a company that enjoyed rights in a defined Free Economic Zone, one of which was a stability clause

⁶⁷⁰ *Pausbok et al v Mongolia*, UNCITRAL Arbitration, Award of 28 April 2011, para 327.

⁶⁷¹ *Pausbok et al v Mongolia*, UNCITRAL Arbitration, Award of 28 April 2011, para 319.

which limited the host state's ability to levy customs duties during a 10 year period. The government, however, decided to introduce administrative charges that added considerable cost to the importation and exportation from the host state. The investor instigated arbitral proceedings and argued that administrative charges entailed a violation of his rights according to Article 2.2 of the Russia-Moldova BIT. The umpire agreed with the investor and concluded:

“The Sole Arbitrator does not exclude that there may be some room for administrative charges which conceptually are to be distinguished from customs duties. In the present case, however, the charges were of such size and construed so that the cost to [investor] exceeded a total of 440 000 lei for the three years [...]. Charges of such magnitude are quite obviously designed to fulfil the purposes typical for customs duties [...]. The Sole Arbitrator accordingly must find that the application of law [...] to [investor] as regards the fees complained about by Mr Bogdanov was in contravention of the stabilisation clauses [...] and that consequently such application entailed a violation [...].”⁶⁷²

Further political developments, e.g. regime change following an election, might seriously affect the host state's commitment to its post-investment obligations, in particular when an investor intends to increase its investment over time.⁶⁷³ In *Eureko v Poland*, the investor acquired in cooperation with another company 30% of shares in an insurance company privatized by the state. The privatization became a contested political issue and the host state reneged on its promise to privatize more of the insurance company. In addition, the investor experienced hostility from government agencies. The investor instigated arbitral proceedings and complained that the full protection and security standard had been violated. The tribunal disagreed:

“The Tribunal is not convinced that the harassment by Polish authorities of senior representatives of Eureko's management breached the standard of full security and protection of the Treaty. Certain of the acts of harassment described [...] are disturbing and appear to come close to the line of Treaty breach [...] However, in any event, there is not clear evidence before the Tribunal that [Poland] was the author or instigator of the actions in question. If such actions were to be repeated and sustained, it may be that the responsibility of [Poland] would be incurred by a failure to prevent them.”⁶⁷⁴

⁶⁷² *Bogdanov v Republic of Moldova*, SCC, Award of 30 March 2010, paras 83-85.

⁶⁷³ See e.g. *Lauder v Czech Republic*, UNCITRAL Arbitration, Award 3 September 2001, *CME v Czech Republic*, UNCITRAL Arbitration, Partial Award of 13 September 2001, *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award 11 October 2005 and *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 22 May 2007.

⁶⁷⁴ *Eureko B.V. v Poland*, Ad hoc arbitration, Award rendered on 19 August 2005, paras 236-237.

The investor also argued that the fair and equitable treatment standard had been violated. The tribunal agreed with the investor that the host state had violated that obligation.⁶⁷⁵

6.3.3.2 Operating licenses revoked or restrictions imposed on the investment

The investor is at times dependent upon the host state in terms of operating licenses. It, therefore, becomes extremely important for the investor to be able to renew his operating license, if needed, or ensure that the license is not taken away by the host state. In *TECMED v Mexico*, the investor was unable to renew his license to operate a landfill of industrial waste. The claimant argued that the decision to deny his request for renewal constituted a change in administrative practice that was different from when the investment was made. In addition, the investor argued that the judicial system had not functioned adequately when the investor attempted to reverse the decision to reject the renewal of the operating permit. The tribunal disagreed and noted that there was not sufficient evidence to conclude that municipal, state and federal authorities had acted unreasonably. Moreover, the tribunal emphasized that the judicial system had not, in relation to efforts made by the investor to reverse administrative measures affecting the landfill, been inconsistent with legal rules applicable to the landfill.⁶⁷⁶

Similarly, some sectors of the economy come under more scrutiny than others, such as financial institutions. In *Saluka v Czech Republic*, the investor acquired a bank privatized by the host state. The investor sought to reorganize the bank's operation but without result. The bank faced serious liquidity problems, in particular after a run on the bank had occurred on two occasions. The bank was one of the largest banks in its field and was as a result closely supervised by the host state's financial authorities. As the bank's position deteriorated and because of the risk of systemic failure of the Czech financial sector, if the bank would become bankrupt, the host state suspended the trading of shares in the bank and prohibited the investor to transfer its shares to a third entity. The bank was later taken over by the state and sold to a third party. The investor instigated arbitral proceedings and argued that his rights had been violated. While the tribunal concluded that the host state had not violated the full protection and security standard by suspending the trading of shares

⁶⁷⁵ *Eureko B.V. v Poland*, Ad hoc arbitration, Award rendered on 19 August 2005, paras 233-234.

⁶⁷⁶ *Técnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 177.

and prohibiting the investor to transfer its shares, it concluded that the fair and equitable treatment standard had been violated.⁶⁷⁷

6.3.3.3 Demands for the renegotiations of concession agreements

Economic difficulties have forced a number of host states to demand that concession agreements be renegotiated, as the states are unable to sustain the regulatory structure upon which the agreements rest.⁶⁷⁸ In general terms this request of host states could not, as such, be considered a violation of the full protection and security standard. It is rather what host states do or do not do, e.g. the non-implementation of tariff regimes critical to the investor and the structure underlying the investment, which has been thought to be a violation of the full protection and security standard.⁶⁷⁹ However, in cases where the treaty-based standard is formulated in a way to increase the level of protection, a tribunal would be more inclined to conclude that the demand for renegotiation entailed a violation. In *Siemens v Argentina*, the investor was awarded the project to design and maintain a personal identification and electoral system. The host state later requested that the investor postpone production and sought to renegotiate the terms of the concession contract. The investor claimed that the standard, which provided for “vollen rechtlichen Schutz und volle rechtliche Sicherheit”, had been violated. The tribunal held that the initiation of renegotiation with the sole purpose of reducing cost and without a declaration of public interest affected the legal security of the investment.⁶⁸⁰ In *Vivendi v Argentina*, the investor also was awarded a concession for a water and sewage system in an Argentine province. The government made public statements that raised public opposition and demanded renegotiation, while the BIT to which the dispute was subjected prescribed that the investment should enjoy protection and security in accordance with fair and equitable treatment. The tribunal noted:

“On the facts before us, it is only possible to conclude that the Bussi government, improperly and without justification, mounted an illegitimate “campaign” against the concession, the Concession Agreement, and the “foreign” concessionaire from the moment it took office, aimed either at reversing the privatisation or forcing the concessionaire to renegotiate (and lower) CAA’s tariffs.”⁶⁸¹

⁶⁷⁷ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, paras 311 et seq and 486-493.

⁶⁷⁸ At times, the investor requests that the concession agreement be renegotiated. See *Impregilo v Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, para 32.

⁶⁷⁹ See *National Grid Plc. v Argentine Republic*, UNCITRAL Award of 3 November 2008, para 269.

⁶⁸⁰ *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para 308.

⁶⁸¹ *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award of 22 May 2007, para 7.4.19.

The tribunal concluded that the standard could not be limited to physical protection alone and had been violated, as had the fair and equitable treatment standard. In contrast, the tribunals in *Suez and Vivendi v Argentina* and *Suez and InterAgua v Argentina* reached the opposite conclusion when arguing that protection according to the full protection and security standard should be limited to protection from “physical injury” despite dealing with a treaty-based standard that prescribed that the investments made were to be “fully and completely protected and safeguarded in the territory [...] in accordance with the principle of just and equitable treatment [...]”.⁶⁸²

6.3.4 Failure to provide for legal system

It is a principle of customary international law that a state is obliged to provide for a legal system. However, while the state has considerable discretion as to the way in which that system serves its nationals, the state is under the obligation to provide a system that protects aliens within its territory in accordance with the minimum standard of international law. This basic obligation is fulfilled when the state in question shows that it has a legal system – or in other words, this obligation is relative in the sense that it is a “best efforts” obligation with the caveat that certain elements must be inherent in the system that do not fall beneath the floor provided by the international minimum standard.

What is the influence of international investment standards which are based on the BIT-regime that have evolved over the past fifty years on this structure of customary international law? As discussed earlier, BITs usually only include a simple formulation of the full protection and security standard whereby the parties to the instruments are obliged to provide for “most constant protection and security” and “full protection and security”. In some cases, treaty law goes further and prescribes that investors are to be accorded “full legal protection and legal security” or “full legal protection and security”. Arbitral awards have dealt with cases involving the conventional formulation of the standard, but not the more expansive articulation of the standard.

While arbitral tribunals have emphasized the importance of having access to the host state’s court system, they have not gone as far as to conclude that the investor is entitled to a court decision in its favour. The tribunal in *Parkerings v Lithuania* argued the following:

⁶⁸² *Suez and Vivendi et al v Argentine Republic*, ICSID Case No. ARB/05/19, Award of 30 July 2010, para 173, and *Suez and InterAgua v Argentine Republic*, ICSID Case No. ARB/05/17, Award of 30 July 2010, para 167.

“The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence – not even an allegation – that the Respondent has violated this obligation.”⁶⁸³

In addition to the investor’s access to the host state’s legal system, tribunals have not considered government measures and police investigations to violate the standard, in particular if the investor has been able to challenge these measures before the host state’s courts. In *Saluka v Czech Republic*, the investor argued that a search undertaken by the police had violated the investor’s fundamental rights of privacy and protection of property. The tribunal noted that the investor had successfully lodged a petition before the Czech Constitutional Court and the seized documents had been returned to the investor. The tribunal failed to see a violation of the full protection and security standard.⁶⁸⁴ In *TECMED v Mexico*, the investor argued that “the judicial authorities, did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations” that affected the investor’s operation. The tribunal disagreed and noted that there was not sufficient proof supporting that municipal, state or federal authorities had not reacted reasonably. The tribunal stated:

“This conclusion is also applicable to the judicial system, in relation to the efforts made to take action against the community’s opposing demonstrations or to the attempt to reverse administrative measures which were deemed inconsistent with the legal rules applicable to the Landfill...”⁶⁸⁵

In a recent award, *Frontier Petroleum Services v Czech Republic*, the claimant invested in the aviation industry in the Czech Republic. The claimant acquired a bankrupt state-owned aircraft manufacturing company and transferred the assets of that company to a joint venture, which the claimant established with a Czech business partner. After various difficulties arose with the claimant’s business partner, the claimant sought assistance from the Czech government. In addition, the claimant instigated civil proceedings in the Czech Republic against his Czech counter-party and arbitral proceedings in Stockholm against the same counter-party and the joint venture itself. After having obtained interim and final arbitral awards, the claimant sought to

⁶⁸³ *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award 11 September 2007, para 360.

⁶⁸⁴ *Saluka Investments B.V. v Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, paras 495-496.

⁶⁸⁵ *Técnicas Medioambientales Tecmed S.A. v United Mexican States*, Additional Facility Case No. ARB(AF)/00/2, Award of 29 May 2003, para 177.

enforce the awards. His attempts were not only unsuccessful before Czech courts, but assets, which the claimant had acquired for his investment, were eventually sold off in bankruptcy proceedings. The claimant instigated arbitral proceedings and argued that he had been “mistreated as a result of inaction of the Czech courts and officials, malfeasance by Czech bankruptcy trustees, and through the manifest inadequacy of the legal system of the Czech Republic with respect to the recognition of arbitral awards.”⁶⁸⁶ The tribunal disagreed with the investor that the full protection and security standard had been violated. It noted that a state’s obligation with regard to its legal system was to provide for a functioning system of courts that was available to the investor:

“Even a decision that in the eyes of an outside observer, such as an international tribunal, is wrong, would automatically lead to state responsibility as long as the courts have acted in good faith and have reached decisions that are reasonably tenable. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.”⁶⁸⁷

One of the fundamental aspects of any legal system is that its judgments and rulings are acknowledged as binding and enforced by the executive branch of government. If a state fails to do so, it has violated the full protection and security standard. Here, *Vecchi v Egypt* provides guidance in a scenario of this nature. An investor acquired real estate from the Egyptian state for the purpose of developing a hotel resort. The relationship between the investor and the host state turned sour after the investor started doing business with an Israeli company. After having been threatened that the investment would be requisited by the state if he did not end his business with the Israeli company, the investor terminated the business relationship. Shortly thereafter, the host state took over the investment by a Ministerial Resolution. The investor filed suit in the Egyptian courts that deemed the government seizure illegal. After having repeatedly won his case before the Egyptian courts, including the Supreme Administrative Court, whose decisions were not enforced by the state, the investor instigated arbitral proceedings. The tribunal noted that the host state had not respected the rulings of its own courts:

“The Tribunal is of the view that the conduct of Egypt fell well below the standard of protection that the Claimants could reasonably have expected, both in allowing the expropriation to occur and in subsequently failing to take steps to return the investment to Claimants following repeated rulings of Egypt’s own courts that the expropriation was illegal.

⁶⁸⁶ *Frontier Petroleum Services v Czech Republic*, IIC 465, Award 12 November 2010, para 28.

⁶⁸⁷ *Frontier Petroleum Services v Czech Republic*, IIC 465, Award 12 November 2010, para 273.

This is indeed the most egregious element in the whole affair. Accordingly the Tribunal finds that Egypt has contravened Article 4(1) of the Italy-Egypt BIT.”⁶⁸⁸

Therefore, a failure by the government to execute final judgments is a violation of full protection and security.⁶⁸⁹ Needless to say, such a violation removes the legal security that a state is obliged to guarantee to the investor according to customary international law and the most common formulations of the standard in treaty law.⁶⁹⁰

6.4 Conclusion

Applying the full protection and security standard requires appreciating the factual elements of each case. As discussed, certain fact-based scenarios appear more frequently in cases dealing with the standard. Outright takings or destruction of the investment make up for the clearest forms of violations of the standard regardless of whether these violations are perpetrated by the state itself or private entities. Other forms of violations of the standard consist of coercions and harassments. However, these types of violations can be more challenging to determine – not least because of the fact that what an investor might experience as coercion or harassment, e.g. investigation undertaken by state agencies, might only be an example of when the state exercises its police powers or supervisory authority. Even more challenging are instances in which the state either makes changes to the regulatory framework to which the investment is subjected or does not fulfil its obligations necessary for the investment to succeed. Finally, cases involving claims purporting that the state has failed to provide for a legal system necessary for the investor to protect and secure the investment in question are particularly demanding. It must, however, be emphasized that the factual elements dealt with here are by no means exhaustive. Recognizing these elements will not enable an arbitrator to reach his conclusion in

⁶⁸⁸ *Waguib Elie George Siag and Clorinda Vecchi v Republic of Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448.

⁶⁸⁹ A state’s aggressive conduct towards an investor is not limited to the domestic sphere alone. In the *Wena Hotels case*, the investor faced law suits and arbitral proceedings which were instigated by Egyptian authorities after the investor had obtained an ICSID award awarding him damages. These lawsuits and arbitral proceedings instigated by Egypt sought to collect rent that had allegedly fallen due while the investment was under the control of the state. See *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award dated December 8, 2000, available at the following website: <<http://italaw.com/documents/WenaInterpretationDecision.pdf>>.

⁶⁹⁰ The failure to execute final judgments also constitutes denial of justice. See J. Paulsson, *Denial of Justice in International Law*, CUP (2005), p. 168. There are other similarities between the full protection and security standard and denial of justice. See Chapter 5.7.3.

the abstract – the arbitrator is still bound by the proven facts when applying them to the standard in the legal dispute before him.

The result must be, after having assessed the factual circumstances that appear most frequently, that the application of the full protection and security standard depends considerably on comprehensive judicial balancing between the investors' and the host states' protected legal interests. As arbitral practice shows, the balancing of those interests is far from being a simple task and depends on all the relevant facts of each case and the level of protection which is owed to the investor.

7. SUMMARY OF FINDINGS AND CONCLUSIONARY REMARKS

This dissertation has sought to discuss the full protection and security standard through the prism of its sources of international investment law; sources that are structurally the same as the sources of international law described in Article 38 of the Statute of the International Court of Justice. A number of conclusions can be drawn from the research undertaken – some of which confirm statements that are considered “conventional wisdom”, while others contradict what has previously been thought about the standard.

(1) Historical development of the standard

While the standard has previously been thought to stem from the treaty practice of the United States, it is clear that it rests upon an older principle recognized by states for centuries: a state is to some extent responsible for the protection and security of aliens travelling or residing within its borders. This principle was originally limited to certain professions but later developed into a general principle of law applicable to all foreigners. It became particularly important during the de-colonization of the regions in South America and Africa where nationals of the colonial powers experienced discrimination that negatively affected their person and property. Later, it became even more important during the ever-expanding interference of government authority into economical affairs.

While the FCN treaties provided for protection and security clauses, aliens, or in other words, investors, only began to enjoy a higher level of protection with the conclusion of the ICSID Convention of 1965 and the emergence of BITs since 1959. This accelerated development of treaty-making, coupled with various concepts that have expanded in scope over time, has increased protection for investors. Not only did investors start to enjoy protection according to treaty-based standards, but they were also able to instigate arbitral proceedings against the host state of the investment and by doing so circumvent national court systems. The application of additional concepts, which rest upon other sources of law, has further developed the full protection and security standard. Still, it is important to note that while some concepts have a long history in international law, they are not to be applied in a non-critical way.

(2) The standard and sources of international law

One of the concepts enjoying a long history in international law is the concept of the standard. A standard is not a source of international law – it is an abstraction of rules and principles that are based on sources of international law. So, when the full protection and security standard is interpreted or applied to a particular legal dispute, it is not the standard as such that is applied but the sources of law from which the standard is abstracted.

Here, the sources most important are, needless to say, treaty law and customary international law. The conclusion must be that the full protection and security standard is by its very nature a two-part standard founded on a treaty based *standard with defined elements* and a *standard of due diligence* which rests upon customary international law. These two foundations of the standard are different in nature – one entails an obligation to abstain from action whereas the other entails an obligation to take action. This makes the full protection and security standard a standard of general application with considerable flexibility to take into account the facts of each case that might render different conclusions in similar situations. This is particularly clear in cases concerned with whether the standard provides only for physical protection or whether it also provides for protection going beyond physical protection and security. It must also be noted with regard to the two main foundations of the full protection and security standard, that other sources also can play a considerable role due to the very minimalistic formulations of treaty law and the wide scope of due diligence according to customary international law.

(3) Interpretation and application

The great influence of the two main foundations of the standard is also reflected in the way in which it is interpreted in arbitral practice. Here, tribunals seek through the Vienna Convention on the Law of Treaties to apply treaty law and customary international law. It is here at the intersection of the treaty based standard and the customary international law standard where the application of the standard through the prism of the concept due diligence becomes particularly challenging. The three part concept entails an obligation to which the host state is subjected, namely (i) the obligation to prevent an occurrence, (ii) the obligation to restore the investor to his previous position and (iii) the obligation to investigate, charge and punish the parties responsible. These elements of the concept of due diligence make issues dealing with full protection more complicated than otherwise due to the relative nature of these

substantive elements and other issues (e.g. the level of diligence and the legal effects of time) that need to be taken into account when determining whether the level of protection owed to the investor. It seems, in addition, that tribunals are at times susceptible to arguments that take into account the development of the host state. In such cases a tribunal might under exceptional circumstances conclude that a state was unable to take “reasonable measures” in order to provide the investor with protection and security. If a tribunal is unable to come to such a conclusion with regard to what “reasonable measures” might be necessary, it is able to address the issue when determining quantum.

(4) Violations – judicial balancing between different legal interests

It appears from the arbitral practice reviewed that the full protection and security standard is violated more often in certain scenarios than others. The “traditional methods” of violating the standard consist of when the state requisites the investment or does not provide protection and security prior to or during an attack from third parties. This field has, however, also been evolving rapidly in recent years not least because of the different approaches taken by tribunals to determine the judicial balancing between, on one hand, the legal interest of the investor, and, on the other hand, the legal interest of the host state. With the widening formulation of the standard, including provisions that expand the definition of the concept of “investment” and that provide for “legal security”, investors have sought compensation in cases where the host state has sought to amend its laws and regulations – an act that has had negative effect on the investor’s business in the host state. Arbitral practice reveals that while tribunals are generally conservative with regard to extending the protection further they do not hesitate when necessary.

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ANNEXES

ANNEX I: Examples of formulations of the full protection and security standard in selected BITs

ANNEX II: Examples of formulations of the full protection and security standard in selected regional instruments

ANNEX III: Examples of formulations of the full protection and security standard in selected multilateral instruments

ANNEX IV: Table of investor-state cases involving the full protection and security standard

ANNEX I: BILATERAL INVESTMENT TREATIES

Annex I. Selected bilateral treaties containing full protection and security provisions

1. Friendship, Commerce and Navigation Treaties

No.	Countries (year)	Title	Article	Text of Treaty
1.	Great Britain-Spain (1713)	Treaty of Amity, Commerce and Peace between Great Britain and Spain	Article III	That the said Kings of Great Britain and Spain, shall take care that their respective People and Subjects from henceforward do abstain from all Force, Violence, or Wrong ; and if any Injury shall be done by either of the said Kings, or by the People or Subjects of either of them, to the People or Subjects of the Other, against the Articles of this Alliance, or against common Right, [...] until such time as Justice is sought and followed in the ordinary course of Law. But if Justice be denied or delayed, then the King, whose People or Inhabitants have received harm; shall ask it of the other, by whom (as is said) the Justice shall have been denied or delayed, or of the Commissioners that shall be by the one King or the other appointed to receive and hear such Demands, to the end that all such Differences may be compounded in Friendship, or according to Law. [...]
			Article XXVIII	And that the Laws of Commerce that are obtained by Peace, may not remain unfruitful, as would fall out if the Subjects of the King of Great Britain, when they go to, come from, or remain in the Dominions or Lordships of the King of Spain, by reason of their Commerce and other Business, should be molested for Cause of Conscience, therefore that the Commerce be secure , and without Danger, as well upon Land as Sea, the said King of Spain shall provide, that the Subjects of the Said King of Great Britain shall not be aggrieved contrary to the Laws of Commerce, and that none of them shall be molested or disturbed for their Conscience, so long as they give no public Scandal or Offence; and the said King of Great Britain shall likewise provide, for the same Reasons, that the Subjects of the King of Spain shall not be molested or disturbed for their Conscience against the Laws of Commerce, so long as they give no public Scandal or Offence.
2.	Sweden-United States (1783)	Treaty of Amity and Commerce and Navigation, between Sweden and United States	Article I	His Swedish Majesty shall use all the means in his power to protect and defend the vessels and effects belonging to citizens or inhabitants of the United States of North America, and every one of them which shall be in the ports, havens, roads, or in the seas near the countries, islands, cities, and towns of his said Majesty, and shall use his utmost endeavors to recover and restore to the right owner all such vessels and effects which shall be taken from them within his jurisdiction
			Article II	In like manner, the United States of North America shall protect and defend the vessels and effects belonging to the subjects of his Swedish Majesty which shall be in the ports, havens, or roads, or on the seas near to the countries, islands, cities, and towns of the said states, and shall use their utmost efforts to recover and restore to the right owners all such vessels and effects which shall be taken from them within their jurisdiction.

No.	Countries (year)	Title	Article	Text of Treaty
3.	Great Britain-Netherlands (1814)	Convention between Great Britain and The Netherlands relative to the Dutch Colonies; Trade with the East and West Indies	Article IV	His Britannic Majesty guarantees to the Subjects of His Royal Highness the Prince Sovereign of the United Netherlands, the same facilities, privileges, and protection , with respect to Commerce and the security of their property and persons within the limits of the British Sovereignty on the Continent of India, as are now or shall be granted to the most favoured Nations. [...]
4.	Austria-Hungary-United States (1829)	Treaty of Commerce and Navigation between Austria-Hungary and the United States of America	Article I	There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their commercial affairs; and they shall enjoy, to that effect, the same security, protection and privileges as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.
5.	Argentine-United States (1853)	Treaty of Friendship, Commerce and Navigation between the United States of America and the Argentine Confederation	Article II	There shall be between all the territories of the United States and all the territories of the Argentine Confederation a reciprocal freedom of commerce. The citizens of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all places, ports and rivers in the territories of either, to which other foreigners, or the ships or cargoes of any other foreign nation or State, are, or may be, permitted to come; to enter into the same, and to remain and reside [...] for the purposes of their residence and commerce; to trade in all kinds of produce, manufactures and merchandise of lawful commerce; and generally to enjoy, in all their business, the most complete protection and security , subject to the general laws and usages of the two countries respectively. [...]
			Article VIII	All merchants, commanders of ships and others, citizens of the United States, shall have full liberty, in all the territories of the Argentine Confederation, to manage their own affairs themselves, or to commit them to the management of whomsoever they please, as broker, factor, agent or interpreter; nor shall they be obliged to employ any other persons in those capacities than those employed by citizens of the Argentine Confederation, nor to pay them any other salary or remuneration than such as is paid in like cases by citizens of the Argentine Confederation. [...] The citizens of the two contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights, and they shall be at liberty to employ in all cases such advocates, attorneys or agents as they may think proper; and they shall enjoy, in this respect, the same rights and privileges therein as native citizens.
			Article XIII	The citizens of the United States, and the citizens of the Argentine Confederation, respectively, residing in any of the territories of the other party, shall enjoy, in their houses, persons and properties, the full protection of the Government.

No.	Countries (year)	Title	Article	Text of Treaty
6.	Germany-Hawaii (1879)	Treaty of Friendship, Commerce and Navigation and Consular Convention between Germany and the Hawaiian Islands	Article II	The subjects and citizens of the two High Contracting Parties may remain and reside in any part of said territories respectively and shall receive and enjoy full and perfect protection for their persons and property. They shall have free and easy access to the courts of justice, provided by law, in pursuit and defense of their rights, and they shall be at liberty to choose and employ lawyers, advocates or agents to pursue or defend their rights before such courts of justice; and they shall enjoy in this respect all the rights and privileges as native subjects or citizens.
7.	Sweden-China (1908)	Treaty of Amity, Commerce and Navigation, between Sweden and China	Article I	There shall be, as there have always been, perpetual peace and friendship between His Majesty the King of Sweden and His Majesty the Emperor of China, and between their respective subjects, who shall enjoy equally in the respective countries of the high contracting parties full and entire protection of their persons and property.
			Article VII	The vessels [...], which are at liberty to trade freely at open ports in time of peace, shall, in the event of either of the high contracting parties being at war with any foreign nation and for that reason excluding the vessels of that nation from her ports, be entitled nonetheless to continue to pursue their commerce in freedom and security and to transport goods to and from the ports of the belligerent powers, [...]
8.	Germany-United States (1923)	Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America	Article I	The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.
9.	Spain-Siam (1925)	Treaty of Friendship, Commerce and Navigation between Spain and Siam	Article III	The subjects of each of the High Contracting Parties shall receive in the territories and possessions of the other the most constant protection and security for their persons and property and, on their submitting themselves to the conditions imposed upon native subjects, shall enjoy in this respect the same rights and privileges as now are or hereafter may be granted to such native subjects.
10.	Austria-United States (1928)	Treaty of Friendship, Commerce and Consular Rights, between the United States of America and Austria	Article I	The nationals of each high contracting party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

No.	Countries (year)	Title	Article	Text of Treaty
11.	China-Estonia (1937)	Treaty of Amity between the Republic of China and the Republic of Estonia	Article V	The nationals of each of the High Contracting Parties shall enjoy in the territory of the other full protection for their persons and property in accordance with the laws and regulations of the country and with the principles of international law. They shall have the right, subject to the laws and regulations of the country to travel, reside, work and engage in commerce and industry in the localities where the nationals of any third country are allowed to do so.
12.	Italy-United States (1951)	Treaty of Friendship, Commerce and Navigation, between the United States of America and the Italian Republic	Article V(1)	The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.
			Article V(3)	The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security [...], upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations [...], and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country.
13.	Philippines-Dominican Republic (1952)	Treaty of Friendship between the Republic of the Philippines and the Dominican Republic	Article IV	The nationals [...] shall be permitted to enjoy reciprocally the right to acquire, possess and dispose of movable and immovable property, to travel, to reside and to engage in trade, industry and other peaceful and lawful pursuits, subject always to the Constitution, laws and regulations promulgated, or which may hereafter be promulgated, by the other. They shall enjoy in matters of procedure the same treatment as is accorded to the nationals of the other, with respect to the protection and security of their persons and property and in regard to all judicial, administrative and other legal proceedings.
14.	Iran-United States (1955)	Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran	Article II(4)	Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall without unnecessary delay be notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed all facilities reasonably necessary to his defense and given a prompt and impartial disposition of his case.

No.	Countries (year)	Title	Article	Text of Treaty
	Iran-United States (1955)	Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (cont.)	Article IV(2)	Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.
15.	Japan-Indonesia (1961)	Treaty of Amity and Commerce between Japan and the Republic of Indonesia	Article III	Nationals of either Party, within the territory of the other Party, shall be accorded treatment no less favourable than that accorded to nationals of such other Party and of any third country with respect to the protection and security for their persons.
16.	Israel-Haiti (1967)	Treaty of Friendship, Commerce and Navigation between the Republic of Israel and the Republic of Haiti	Article IV	Nationals of either High Contracting Party shall be accorded in the territory of the other Party the protection and personal security accorded to nationals of the other Party.

2. Bilateral Investment Treaties

2.1 Full protection and security provisions

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
1.	Argentina-Australia (1995)	Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments	Recognizing that the promotion and protection of such investments on the basis of a bilateral agreement will be conducive to the stimulation of individual business initiative to the benefit of both countries	Art. 4(2) [Protection of Investments]	Each Contracting Party shall, subject to its laws, grant full legal protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments through unjustified or indiscriminate measures.
2.	Argentina-Canada (1991)	Agreement Between The Government Of Canada And The Government Of The Republic Of Argentina For The Promotion And Protection Of Investment	Recognizing that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them	Art. 2(4) [Promotion and Protection of Investments]	Investments or returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in accordance with principles international and shall enjoy full protection and security in the territory of the other Contracting Party.
3.	Argentina-Greece (1999)	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments	Recognizing that the promotion and protection of such investments on the basis of an Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both countries	Article 3(1) [Treatment of Investments]	Each Contracting party, once it has admitted investments by investors of the other Contracting Party, shall grant full protection and security to such investments and shall accord them treatment which is no less favourable than that accorded to investments of its own investors or to investments of investors of any third State, whichever is the most favourable.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
4.	Argentina-Korea (1994)	Agreement between the Government of the Republic of Korea and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments	Recognizing that the encouragement and protection of investments on the basis of the present Agreement stimulates business initiative in this field	Art. 2(2) [Promotion and Protection of Investments]	Investments of Investors of either Contracting Party shall at all times be accorded fair and equitable treatment, and shall enjoy full protection and security in the territory of the other Contracting Party.
5.	Argentina-Philippines (1999)	Agreement between the Government of the Philippines and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments	Recognising that the encouragement and protection of such foreign investments on the basis of an agreement will be conducive to the stimulation of individual business initiative and will benefit the economic prosperity of both countries	Art. 3(2) [Protection of Investments]	Each Contracting Party, when it has admitted investments in its territory by investors of the other Contracting Party, shall grant full legal protection to such investments and shall accord them treatment which is no less favourable than that accorded to investments by its own investors in accordance with existing laws, rules and regulations or by investors by third states.
6.	Argentina-Sweden (1991)	Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments	Recognizing that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives	Art. 2(4) [Promotion and Protection of Investments]	The investments made in accordance with the laws and regulations of the Contracting Party in whose territory they are undertaken, enjoy the full protection of this Agreement.
7.	China-United Kingdom (1986)	Agreement between the Government of the United Kingdom and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments	Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative of the nationals and companies and will increase prosperity in both States	Article 2(2) [Promotion and Protection of Investment]	Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy the most constant protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
8.	China-Germany (2003)	Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments	Recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity [...]	Article 2(2) [Promotion and Protection of Investment]	Investment of investors of either Contracting Party shall enjoy constant protection and security in the territory of the other Contracting Party.
9.	China-Latvia (2004)	Agreement between the Governments of the People's Republic of China and Latvia on the Promotion and Protection of Investments	Recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States	Article 3 [Expropriation and compensation] Article 2(2) [Promotion and Protection of Investments]	Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.
10.	China-Uganda (2004)	Agreement between the Government of the People's Republic of China and Uganda on the Reciprocal Promotion and Protection of Investments	Recognising that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity of both Contracting States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between [...] in the interest of their economic development	Article 2(2) [Promotion and Protection of Investments]	The investments made by investors of one contracting party shall enjoy full and complete protection and safety in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
11.	China-Korea (1992)	Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the Korea and the Government of the People's Republic of China	Intending to create favourable conditions for investment by investors of each State within the territory of the other State by means of the favourable treatment and the protection accorded by each Contracting Party to investment, business activities in connection therewith, and Recognizing that the encouragement and reciprocal protection of investment will stimulate economic and technological exchanges between the two States	Article 5(1)	Investments and returns of investors of either State shall receive the most constant protection and security within the territory of the other State.
12.	China-Peru (1994)	Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments	Recognising that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States	Article 3	Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party [...] The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.
13.	Czech Republic-Australia (1993)	Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments	Recognising that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties	Article 3(3) Promotion and Protection of Investments	A Contracting Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
14.	Czech Republic-Canada (1990)	Agreement between the Government of Canada and the Government of the Czech and Slovak Republic for the Promotion and Protection of Investments	Recognizing that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them	Article III(1) Protection of Investment	Investments or returns of investors of either Contracting party shall at all times be accorded fair and equitable treatment in accordance with principles of international law and shall enjoy full protection and security in the territory of the other Contracting Party.
15.	Czech Republic-Venezuela (1995)	Agreement between the Czech Republic and the Republic of Venezuela for the Promotion and Protection of Investments	Conscious that the promotion and reciprocal protection of investments according to the present Agreement stimulates the business initiatives in this field.	Article 2(2) [Promotion and Protection of Investment]	Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in accordance with the rules and principles of international law, and shall enjoy full protection and security in the territory of the other Contracting Party.
16.	Czech Republic-Tunisia (1997)	Agreement between the Czech Republic and the Republic of Tunisia for the Promotion and Reciprocal Protection of Investments	Conscious that the promotion and reciprocal protection of investments, according to the present Agreement, stimulates the business initiatives in this field.	Article 2(2) [Promotion and Protection of Investment]	Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
17.	Czech Republic-Netherlands (1992)	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic		Article 3(2)	Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
	Czech Republic-Netherlands (1992)	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (cont)			More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.
18.	Egypt-Latvia (1997)	Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of Latvia for the Promotion and Protection of Investments	Recognizing that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting Parties	Article 2(2) [Promotion and Protection of Investments]	Investments of investors shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting party.
19.	Egypt-Italy (1989)	Agreement for the Promotion and Protection of Investments between the Republic of Italy and the Arab Republic of Egypt	Recognizing that the encouragement and reciprocal protection under international agreements of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting States.	Article 4(1) [Compensation for Damage or Loss]	Investments by nationals or companies of either Contracting party shall enjoy full protection in the territory of the other Contracting Party
20.	Egypt-Nigeria (2000)	Agreement between the Government of the Federal Republic of Nigeria and the Government of the Arab Republic of Egypt for the Reciprocal Promotion and Protection of Investments	Recognising that the reciprocal promotion and protection of investments will be conducive to the stimulation of private business initiative, contribute to the development and increase prosperity of both parties	Article 2(1) [Promotion and Protection of Investments]	Either Contracting Party shall within the framework of its laws and regulations, promote economic cooperation through the protection , in its territory, of investments of nationals and companies of the other Contracting Party, subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
	Egypt-Nigeria (2000)	Agreement between the Government of the Federal Republic of Nigeria and the Government of the Arab Republic of Egypt for the Reciprocal Promotion and Protection of Investments (cont.)		Article 2(3) [Promotion and Protection of Investments]	[...] each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals and companies or to investments of nationals and companies of any third State, whichever is more favourable to the nationals and companies concerned.
21.	Egypt-United States (1986)	Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments	Both have resolved to conclude a bilateral Treaty pertaining to the reciprocal encouragement and protection of investments	Article II(4) [Encouragement and Promotion of Investments]	The treatment, protection and security of investments shall never be less than that required by international law and national legislation.
22.	Egypt-Russia (1997)	Agreement between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the encouragement and mutual protection of capital investments	and recognizing that the encouragement and the mutual protection , rendered on the basis of the given Agreement, will facilitate the development of mutually advantageous commercial and economic, as well as scientific and technical, cooperation	Article 2(2) [Encouragement and Protection of Capital Investment]	Each of the Contracting Parties shall guarantee to the investors of the other Contracting Party, in conformity with its legislation, complete protection and security of the capital investments of the investors of the other Contracting Party.
23.	Egypt- Germany (2005)	Agreement between the Arab Republic of Egypt and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments	Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both countries	Article 2(2) [Encouragement and Protection of Investments]	Each Contracting Party shall in its territory in any case accord investments by investors of the other Contracting Party fair and equitable treatment as well as full protection under the Agreement.
				Article 4 [Expropriation]	Investment by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.

No.	Countries (year)	Title	Preamble	Article [heading]	Text of Treaty
24.	India-Denmark (1995)	Agreement between the Government of the Republic of India and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments		Article 2(2) [Promotion and Protection of Investments]	Investments of investors of shall Contracting Party shall at all times enjoy full protection and security in the territory of the other Contracting Party and shall not be subject to unreasonable or discriminatory measures.
25.	India-Switzerland (1997)	Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments	Recognising that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 3(2) [Promotion and Protection of Investment]	Investments of investors of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party and shall at all times be accorded fair and equitable treatment.
26.	India-Thailand (2000)	Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of India for the Promotion and Protection of Investments	Recognising that the encouragement and reciprocal protection of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States	Article 3(2) [Promotion and Protection of Investment]	Investment and returns of investors of each Contracting Party in the territory of the other Contracting party, shall at all times be accorded fair and equitable treatment including protection and security under the laws of the other Contracting Party.
27.	India-Greece (2007)	Agreement between the Government of the Hellenic Republic and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments	Recognizing that the promotion and protection of investments, on the basis of this Agreement, will stimulate the business initiative in this field	Article 3(2) [Promotion and Protection of Investments]	Investments and returns of investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
28.	India-Netherlands (1997)	Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments	Recognising that reciprocal protection of such investments under an agreement will subserve the aforesaid objective and will be conducive to the stimulation of individual business initiative and will increase prosperity in both States	Article 4 [National treatment and most favoured nation treatment]	Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
29.	India-United Kingdom (1994)	Agreement between the Government of the United Kingdom and the Government of the Republic of India for the Promotion and Protection of Investments	Recognising that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States	Article 3(2) [Promotion and Protection of Investment]	Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
30.	Indonesia-Finland (1996)	Agreement between the Government of the Republic of Finland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments	Recognizing that the need to protect investments by nationals and companies of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to expanding the economic prosperity of both Contracting Parties.	Article II(2) [Promotion and Protection of Investments]	Investments by investors of either Contracting Party shall, at all times, subject to its laws and regulations, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
31.	Indonesia-Thailand (1998)	Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments	Recognising that the encouragement and protection of such investments under this Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both countries.	Article III(2) [Promotion and Protection of Investments]	Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
32.	Indonesia-Chile (1999)	Agreement between the Government of the Republic of Chile and the Government of the Republic of Indonesia on the Reciprocal Promotion and Protection of Investments	Recognizing that the reciprocal promotion and protection of such foreign investments favour the economic prosperity of both countries	Articles III(2) [Promotion and Protection of Investments]	Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.
				Article IV(1) [Treatment of Investments]	Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments adequate physical security and protection .
33.	Indonesia-Bangladesh (1999)	Agreement between the Government of Indonesia and the Government of the People's Republic of Bangladesh concerning the Promotion and Protection of Investments	Recognizing that the Agreement on the Promotion and Protection of such investments will be conducive to the stimulation of investment activities in both countries	Articles II(1) [Promotion and Protection of Investments]	Investments of Investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.
				Article III (1) [Most-Favoured-Nation Provisions]	Each Contracting Party shall ensure fair and equitable treatment of the investment of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord such investment adequate physical security and protection .

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
34.	Indonesia-Spain (1995)	Agreement between the Republic of Indonesia and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments	Recognizing that the promotion and protection of investments under this Agreement will stimulate initiatives in this field.	Article II(2) [Promotion and Protection]	Each party shall protect in its territory the investments made in accordance with its laws and regulations, by investors of the other Party and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance use,, enjoyment, expansion, sale and if appropriate, the liquidation of such investments.
35.	Indonesia-Korea (1991)	Agreement between the Government of the Republic of Korea and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investment	Recognizing that the promotion and protection of such investments will be conducive to the stimulation of individual business initiative and to foster prosperity in both countries	Article 2(2) [Promotion and Protection of Investment]	Investments of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Party.
36.	Thailand-Bahrain (2002)	Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments	Recognising that the encouragement of such investments and the reciprocal protection of investments under international agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 3(2)	Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection an security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment in its territory of the other Contracting Party.
37.	Thailand-Canada (1997)	Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments	Recognising that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them.	Article II(2)	Each Contracting Party shall accord investments or returns of investors of the other Contracting Party (a) fair and equitable treatment in accordance with principles of international law, and (b) full protection and security .

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
38.	Thailand-Germany (2002)	Treaty between the Kingdom of Thailand and the Federal Republic of Germany for the Encouragement and Reciprocal Protection of Investments	Recognizing that the encouragement and the protection of such investments are conducive to stimulate private business initiative and to increase the prosperity in both countries.	Article 2(3)	Each Contracting Party shall in its territory in any case accord such investments by investors of the other Contracting Party and their returns fair and equitable treatment and full protection .
39.	Thailand-Peru (1991)	Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Peru for the Promotion and Protection of Investments	Recognising that the encouragement of such investment of capital and the reciprocal protection of investments under international agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 4(1) [Protection and Compensation]	Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.
40.	Thailand-India (2000)	Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of India for the Promotion and Protection of Investments	Recognising that the encouragement and reciprocal protection of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 3(2) [Promotion and Protection of Investment]	Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party shall enjoy the most constant protection and security under the law of the latter Contracting Party.
				Article 3(2) [Promotion and Protection of Investment]	Investments and returns of investors of each Contracting Party in the territory of the other Contracting Party, shall at all times be accorded fair and equitable treatment including protection and security under the laws of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
41.	Thailand-Slovenia (2002)	Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Slovenia on the Promotion and Protection of Investments	Recognizing that the promotion and protection of investments on the basis of the this Agreement will stimulate business initiatives.	Article 2(2) [Promotion and Protection of Investments]	Each Contracting Party shall accord to investments in its territory of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security .
42.	Turkey-Denmark (1992)	Agreement between the Republic of Turkey and the Kingdom of Denmark concerning the reciprocal promotion and protection of investments.		Article 3(1) [Protection of Investment]	Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
43.	Turkey-Germany (1962)	Treaty between the Federal Republic of Germany and the Republic of Turkey concerning the reciprocal Promotion and Protection of Investments	Recognizing that reciprocal contractual promotion and protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations.	Article 3(1)	Investments by nationals or companies of either Contracting Party shall enjoy protection and security in the territory of the other Contracting Party.
44.	Turkey-Russia (1997)	Agreement between the Government of the Russian Federation and the Republic of Turkey regarding the promotion and reciprocal protection of investments.	Taking into consideration that the promotion and reciprocal protection of investments shall promote the development of mutual beneficial commercial and economic as well as scientific and technical co-operation.	Article II(2) [Promotion and Protection of Investments]	Investments of investors of one of the Contracting Parties made in the territory of the other Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security .

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
45.	Turkey-Finland	Agreement between the Government of the Republic of Finland and the Government of the Republic of Turkey for the reciprocal promotion and protection of investments	Recognizing the mutual desire to stimulate the flow of capital with the aim of promoting economic activity in both states and to protect investments by investors of both states.	Article 3 [Protection of Investments]	Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the cooperation, management, maintenance, use, enjoyment, sale or liquidation thereof by those investors. Each Contracting Party shall accord to investments of investors of the other Contracting party full security and protection , which in any case shall not be less than that accorded to investments of investors of any third State. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.
46.	Turkey-Netherlands (N/A)	Agreement on reciprocal encouragement and protection of investments between the Kingdom of the Netherlands and the Republic of Turkey		Article 4(1) [Most-favoured-nation Provisions]	Each Contracting Party shall, within the framework of its laws and regulations promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit investments of investors of the other Contracting Party. Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.
				Article 2(1)	Each Contracting Party shall, within the framework of its laws and regulations promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit investments of investors of the other Contracting Party.
				Article 3(2)	Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
47.	Turkey-Morocco (1997)	Agreement between the Government of the Republic of Turkey and the Government of Kingdom of Morocco for the promotion and protection of investments.	Recognising the importance of the reciprocal encouragement and protection of investments and its contribution to stimulate inflows of capital and business initiative and to increase prosperity in both States.	Article 2(2) [Promotion and Protection of Investment]	Each Contracting Party shall ensure fair and equitable treatment and subject to the strictly necessary measures to maintain the public order provide full protection and security for investments of investors of the other Contracting Party.
48.	BLEU-Bangladesh (1981)	Agreement between the Belgo-Luxembourg Economic Union and the People's Republic of Bangladesh for the Promotion and Protection of Investments	Recognising that reciprocal encouragement and protection under international agreements of such investments will be [conductive] to the stimulation of individual business initiative and is likely to promote investments for the mutual prosperity of the Contracting Parties.	Article 2(2) [Promotion and Protection of Investments]	Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
49.	BLEU-Kazakhstan (1998)	Agreement between the Government of the Republic of Kazakhstan and the Belgo-Luxembourg Economic Union on the reciprocal promotion and protection of investments.		Article 3(2)-3(3) [Protection of Investments]	Except for measures required to maintain public order, such investments shall enjoy continuous protection and security , i.e. excluding all unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof. The treatment and protection referred to in paragraphs 1 and 2 shall at least be equal to those enjoyed by investors of a third State and shall in no case be less favourable than those recognized under international law.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
50.	BLEU-Philippines (1998)	Agreement between the Government of the Republic of the Philippines and the Belgo-Luxembourg Economic Union on the reciprocal promotion and protection of investments	Recognizing that encouragement and protection of investments will benefit the economic prosperity of both States.	Article III(2)-III(3) [Treatment]	Except for measures required to maintain public order, such investments shall enjoy continuous protection and security , i.e. excluding all unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof. The treatment and protection referred to in paragraphs 1 and 2 shall at least be equal to those enjoyed by investors of a third State and shall in no case be less favourable than those recognized under international law.
51.	BLEU-Hong Kong (1996)	Agreement between the Government of Hong Kong and the Belgo-Luxembourg Economic Union for the Promotion and Protection of Investments.	Recognising that the encouragement and reciprocal protection under agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both areas.	Article 2(2) [Promotion and Protection of Investment and Returns]	Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party.
52.	BLEU-Saudi Arabia (2001)	Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union concerning the reciprocal promotion and protection of investments.	Recognizing that the reciprocal promotion and protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both Parties.	Article 4(1)	Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
53.	BLEU-Colombia (2009)	Agreement between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the reciprocal promotion and protection of investments.	Recognizing the need to promote and protect foreign investment with the aim to foster the economic prosperity of both Contracting Parties.	Article III(2) [Promotion and Protection of Investments]	All investments made by investors of a Contracting Party in the territory of the other Contracting Party shall enjoy at all times, in accordance with customary international law, fair and equitable treatment, as well as full protection and security . For greater certainty, a. the concepts of “fair and equitable treatment” and “ full protection and security ” do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law and general principles of law embodied in the main legal systems of the world; b. a determination that there has been a breach of another provision of this Agreement or another international agreement may, but does not necessarily imply that the minimum standard of treatment of aliens has been breached; c. “fair and equitable treatment” includes, among others, the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world; and d. the “ full protection and security ” standard does not imply, in any case, a better treatment to that accorded to nationals of the Contracting Party where the investment was made.
54.	Finland-Brazil (1995)	Agreement between the Government of the Republic of Finland and the Government of Brazil on the Promotion and Protection of Investments.	Recognizing that the promotion and protection of such investments will contribute to stimulate investment initiatives.	Article 2(2) [Promotion and Protection of Investments]	Investments by investors of each Contracting Party shall at all times enjoy full protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
55.	Finland-Bulgaria (1997)	Agreement between the Government of the Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments	Recognizing that the promotion and protection of such investments favour the expansion of the economic relations between both countries and stimulate investment initiatives.	Article 2(1) Promotion and Protection of Investments	Each Contracting Party shall promote and protect in its territory investments of investors of the other Contracting Party and shall admit such investments in accordance with its laws and regulations and accord them fair and equitable treatment and protection .
56.	Finland-Indonesia (1996)	Agreement between the Government of the Republic of Finland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments	Recognizing the need to protect investments by nationals and companies of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view of expanding the economic prosperity of both Contracting Parties.	Article II(2) [Promotion and Protection of Investments]	Investments by investors of either Contracting Party shall, at all times, subject to its laws and regulations, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
57.	Finland-China (2004)	Agreement between the Government of the Republic of Finland and the Government of the People's Republic of China on the encouragement and reciprocal protection of investments.	Recognising that the encouragement and reciprocal protection of such investment will be conducive to stimulating business initiative of investors and to increasing prosperity in both States.	Article 2(2) [Promotion and Protection of Investments]	Investments of the investors of either Contracting Party shall enjoy constant protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
58.	Finland-Ecuador (2001)	Agreement between the Government of the Republic of Finland and the Government of the Republic of Ecuador on the promotion and protection of investments.	Recognising that the promotion and protection of investments on the basis of this Agreement will contribute to the stimulation of individual economic initiative and will be conducive to increasing the prosperity of both Contracting Parties.	Article 2(2) [Promotion and Protection of Investments]	Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security .
59.	Finland-Belarus (2006)	Agreement between the Government of the Republic of Belarus and the Government of the Republic of Finland on the promotion and protection of investment.	Recognising the need to protect investments of the investors of one Contracting Party in the territory of the other contracting Party on a non-discriminatory basis. Having resolved to conclude an agreement concerning the promotion and protection of investments.	Article 2(2) [Promotion and Protection of Investments]	Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security .
60.	Germany-Philippines (1998)	Agreement between the Federal Republic of Germany and the Republic of the Philippines for the promotion and reciprocal protection of investments.	Recognizing encouragement and protection of such investments will benefit the economic prosperity of both states.	Article 4(1) [Expropriation and Compensation]	Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.
61.	Germany-Hong Kong (1996)	Agreement between the Government of Hong Kong and the Government of the Federal Republic of Germany for the encouragement and reciprocal protection of investments.		Article 2(2)	Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other contracting party.
				Article 4	In accordance with the provisions of Article 2(2) of this Agreement, investments by investors of either Contracting Party shall enjoy full protection and security in the area of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
62.	Germany-Kazakhstan (1992)	Vertrag zwischen der Bundesrepublik Deutschland und der Republik Kasachstan über die Förderung und den gegenseitigen Schutz von Kapitalanlagen.	in der Erkenntnis, daß eine Förderung und ein vertraglicher Schutz dieser Kapitalanlagen geeignet sind, die private wirtschaftliche Initiative zu beleben und den Wohlstand beider Völker zu mehren.	Article 4	Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genießen im Hoheitsgebiet der anderen Vertragspartei vollen Schutz und volle Sicherheit .
63.	Germany-Kuwait (1994)	Agreement between the Federal Republic of Germany and the State of Kuwait for the encouragement and reciprocal protection of investments.	Recognizing that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and to the increase of the prosperity in both states.	Article 4(1) [Protection of Investments]	Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.
64.	Germany-Nigeria (2000)	Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the encouragement and reciprocal protection of investments.	Recognizing that the contractual protection of such investment are apt to stimulate private business initiative and to increase the prosperity of both nations.	Article 3(2) [Protection of Investments]	Each contracting party shall in its territory in any case accord investments by investors of the other Contracting Party fair and equitable treatment as well as full protection under the treaty.
65.	Germany-Venezuela (1998)	Vertrag zwischen der Bundesrepublik Deutschland und der Republik Venezuela über die Förderung und den gegenseitigen Schutz von Kapitalanlagen.	in der Erkenntnis, daß eine Förderung und ein vertraglicher Schutz dieser Kapitalanlagen geeignet sind, die private wirtschaftliche Initiative zu beleben und den Wohlstand beider Völker zu mehren.	Article 5(1) [Protection of Investments] Artikel 2(2)	Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party. Dieser Vertrag findet Anwendung auf Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei, die im Hoheitsgebiet der anderen Vertragspartei gemäß deren Gesetzgebung vorgenommen worden sind. Diese Kapitalanlagen genießen vollen Schutz dieses Vertrags.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
65.	Germany-Venezuela (1998)			Artikel 4(1)	Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genießen im Hoheitsgebiet der anderen Vertragspartei vollen rechtlichen Schutz und Sicherheit .
66.	Netherlands-Brazil (1998)	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federative Republic of Brazil.		Article 3(1)	Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full security and protection .
67.	Netherlands-Indonesia (N/A)	Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on promotion and protection of investments.	Recognizing that the Agreement on the promotion and protection of such investments will be conducive to the stimulation of investment activities in both countries.	Article 3(1) [Treatment and Most Favoured Nation Provisions]	Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord such investments adequate physical security and protection .
68.	Netherlands-India (N/A)	Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments.	Recognising that reciprocal protection of such investments under an agreement will subserve the aforesaid objective and will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 4(1) [National treatment and most favoured nation treatment]	Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
69.	Netherlands-Philippines (N/A)	Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the promotion and protection of investments.		Article 3(2)	Investments of nationals of [...] shall, in their entry, operation, management, maintenance, use, enjoyment or disposal, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other [...].

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
70.	Netherlands-Venezuela	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela.		Article 2	<p>Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.</p> <p>More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third state, whichever is more favourable to the national concerned.</p>
71.	Netherlands-Bahrain (N/A)	Agreement on promotion and protection of investments between the Government of the Kingdom of Bahrain and the Government of the Kingdom of the Netherlands.		Article 2	<p>Either Contracting party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.</p> <p>Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full security and protection.</p>
				Article 3(1)	

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
72.	Sweden-Lebanon (2001)	Agreement between the Lebanese Republic and the Kingdom of Sweden on the promotion and reciprocal protection of investments.	Recognizing that the encouragement and reciprocal protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both states.	Article 2(3) [Promotion and Protection of Investments]	Each Contracting Party shall ensure fair and equitable treatment within its territory of investors of the other Contracting Party and their investments. Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment extension, sale or liquidation of such investments. Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.
73.	Sweden-Russia (1995)	Agreement between the Government of the Kingdom of Sweden and the Government of the Russian Federation on the promotion and reciprocal protection of investments.		Article 4(1) [Expropriation and Compensation]	
74.	Sweden-Bulgaria (1994)	Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Bulgaria on the mutual promotion and protection of investments.	Recognizing that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties.	Article 2(2) [Promotion and Reciprocal Protection of Investments]	The investments made by investors of one Contracting Party in the territory of the other Contracting Party enjoy full protection in accordance with the provisions of this Agreement.
75.	Sweden-Korea (1995)	Agreement between the Government of the Republic of Korea and the Government of the Kingdom of Sweden on the promotion and reciprocal protection of investments.	Recognizing that the mutual promotion and protection of investments on the basis of this agreement stimulates business initiative in this field.	Article 2(3) [Promotion and Protection]	The investments made in accordance with the laws and regulations of the Contracting Party in whose territory they are undertaken, enjoy the full protection of this Agreement.
				Article 2(2) [Promotion and Protection of Investments]	Investments and returns of investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
76.	Sweden-Argentina (1991)	Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the promotion and reciprocal protection of investments.	Recognizing that the promotion and protection of such investments favour the expansion of the economic relations between the two contracting parties and stimulate investment initiatives.	Article 2(4) [Promotion and Protection of Investments]	The investments made in accordance with the laws and regulations of the Contracting Party in whose territory they are undertaken, enjoy the full protection of this Agreement.
77.	Sweden-Thailand (2000)	Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Sweden on the promotion and protection of investments.	Recognizing that the promotion and protection of such investments favour the expansion of the economic relations between the two contracting parties and stimulate investment initiatives.	Article 3(4) [Treatment of Investments]	Investments and returns of investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other contracting party.
78.	Switzerland-Korea (1971)	Agreement between the Government of the Republic of Korea and the Government of the Swiss confederation concerning the encouragement and reciprocal protection of investments.	Recognizing the need to protect investments by nationals and companies of both States and to stimulate the flow of capital with a view to the economic prosperity of both states.	Article 2(1)	Each contracting party shall protect within its territory investments made in accordance with its legislation by nationals or companies of the other contracting party and shall not impair unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension and, should it happen, liquidation of such investments.
79.	Switzerland-Jordan (1976)	Agreement between the Hashemite Kingdom of Jordan and the Swiss Confederation on the promotion and reciprocal protection of investments.	Recognizing the need to protect investments by nationals and companies of both states and to stimulate the flow of capital with a view to the economic prosperity of both states.	Article 2(1) [Protection , Treatment, Customs Union]	Each contracting party shall protect within its territory investments made in accordance with its legislation by nationals or companies of the other contracting party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, selling and, should it so happen, liquidation of such investments.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
80.	Switzerland-Namibia (1994)	Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Republic Namibia über die Förderung und den gegenseitigen Schutz von Investitionen.	In der Erkenntnis, dass Förderung und Schutz von Investitionen zur Mehrung des wirtschaftlichen Wohlstandes in beiden Staaten beitragen.	Art. 4(1) [Schutz , Behandlung]	Investitionen von Investoren einer Vertragspartei im Hoheitsgebiet der anderen Vertragspartei wird zu jedem Zeitpunkt eine gerechte und billige Behandlung sowie voller Schutz und Sicherheit gewährt.
81.	Switzerland-Kazakhstan (1994)	Agreement between the Swiss Federal Council and the Republic of Kazakhstan on the promotion and reciprocal protection of Investments.	Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both states.	Article 3(1) [Protection and treatment of Investments]	Each contracting party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other contracting party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so, happen, liquidation of such investments.
82.	Switzerland-India (1997)	Agreement between the Swiss Confederation and the Republic of India for the promotion and protection of Investments.	Recognising that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.	Article 3(2) [Promotion and Protection of Investments]	Investments of investors of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party and shall at all times be accorded fair and equitable treatment.
83.	Switzerland-Nigeria (2000)	Accord entre le Conseil fédéral suisse et le Gouvernement de la République fédérale du Nigeria concernant la promotion et la protection réciproques des investissements	Reconnaissant que la promotion et la protection réciproques de tels investissements stimulent l'initiative entrepreneuriale, contribuent au développement économique et à la prospérité des deux Etats.	Article 3(1) [Protection et traitement]	Les investissements des investisseurs d'une Partie contractante se verront accorder à tout moment un traitement juste et équitable sur le territoire de l'autre Partie contractante, et jouiront d'une protection et d'une sécurité pleines et entières.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
84.	United Kingdom-Egypt (1976)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the promotion and protection of investments.	Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both states.	Article 2(2) [Promotion and Protection of Investment]	Investments of nationals or companies of either contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Each contracting party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party is not in any way impaired by unreasonable or discriminatory measures.
85.	United Kingdom-Sri Lanka (1980)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the promotion and protection of investments.	Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both states.	Article 2(2) [Promotion and Protection of Investment]	Investments of nationals or companies of either contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party.
86.	United Kingdom-Argentina (1990)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments.	Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both states.	Article 2(2) [Promotion and Protection of Investment]	Investments of investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other contracting party.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
87.	United Kingdom-Kenya (1999)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the promotion and protection of investments.	Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both states.	Article 2(2) [Promotion and Protection of Investment]	Investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party.
88.	United Kingdom-Mexico (2006)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the promotion and reciprocal protection of investments	Recognising the reciprocal protection of investments under this agreement would foster individual business initiative and will increase prosperity in both states.	Article 3(1) [Minimum Standard of Treatment in Accordance with Customary International Law] Article 3(2) [Minimum Standard of Treatment in Accordance with Customary International Law]	Investment of investors of each contracting party shall at all times be accorded treatment in accordance with customary international law, including fair and equitable treatment and full protection and security , in the territory of the other contracting party. The contracting parties do not intend the obligations in paragraph 1 above in respect of “fair and equitable treatment” and “ full protection and security ” to require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of this Agreement or of a separate international agreement, does not, in and of itself, establish that there has been a breach of the provisions of this article.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
89.	United Kingdom-Ethiopia (2009)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments.	Recognizing that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiatives and will increase prosperity in both contracting states.	Article 2(2) [Promotion and Protection of Investment]	Investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party.
90.	United States-Congo (1990)	Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo concerning the reciprocal encouragement and protection of investment.	Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment.	Article II(2)	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.
91.	United States-Czech & Slovak Republic (1991)	Treaty with the Czech and Slovak Federal Republic concerning the reciprocal protection of investment.	Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment.	Article II(2)(a)	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
92.	United States-Ecuador (1993)	Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investment.	Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment.	Article II(3)(a)	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
93.	United States-Romania (1992)	Treaty between the Government of the United States of America and the Government of Romania concerning the reciprocal encouragement and protection of investment.	Having resolved to conclude a treaty concerning the reciprocal encouragement and protection of investment.	Article II(2)(a)	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
94.	United States-Argentina (1991)	Treaty between United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment.	Having resolved to conclude a treaty concerning the reciprocal encouragement and protection of investment.	Article II(2)(a)	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
95.	United States-Turkey (1985)	Treaty between the United States of America and the Republic of Turkey concerning the reciprocal encouragement and protection of investments.	Having resolved to conclude a treaty concerning the reciprocal encouragement and protection of investments.	Article II(3)	Investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in a manner consistent with international law. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each party shall observe any obligation it may have entered into with regard to investments.

2.2 No Full protection and security provisions

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
1.	Bangladesh-Italy (1990)	Agreement between the Republic of Italy and the Government of the People's Republic of Bangladesh on the promotion and protection of investments	[...] and acknowledging that offering encouragement and mutual protection of such investments based on international Agreements will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties		
2.	Australia-Philippines (1995)	Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments	Recognising that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the areas of the Parties		
3.	Egypt-Botswana (2003)	Agreement between the Government of the Arab Republic of Egypt and The Government of the Republic of Botswana	Recognising that the promotion and reciprocal protection of such investments will stimulate the development of business initiatives and will increase prosperity in the territories of both Contracting Parties	Article 3(3) [Promotion and Protection of Investments]	Investments shall be accorded fair and equitable protection in accordance with this agreement

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
4.	India-Indonesia (1999)	Agreement between the Government of the Republic of Indonesia and The Government of the Republic of India for the promotion and protection of investments	Recognising that the encouragement and mutual protection of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties	Article 3 [Promotion and Protection of Investments]	
5.	Turkey-South Africa (2000)	Agreement between the Republic of Turkey and the Republic of South Africa concerning the reciprocal promotion and protection of investments.	Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments.	Article II [Promotion and Protection of Investments]	
6.	Sweden-Mexico (N/A)	Agreement between the Government of the Kingdom of Sweden and the Government of the United Mexican States concerning the promotion and reciprocal protection of investments.	Recognising that the promotion and reciprocal protection of such investments favour the expansion of the economic relations between the two contracting parties and stimulate investments initiatives.	Article 2(3) [Promotion and Protection of Investments]	Investments by investors of a contracting party shall at all times be accorded fair and equitable treatment in accordance with the relevant international standards under international law. Neither contracting party shall impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of such investments.
7.	China-Turkey (1990)	Agreement between the People's Republic of China and the Republic of Turkey concerning the reciprocal promotion and protection of investments.	Having resolved to conclude an agreement concerning the reciprocal promotion and protection of investments.		

3. Free Trade Agreements

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
1.	China-New Zealand (2003)	Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China	<p>Mindful that fostering innovation and the promotion and protection of intellectual property rights will encourage further trade, investment and cooperation between the Parties;</p> <p>Mindful that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development;</p>	Article 143 [Fair and Equitable Treatment]	<p>1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.</p> <p>2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.</p> <p>3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.</p> <p>4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.</p> <p>5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.</p>

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
2.	Australia-Thailand (2005)	Australia-Thailand Free Trade Agreement		Article 909(3) [Promotion and Protection of Investments]	Each Party shall accord within its territory protection and security to investments
3.	United States-Chile (2003)	United States-Chile Free Trade Agreement		Article 10.4: Minimum Standard of Treatment	<p>1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</p> <p>(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and</p> <p>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p>

No.	Countries (year)	Title	Preamble	Article [heading]	Formulation
4.	United States-Singapore (2003)	United States-Singapore Free Trade Agreement		Article 15.5: Minimum Standard of Treatment	<p>1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.</p> <p>(a) The obligation in paragraph 1 to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and</p> <p>(b) The obligation in paragraph 1 to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p>

ANNEX II: REGIONAL TREATIES

Annex II. Table of selected regional agreements containing a full protection and security provision

No.	Title	Preamble	Text
1.	Economic Agreement of Bogota of 1948		<p>Chapter IV Private Investments</p> <p>Article 22. The states declare that the investments of private capital and the introduction of modern methods and administrative skills from other countries, for productive and economic and socially suitable purposes, are an important factor in their general economic development and the resulting social progress.</p> <p>They recognize that the international flow of such capital will be stimulated to the extent that nationals of other countries are afforded opportunities for investment and security for existing and future investments. [...]</p>
2.	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference		<p>Chapter Two: General provisions regarding promotion, protection and guarantee of the capitals and investments and the rules governing them in the territories of the contracting parties</p> <p>Article 2</p> <p>The contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws. The invested capital shall enjoy adequate protection and security and the host state shall give the necessary facilities and incentives to the investors engaged in activities therein.</p>
		<p>The Agreement was adopted on 2 May 1948 by the Ninth International Conference of American States. It was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay and Venezuela. The Agreement never entered into force.</p>	
		<p>The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference was approved and opened for signature by resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq, on 1-5 June 1981. It entered into force on 23 September 1986. As of January 1995, the members of the Organization of Islamic Conference included Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Islamic Republic of Iran, Iraq, Jordan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Maldives, Malaysia, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syrian Arab Republic, Tajikistan, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Yemen, and United Republic of Tanzania.</p>	

No.	Title	Preamble	Text
3.	<p>An Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments</p> <p>The Agreement Among the Governments 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 was signed on 15 December 1987.</p>	<p>RECOGNIZING that an agreement on the promotion and protection of such investments will contribute to the furtherance of the above mentioned purposes</p>	<p><i>Article III</i></p> <p>GENERAL OBLIGATIONS</p> <p>1) Each Contracting Party shall, in a manner consistent with its national objectives, encourage and create favourable conditions in its territory for investments from the other Contracting Parties. All investments to which this Agreement relates shall, subject to this Agreement, be governed by the laws and regulations of the host country, including rules of registration and valuation of such investments.</p> <p>2) Investments of nationals or companies of one Contracting Party in the territory of other Contracting Parties shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the host country.</p> <p>3) Each Contracting Party shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment of nationals or companies of the other Contracting Parties.</p>
			<p><i>Article IV</i></p> <p>TREATMENT</p> <p>1) Each Contracting Party shall, within its territory, ensure full protection of the investments made in accordance with its legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments.</p> <p>2) All investments made by investors of any Contracting Party shall enjoy fair and equitable treatment in the territory of any other Contracting Party. This treatment shall be no less favourable than that granted to investors of the most-favoured-nation.</p> <p>3) Investors of any Contracting Party who within the territory of another Contracting Party suffer damages in relation to their investment activities in connection with their investments, owing to the outbreak of hostilities or a state of national emergency, shall be accorded treatment no less favourable than that accorded to investors of any third country, as regards restitution, compensation or other valuable consideration. Payments made under this provision shall be effectively realizable and freely transferable, subject to Article VII.</p>

No.	Title	Preamble	Text
4.	Agreement for the Promotion and Protection of Investments	The Association of Southeast Asian States (ASEAN), an organisation established in 1967, with ten Southeast Asian countries, adopted in 1987 an Agreement for the Promotion and Protection of Investments.	Each Contracting Party shall, within its territory ensure full protection of the investments made in accordance with legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments.
	In 2009 the ASEAN Member States adopted the ASEAN Comprehensive Investment Agreement.	<p>1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty:</p> <p>(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and</p> <p>(b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p>	
5.	North American Free Trade Agreement	The North American Free Trade Agreement (NAFTA) was signed by Canada, Mexico, and the United States of America on 17 September 1992. It entered into force on 1 January 1994.	<p>Article 1105: Minimum Standard of Treatment</p> <p>1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p>2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.</p> <p>3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).</p>

No.	Title	Preamble	Text
6.	<p>Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR (“Colonia Protocol”)</p> <p>The Protocol was signed on 17 January 1994. This protocol covers investments that are made by investors coming from states parties to MERCOSUR, a customs union established by Argentina, Brazil, Paraguay and Uruguay with the treaty of Asunción of 16 March 1991.</p>	<p>That the promotion and protection of such investments on the base of a Protocol will contribute to stimulate the initiative economic, individual and to increase the development in the four States.</p>	<p>Each Contracting Party will give full protection to those investments and grant them a not less favourable treatment than granted to investments of their own national investors or third state investors.</p>
7.	<p>Protocol for the Promotion and Protection of Investments Made by Countries that do not belong to MERCOSUR (“Buenos Aires Protocol”)</p> <p>The Protocol was signed on 5 August 1994. This protocol covers, as its name entails, investments made by investors that come from states that are not parties to MERCOSUR, a customs union established by Argentina, Brazil, Paraguay and Uruguay with the treaty of Asunción of 16 March 1991.</p>	<p>Acknowledging that the promotion and protection of investments based on agreements with Third States will help to stimulate individual economic initiative and will increase the prosperity of the four States Parties.</p>	<p>Each State Parties shall grant full protection for such investments, and may not accord them a treatment less favourable than that granted to the investments of its own national investors, or the investments made by investors from other states.</p>
8.	<p>Energy Charter Treaty</p> <p>The Energy Charter Treaty was signed in Lisbon on 17 December 1994, together with Decisions with respect to the Energy Charter Treaty and the Final Act of the European Energy Charter Conference. The signatories of the Energy Charter Treaty as of March 2008 were Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, the European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan.</p>		<p>PART III INVESTMENT PROMOTION AND PROTECTION ARTICLE 10 PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS</p> <p>(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.</p>

No.	Title	Preamble	Text
9.	ECOWAS Energy Protocol	The ECOWAS Energy Protocol was signed on 31 January 2003. Pursuant to Article 40, the Protocol is provisionally implemented pending its entry into force. ECOWAS comprises Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.	<p>CHAPTER III INVESTMENT PROMOTION AND PROTECTION</p> <p>ARTICLE 10 PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS</p> <p>(1) Each Contracting Party shall, in accordance with the provisions of this Protocol, encourage and create stable, equitable, favourable and transparent conditions for Investors to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.</p>
10.	Agreement between the Caribbean Community (CARICOM), acting on behalf of the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago and the Government of the Republic of Costa Rica	The Agreement Between the Caribbean Community (CARICOM), Acting on Behalf of the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago and the Government of the Republic of Costa Rica was signed on 9 March 2004.	<p>Article X.04 Protection</p> <p>1. Investments of either Party shall at all times be accorded fair and equitable treatment, and shall enjoy full legal protection and security in accordance with international law.</p> <p>2. Neither of the Parties shall obstruct, in any manner, either through arbitrary or discriminatory measures, the enjoyment, use, management, conduct, operation and sale or other disposition thereof of such investments. Each Party shall comply with any obligation assumed regarding investments of the other Party.</p> <p>3. Returns from investments and in the event of their re-investment the returns there from shall enjoy the same protection as the investment.</p>

ANNEX III: MULTILATERAL TREATIES

Annex III. Table of multilateral agreements containing a full protection and security provision

No.	Title	Preamble	Text
1.	Havana Charter of 1948 The Havana Charter for an International Trade Organization was drawn up at the International Conference on Trade and Employment, which met at Havana from 21 November 1947 to 24 March 1948, for submission to the governments represented. The Final Act of the International Conference on Trade and Employment was signed by the representatives of Afghanistan, Australia, Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Ireland, Italy, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Southern Rhodesia, Sweden, Switzerland, Syria, Transjordan, South Africa, United Kingdom, United States of America, Uruguay, Venezuela, the United Nations and the United Nations Conference on Trade and Employment. The Charter never entered into force.		<p>Article 12: International Investment for Economic Development and Reconstruction</p> <p>1. The Members recognize that:</p> <ul style="list-style-type: none"> (a) international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress; (b) the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments; (c) without prejudice to existing international agreements to which Members are parties, a Member has the right: [...] <ul style="list-style-type: none"> (d) the interests of Members whose nationals are in a position to provide capital for international investment and of Members who desire to obtain the use of such capital to promote their economic development or reconstruction may be promoted if such Members enter into bilateral or multilateral agreements relating to the opportunities and security for investment which the Members are prepared to offer and any limitations which they are prepared to accept of the rights referred to in sub-paragraph (c). <p>2. Members therefore undertake:</p> <ul style="list-style-type: none"> (a) subject to the provisions of paragraph 1 (c) and to any agreements entered into under paragraph 1 (d), <ul style="list-style-type: none"> (i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and (ii) to give due regard to the desirability of avoiding discrimination as between foreign investments; (b) upon the request of any Member and without prejudice to existing international agreements to which Members are parties, to enter into consultation or to participate in negotiations directed to the conclusion, if mutually acceptable, of an agreement of the kind referred to in paragraph 1 (d). <p>3. Members shall promote co-operation between national and foreign enterprises or investors for the purpose of fostering economic development or reconstruction in cases where such co-operation appears to the Members concerned to be appropriate.</p>

No.	Title	Preamble	Text
2.	<p>The Abs-Shawcross Draft Convention on Investments Abroad of 1959</p> <p>This initiative began in 1957 when the Society to Advance the Protection of Foreign Investments, an organization of German business people, with headquarters in Cologne, published a draft instrument entitled International Convention for the Mutual Protection of Private Property Rights in Foreign Countries. That version was subsequently revised and, in April 1959, a Draft Convention on Investments Abroad was issued. The Draft Convention, which was under consideration by the Organisation for European Economic Co-operation, was not adopted. The Draft Convention was accompanied by a commentary by the authors.</p>	<p>Preamble</p>	<p>Article I</p> <p>Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures.</p>
3.	<p>Draft Convention on the Protection of Foreign Property of 1967</p> <p>The Draft Convention on the Protection of Foreign Property was prepared by a Committee of the Organisation for Economic Co-operation and Development. The Council of the OECD, at its 150th meeting on 12 October 1967, adopted “The Resolution of the Council on the Draft Convention on the Protection of Foreign Property” which, <i>inter alia</i>, approved the publication of the Draft Convention. The Draft Convention was not opened for signature.</p>	<p>CONSIDERING the contribution which will be made towards this end by a clear statement of recognised principles relating to the protection of foreign property, combined with rules designed to render more effective the application of these principles within the territories of the Parties to this Convention</p>	<p>Article 1</p> <p>Treatment of Foreign Property</p> <p>(a) Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.</p>

No.	Title	Preamble	Text
4.	<p>Convention establishing the Multilateral Investment Guarantee Agency of 1988</p> <p>The Convention Establishing the Multilateral Investment Guarantee Agency was submitted to Governments by the Board of Governors of the International Bank for Reconstruction and Development on 11 October 1985. The Convention entered into force on 12 April 1988. As of 31 May 1995, the MIGA Convention had been signed by 152 States.</p>		<p><i>Article 12. Eligible Investments</i></p> <p>(a) Eligible investments shall include equity interests, including medium- or long-term loans made or guaranteed by holders of equity in the enterprise concerned, and such forms of direct investment as may be determined by the Board.</p> <p>[...]</p> <p>(d) In guaranteeing an investment, the Agency shall satisfy itself as to:</p> <ul style="list-style-type: none"> (i) the economic soundness of the investment and its contribution to the development of the host country; (ii) compliance of the investment with the host country's laws and regulations; (iii) consistency of the investment with the declared development objectives and priorities of the host country; and (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment. <p><i>Article 23. Investment Promotion</i></p> <p>(a) The Agency shall carry out research, undertake activities to promote investment flows and disseminate information on investment opportunities in developing member countries, with a view to improving the environment for foreign investment flows to such countries. The Agency may, upon the request of a member, provide technical advice and assistance to improve the investment conditions in the territories of that member. In performing these activities, the Agency shall: [...]</p> <p>(b) The Agency also shall:</p> <ul style="list-style-type: none"> (i) encourage the amicable settlement of disputes between investors and host countries; (ii) endeavour to conclude agreements with developing member countries, and in particular with prospective host countries, which will assure that the Agency, with respect to investment guaranteed by it, has treatment at least as favorable as that agreed by the member concerned for the most favored investment guarantee agency or State in an agreement relating to investment, such agreements to be approved by special majority of the Board; and (iii) promote and facilitate the conclusion of agreements, among its members, on the promotion and protection of investments. <p>(c) The Agency shall give particular attention in its promotional efforts to the importance of increasing the flow of investments among developing member countries.</p>

No.	Title	Preamble	Text
5.	World Bank Guidelines on the Treatment of Foreign Direct Investment of 1992	The World Bank Guidelines was formulated by an expert group under the auspices of the World Bank. The document was published in form of guidelines as the expert group thought that the political climate was not ready for binding principles.	<p>2. Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines.</p> <p>3.(a) With respect to the protection and security of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors as described in Section 1 above, such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances. In all cases, full protection and security will be accorded to the investor's rights regarding ownership, control and substantial benefits over his property, including intellectual property.</p>
6.	Multilateral Agreement on Investment (draft 1998)	Wishing to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures	<p>IV. INVESTMENT PROTECTION</p> <p>1. GENERAL TREATMENT</p> <p>Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.</p> <p>1.2. A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory] measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of another Contracting Party.</p>
			<p>3. PROTECTION FROM STRIFE</p> <p>3.1. An investor of a Contracting Party which has suffered losses relating to its investment in the territory of another Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.</p> <p>3.2. Notwithstanding Article 3.1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from</p> <p>(a) requisitioning of its investment or part thereof by the latter's forces or authorities, or</p> <p>(b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,</p> <p>shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation [...]</p>

No.	Title	Preamble	Text
7.	International Agreement on Investment The Consumer Unity & Trust Society (CUTS) prepared a first draft of an International Agreement on Investment for discussions at the UNCTAD Round Table between Ambassadors and NGOs on a Possible Multilateral Framework on Investment, jointly organized with the United Nations Non-governmental Liaison Service in Geneva on 10 June 1998. The draft lays out what, according to CUTS, an equitable alternative international agreement on investment should look like. CUTS considered that the draft provided a good basis for starting discussions, although it could be improved. CUTS made this effort to help the international community in developing investment instruments that would promote social justice, equity, transparency, predictability and accountability.		IX. INVESTMENT PROTECTION: GENERAL TREATMENT 1.1. (a) Each Contracting Party shall accord, to investments (in its territory) of investors of another Contracting State, fair and equitable treatment and full and constant protection and security , including such treatment, protection and security in respect of the operation, management, maintenance, use, enjoyment or disposal of such investment. (b) In no such case shall a Contracting Party accord, to such investments, treatment or protection that is less favourable than that required by customary international law.

ANNEX IV: SELECTED AWARDS

Annex IV. Analytical table of Investor-State cases during 1990-2012

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
1.	Asian Agricultural Products v Republic of Sri Lanka, ICSID Award, 21 June 1990	UK-Sri Lanka BIT	Investment damaged following an attack by government forces on revolutionary forces	Treaty law and customary international law	Violation	The words “full protection and security” do not entail strict liability A legal assessment is necessary to determine whether host state provided full protection and security and whether it exercised due diligence Due diligence obligation to provide protection breached
2.	American Manufacturing & Trading Inc. v Republic of Zaire, ICSID Award, 21 February 1997	US-Zaire BIT	Investment destroyed during a period of looting and destruction of property – allegedly, army personnel participated in the lawlessness	International law	Violation	The state is required to provide protection and security – it is an objective obligation that must not be inferior to the minimum standard of vigilance required by international law
3.	Wena Hotels Ltd. v Arab Republic of Egypt, ICSID Award, 8 December 2000	UK-Egypt BIT	Government seizure of investment – investment returned to investor one year later – revocation of license to operate investment	Treaty law and customary international law	Violation	The state did not (i) prevent the seizure of the investment or return it to the investor after it had been seized (ii) punish the officials that orchestrated the takeover of the investment

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
4.	Alex Genin v Estonia, ICSID Award, 25 June 2001	US-Estonia BIT	Investor purchased a bank but banking license later revoked – claims of harassment of personnel submitted	Estonian law, treaty law and ICSID Convention	No violation	Investor claimed violation of full protection and security – claims of harassment were denied due to lack of proof
5.	Ronald S. Lauder v Czech Republic, UNCITRAL Award, 3 September 2001	US-Czech & Slovak BIT	Investor established a TV station – Amendments to law changed structure of investment – government interference with license	Treaty law and international law	No violation	The state is obliged to exercise due diligence in protecting the investment as reasonable under the circumstances – amendments to law and the use of regulatory powers did not violate the standard
6.	CME v Czech Republic, UNCITRAL Award, 13 September 2001	Netherlands-Czech & Slovak BIT	Investor established a TV station – Amendments to law changed structure of investment – government interference with license	Treaty law and international law	Violation	Law amendments and participation of an administrative body amended the business relationship between the investor and a Czech business partner – the changes enabled the business partner to terminate business relationship and destroy commercial value of investment

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
7.	Middle Eastern Cement v Egypt, ICSID Award, 12 April 2002	Greece-Egypt BIT	A ship owned by the investor was seized and sold at auction without notification being sent to the investor	Treaty law	Violation	The BIT prescribed that an investment should enjoy fair and equitable treatment and full protection and security – taking into account the special protection provided for in the BIT against actions “tantamount to expropriation” the auctioning off was considered to be a violation
8.	Mondev International Ltd. v United States of America, ICSID Award, 11 October 2002	NAFTA	Investor won a trial case against a public entity that was thought to have violated a contract – an appellate court changed the lower court’s conclusion based on the entity’s immunity from jurisdiction	Treaty law and international law	No violation as to decisions of US Courts; other claims dismissed due to lack of jurisdiction	Article 1105(1) refers to a standard existing under customary international law The content of the minimum standard of customary international law cannot be limited to customary international law as recognized in arbitral decision in the 1920s A tribunal may not adopt its own “idiosyncratic” standard without reference to established sources of law

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
9.	ADF Group Inc. v United States of America, ICSID Award (Additional Facility), 9 January 2003	NAFTA	The claimant, a contractor in a construction project, was only able to provide for material at a higher cost due to a Buy American requirement	Treaty law	No violation	Article 1105(1) of NAFTA should be interpreted with the customary international law minimum standard – investor did not sustain its claim that actions taken by the host state were inconsistent with Article 1105(1)
10.	Tecnicas Medioambientales Tecmed S.A. v Mexico, ICSID Award (Additional Facility), 29 May 2003	Spain-Mexico BIT	Investor participated successfully in an auction relating to a landfill of hazardous industrial waste – authorization to run the landfill not renewed – social demonstrations against the landfill	Treaty law	No violation	The investor did not furnish evidence to prove that the host state authorities had contributed support to social and political movements that campaigned against the landfill
11.	The Loewen Group Inc. and Raymond L. Loewen v United States of America, ICSID Award (Additional Facility), 26 June 2003	NAFTA	The claimant was a party to a trial case whereby anti-foreign references were used against him – claimant lost and was ordered to pay a vast amount in damages	Treaty law and international law	No violation	By not pursuing an appeal to the US Supreme Court the claimant was unable to show a violation of NAFTA or customary international law

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
12.	Occidental Exploration and Production Company v Republic of Ecuador, LCIA Award, 1 July 2004	US-Ecuador BIT	The investor entered into an agreement relating to oil exploration in host state – the investor paid VAT on all purchases in host state and applied for reimbursement – host state denied all reimbursements	Treaty law and international law	Issue not addressed	When a violation of the fair and equitable treatment standard is found, the question whether a violation of the full protection and security standard becomes moot
13.	Ceskoslovenska Obchodni Banka A.S. v Slovak Republic, ICSID Award, 29 December 2004	Czech-Slovak BIT	The claimant, which was a public company but was later restructured and privatized, argued that respondent failed to cover losses incurred by a collection company according to an agreement made between the Slovak & Czech Finance Ministries and concerned the claimant	Treaty law and international law and Czech law	Violation	The host state's actions would, if accepted, deprive the claimant from any meaningful protection for its loans and breach the host state's commitments to let claimant enjoy full protection and security
14.	Eureko B.V. v Republic of Poland, 19 August 2005	Netherlands-Poland BIT	The investor bought an insurance company as a part of a privatization of government public companies – the privatization became a political issue and the host state reneged on its prior commitments – officials of the investor harassed by authorities	Treaty law and international law	No violation	The tribunal could not find clear evidence that the state had harassed the investor and breached the standard – individual acts of harassment were serious and came close to a violation – if acts had been repeated the country would have had an obligation to prevent

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
15.	Bogdanov v Moldova, SCC Award, 22 September 2005	Russia-Moldova BIT	Government changes made to regulatory framework after investment made	Treaty law	No violation	Standard formulated in such a way that it was not to be considered “corrective” of host country legislation
16.	Noble Ventures v Romania, 12 October 2005	US-Romania BIT	An investor bought a privatized steel mill – shortly thereafter a change in government took place – civil unrest ensued after workers were not paid wages and local unions demonstrated following negative statements made by politicians – police refused to exercise powers	Treaty law and international law	No violation	It is doubtful whether treaty law can be understood as providing wider protection than customary international law – the standard is not a strict standard of protection, but required due diligence – investor has not proven that alleged injuries could have been prevented
17.	Saluka Investments BV v Czech Republic, UNCITRAL Award, 17 March 2006	Netherlands-Czech & Slovak BIT	After having privatized one of its banks, the state forced the bank into administration after financial difficulties – in addition, the host state (i) suspended the trading of the bank’s shares, (ii) prohibited the investor to transfer its shares in the bank and (iii) searched the premises of the investor a part of an investigation	Treaty law and international law	No violation	The decisions taken by the authorities (i) suspending the trading of shares in the privatized bank, (ii) prohibiting any transfer of the investor’s shares were according to legal authority; (iii) the decision to search the premises of the investor was successfully challenged in state courts

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
18.	Azurix Corp. v Argentina, ICSID Award, 14 July 2006	US-Argentina BIT	Investor had invested in a utility that distributed drinking water and disposed of sewerage water – government measures interfere with a concession agreement, e.g. non-implementation of revisions to tariff regime to address years of disinvestment	Treaty law and international law	Violation	Full protection and security and fair and equitable treatment are two independent standards but interrelated – the inclusion of “full” extends the protection of the standard beyond physical security
19.	PSEG Global Inc v Turkey, ICSID Award, 19 January 2007	US-Turkey BIT	Law changes implemented by government and inconsistencies in administrative practice – contracts renegotiated	Treaty law and international law	No violation	Violations of protection and security could not be found – even though a broader protection possible in some cases, circumstances of the case did not justify such an interpretation
20.	Siemens A.G. v Argentina, ICSID Award, 6 February 2007	Germany-Argentina BIT	Investor was awarded the project of designing and maintaining <i>inter alia</i> a personal identification and electoral information system – host state later requested that investor postpone the production of one of these systems – contract renegotiated	Treaty law and international law	Violation	The obligation to provide protection and security is not limited to physical protection – the formulation “legal security” supports a wide interpretation – renegotiation demanded by the state for the purpose of reducing the state’s cost affected the legal security of the investor

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
21.	Eastern Sugar B.V. v Czech Republic, SCC Award, 27 March 2007	Netherlands-Czech & Slovak BIT	The investor invested in facilities shortly after the downfall of the iron curtain – a number of years later the host state implemented a regulatory regime that affected the investment	Treaty law and international law	Violation claimed by claimant, but only address within the context of fair and equitable treatment	The obligation to provide full protection and security entails the obligation to prevent actions by third parties – claimant complained about the actions of the host state, not third parties – actions of host state dealt with in fair and equitable treatment
22.	Enron Corp. v Argentina, ICSID Award, 22 May 2007	US-Argentina BIT	The investor acquired shares in a gas transportation company privatized by the government – regulatory framework amended and government decrees implemented after investment made due to economic instability	Treaty law and international law and Argentine law	No violation	The standard has historically been developed in the context of physical protection and security – there might be cases where a broader interpretation could be justified – such a broad interpretation was not adequately developed by investor
23.	MCI Power Group L.C. and New Turbine Inc. v Ecuador, ICSID Award, 31 July 2007	US-Ecuador BIT	Investor claimed that government authorities had harassed senior representatives by tax investigations and legal proceedings instigated against the investor	Treaty law and international law	Violation claimed by claimant, but not mentioned by tribunal	The exercise of regulatory power, including investigations and court cases that were filed against investor addressed in the context of fair and equitable treatment

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
24.	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina, 20 August 2007	France-Argentina BIT	The investor was granted a concession agreement for the water and sewage system in an Argentine province – government authorities used regulatory powers and made negative statements that raised public opposition to the investor’s participation – agreement renegotiated	Treaty law and international law	Violation	The BIT’s text did not limit protection and security to “physical interferences” – scope of protection interpreted to apply to any act or measure depriving an investor of protection and full security – the standard can apply to more than physical security of an investor or the investment because both can be harassed without physical harm
25.	Parkerings Compagniet A.S. v Lithuania, ICSID Award, 11 September 2007	Norway-Lithuania BIT	Investment vandalized by unknown third parties	Treaty law	No violation	The state fulfilled the obligation owed to the investor by starting an investigation to find the authors of the vandalism
26.	Sempra Energy Int. v Argentina, ICSID Award, 28 September 2007	US-Argentina BIT	Government changes terms of license and regulatory framework after investment is made	Treaty law and International law	No violation	Historically the standard has been applied to physical protection and security – tribunal did not exclude that a broader application was possible – arguments about lack of protection and security in the broader ambit not developed

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
27.	BG Group Plc. v Argentina, UNCITRAL Award, 24 December 2007	UK-Argentina BIT	The investor purchased certain state-owned companies which dealt with gas transportation and distribution – government authorities used regulatory powers and reneged on a currency peg which negatively affected the investment structure – agreement renegotiated	Treaty law and international law	No violation	The standard of full protection and security usually associated with physical security – as the investor did not allege physical violence or damage in the implementation of the measures adopted, no violation could be found
28.	Bewater Gauff Ltd. v United Republic of Tanzania, ICSID Award, 24 July 2008	UK-Tanzania BIT	The investor took part in a tender and was awarded a project to repair and expand the Dar es Salaam Water and Sewerage infrastructure – after the investor began work, government entities terminated contracts, repealed VAT exemptions and took over the investor's business	Treaty law and international law	Violation	The inclusion of “full” in full protection and security extends the content of the standard beyond physical security – it implies that stability in a secure environment, both physical, commercial and legal

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
29.	Rumeli Telekom A.S. and Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan, ICSID Award, 29 July 2008	Turkey-Kazakhstan BIT	Investor participated successfully via joint venture established with local business partner in a state auction – after the investment became a success, the investor’s business partner, who was connected to high officials, orchestrated a scheme whereby the investor lost control of the investment	Treaty law and international law	No violation	The full protection and security standard obliges a state to provide a certain level of protection from physical damage – the actions of state security forces were not according to orders given by state officials but by orders from a business company – police officers were present during enforcement procedures
30.	Plama Consortium Ltd. v Bulgaria, ICSID Award, 27 August 2008	Energy Charter Treaty	The claimant purchased a company that had been privatized, but had operational difficulties due to poor economic times – claimant alleged that the government had implemented law amendments that affected the investment and given statement that incited violence towards the investment - judicial authorities thought to have created problems and refused to adopt corrective measures important to investment	Treaty law and international law	No violation	The obligation to provide protection and security is an obligation of vigilance – an obligation to create a framework that grants security – the claimant could not provide evidence that supported the claim that the government or other authorities had acted in a way that violated the standard

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment (cont.)	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal (cont.)
31.	National Grid Plc. v Argentina, UNCITRAL Award, 3 November 2008	UK-Argentina BIT	The investor purchased an electric company that was sold as a part of a privatization program – the program was based on numerous statements, including pegging the national currency with the US dollar – due to an economic crisis the regulatory framework was amended and previous statements were not honored	Treaty law and international law and Argentina law (?)	Violation	The obligation to provide full protection and security usually applied in situations involving physical threats – if the standard is (i) not formulated so as to limit protection to physical protection, (ii) stipulated in connection with fair and equitable treatment and (iii) a part of a treaty that defines the concept of “investment” broadly, there is no reason to limit the application of the standard to physical protection alone
32.	Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt, ICSID Award, 6 November 2008	Belgo-Luxembourg Economic Union-Egypt BIT	The investors were rewarded a project – during its implementation the investors experienced operational difficulties resulting in higher costs – their claims for higher fee was denied	Treaty law and international law	No violation	The investor did not establish whether there had been a discriminatory measure or whether the management or enjoyment of the investment was hindered

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
33.	LESI SpA et al v Algeria, ICSID Award, 12 November 2008	Italy-Algeria BIT	The investor participated in a tender in order to cooperate in the construction of a dam that was to supply the City of Algiers with drinking water – the investor’s work was hampered by repeated security problems related to occurrences that later developed into civil war within the host country	Treaty law	No violation	The BIT included two versions of the standard: (i) a general one providing protection and security and (ii) a specific one dealing with protection during <i>inter alia</i> armed conflict and revolution that was not less than MFN treatment or national treatment – the tribunal found that security issues were so severe that they were revolutionary – no violation found as the host state had taken active measures to address the security problems
34.	Waguih Elie George Siag and Clorinda Vecchi v Egypt, ICSID Award, 1 June 2009	Italy-Egypt BIT	The investor purchased real estate from the government for the purposes of developing a hotel resort – the investor alleged that the government had expropriated the investment and that the host state had failed to provide police protection from government harassment, intimidation and corruption	Treaty law and international law	Violation	The standard is not absolute, the state must exercise due diligence to prevent harm – when investor realized that investment was to be taken by the state, he requested protection – the state failed to prevent its taking and to return it after state courts had deemed expropriation illegal

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
35.	Pantechniki S.A. Contr. & Engineers v Albania, ICSID Award, 30 July 2009	Greece-Albania BIT	Civil unrest resulted in looting following the collapse of a pyramid scheme	Treaty law and international law	No violation	Umpire analyzed the treaty based standard with the due diligence principle in addition to addressing the resources available to the state
36.	Mohammad Ammar Al-Bahloul v Tajikistan, SCC Award, 2 September 2009	Energy Charter Treaty	The investor claimed that security forces had demanded cash payments, would not guarantee security of employees and miscarriage of justice	Treaty law	No violation	The investor could not prove action or inaction of security forces – matters of justice not subjected to a strict standard
37.	Yury Bogdanov v Moldova, SCC Award, 30 March 2010	Russia-Moldova BIT	The host state levied high administrative charges on the investor's company	Treaty law	Violation	According to the treaty standard complete and unconditional legal protection of the capital investment guaranteed – application of administrative charges violated umbrella clauses and consequently the standard

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
38.	GEMPLUS and TALSUD v Mexico, ICSID Award, 16 June 2010	France-Mexico BIT / Argentina-Mexico BIT	After having entered into a concession agreement with investor, the host state requisited the investment	Treaty law and international law	No violation	The full protection and security treaty provision did not entail a strict obligation – a state's obligation deals with protection against action by third parties, not action by state itself
39.	Suez and Vivendi et al v Argentina, ICSID Award, 30 July 2010	France-Argentina BIT / Spain-Argentina BIT	The host state privatized Santa Fe's water and sewage services – due to severe economic difficulties the host state amended the regulatory structure that affected the investment negatively in addition to later taking over the investment	Treaty law and international law	No violation	After having considered each BIT, the historical development of the standard and recent awards, the tribunal concluded that the standard entailed a due diligence obligation to protect an investor from physical harm, but excluding an obligation to maintain a stable legal and commercial environment

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
40.	Suez and InterAgua v Argentina, ICSID Award, 30 July 2010	France-Argentina BIT / Spain-Argentina BIT / UK-Argentina BIT	The host state privatized the water and sewage services in Buenos Aires – due to severe economic difficulties the host state amended the regulatory structure that affected the investment negatively in addition to later taking over the investment	Treaty law and international law	No violation	After having considered each BIT, the historical development of the standard according to international law and recent awards, the tribunal concluded that the standard entails a due diligence obligation resulting in protecting an investor from physical harm, but excluding an obligation to maintain a stable legal and commercial environment
41.	AES Summit Generation Limited AES-Tisza Erőmű Kft. v Hungary, ICSID Award, 23 September 2010	Energy Charter Treaty	In 1995, the host state privatized its energy sector – In 2004, the host state abolished administrative pricing, but reintroduced them in 2006-7 - negatively affected the investment	Treaty law and international law	No violation	The most constant protection and security standard does not imply that no change in law can occur that affects the investor's rights

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
42.	Frontier Petroleum Services v Czech Republic, UNCITRAL Award, 12 November 2010	Canada-Czech/Slovak BIT	The investor bought a bankrupt state-owned company in order to use its assets in a joint venture, which was established with a Czech business partner – the investor instigated arbitral proceedings in another country against his Czech business partner – investor sought to enforce in the host state but failed – the investor claimed that Czech courts and officials had failed to protect and secure his investment	Treaty law and international law	No violation	In terms of the judiciary, the full protection and security standard means that the state is obliged to make a functioning system of courts and legal remedies available to investors – even if a court decision is “wrong” to an outsider, it does not automatically lead to state responsibility if courts act in good faith and decision is reasonably tenable
43.	Total SA v Argentina, ICSID Award, 27 December 2010	France-Argentina BIT	Based on assurances provided by the host state, the claimant invested power generation industries – the host state enacted emergency laws during an economic crisis which went against assurances given and negatively affected the investment	Treaty law and international law	No violation	Full protection and security standard a part of the fair and equitable treatment standard according to BIT – despite the full protection and security standard provided for “legal security”, the tribunal found that the host state had not violated the standard – a violation of the fair and equitable treatment standard was established

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
44.	GEA Group Aktiengesellschaft v Ukraine, ICSID Award, 31 March 2011	Germany-Ukraine BIT	The investor claimed that the host state had (i) not punished parties that were responsible for stealing the investor's products, (ii) failed to respond to an attack on one of the investor's employees and (iii) not punished its business party in the Ukraine for misrepresentation	Treaty law and international law	No violation	The tribunal denied the investor's claims with reference to that (i) the investor had not filed complaints about alleged theft of its products, (ii) an investigation to an attack on the investor's employee had been instigated and (iii) the host state could not be held responsible for actions of a private and independent legal entity
45.	Paushok et al v Mongolia, UNCITRAL Award, 28 April 2011	Russia-Mongolia BIT	The claimant, which had invested in the gold industry in the host state, became subject to various laws, which negatively affected the investment, and government actions in the form of tax audits, etc.	Treaty law and international law	No violation	While acknowledging that the full protection and security standard entailed a minimum standard of vigilance, which prescribed a due diligence obligation of prevention and punishment, the tribunal could not find anything to conclude that there had been a violation of the standard

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
46.	Impregilo S.p.A v Argentina, ICSID Award, 21 June 2011	Italy-Argentina BIT	The claimant invested in the host country's water and sewage sector – following the economic collapse of 2000-2001, the investor struggled to maintain his services as his non-collection rates for services rendered had reached 60% - the investor requested of the host state that the concession be renegotiated but was denied – the host country terminated the concession	Treaty law (full protection and security standard applicable through MFN clause)	Issue not addressed	The tribunal concluded that the fair and equitable treatment standard had been violated – as the tribunal had reached such a conclusion, it thought it not necessary to examine whether there had also been a violation of full protection and security
47.	El Paso v Argentina, ICSID Award, 31 October 2011	US-Argentina BIT	The claimant invested in the host country's energy sector – as a result of the 2001-2002 economic crisis, the host country amended the regulatory structure that affected the investment and froze bank deposits and currency transactions	Treaty law	No violation	The standard is no more than the traditional obligation to protect under customary int. law – the host state has the duty to diligently prevent and repress actions of third parties – as all actions could be attributed to the host country, the alleged violations would be assessed under other standards

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
48.	Spyridon Roussalis v Romania, ICSID Award, 7 December 2011	Greece-Romania BIT	The claimant invested in the host country, but disagreement arose <i>inter alia</i> as to the claimant's further additional obligations in relation to the investment ("post-purchase investment") – following a police inspection, the state prosecutor instigated criminal proceedings against the claimant for alleged avoidance of fiscal duties	Treaty law	No violation	Criminal proceedings instigated by a prosecutor concerned alleged accounting violations in relation to post-purchase investment and avoidance of fiscal duties – an interdiction order was not unusual, commonly used in order to prevent the accused from fleeing – standard not violated because physical integrity of investment not compromised by use of force
49.	Oostergetel v Slovak Republic, UNCITRAL Award, 23 April 2012	Netherlands-Czech & Slovak BIT	The claimant purchased a company privatized by the host country – the company owed taxed when sold but tax liabilities increased – the state demanded that the company be declared bankrupt – the investor argued that the host country had in cooperation with a business group brought about the company's collapse and that the bankruptcy proceedings had been improper	Treaty law	No violation	The same facts that gave rise to a violation of full protection and security had already been addressed under the rubric of fair and equitable treatment – the allegation of a breach of full protection and security lacked a factual basis taking into account that the same facts had been referred to under fair and equitable treatment

No.	Parties to dispute, Type of Award, Date of Award	Instrument on which proceedings instigated	Measures affecting the investment	Law applied by tribunal	Violation of full protection and security?	Assessment of tribunal
50.	SAUR International S.A. v Argentina, ICSID Award, 6 June 2012	France-Argentina BIT	The investor was the holder of a concession for public service production and distribution of drinking water and sanitation services – following the economic crisis, the investor was refused to increase service charges – the investment was taken over by the government – the investor’s offices were overtaken by police and employees allegedly not allowed to contact the investor	Treaty law	No violation	The presence of police forces during the takeover were based on statutory authority – police presence was only a precautionary measure – allegations that employees were not allowed to communicate with the investor were not proven – even if they had been proven, they were not sufficiently serious to be a violation
51.	Toto v Lebanon, ICSID Award, 7 June 2012	Italy-Lebanon BIT	The investor entered into an agreement with the host state to construct a part of the Arab Highway linking <i>inter alia</i> Beirut to Damascus – the investor argued that the host state had failed to expropriate private property, failed to protect its possessions and protect it from disgruntled former owners of land that obstructed construction	Treaty law	No violation	Even though there exists an obligation to provide protection and security, it does not mean that the temporary obstruction of former expropriated owners amounts to an impairment that affects the investment’s physical integrity – the investor failed to show that preventive action could have been taken or that host state acted negligently

"ABSTRACT" der Dissertation:
FULL PROTECTION AND SECURITY IN INTERNATIONAL LAW

Die vorliegende Dissertation behandelt einen Investitionsschutzstandard des Internationalen Investitionsrechts, das Gebot des vollen Schutzes und der Sicherheit ("full protection and security standard"). Die Dissertation gliedert sich in drei Abschnitte und sieben Kapitel.

Abschnitt I stellt die Untersuchung hinsichtlich Gliederung und Inhalt vor. Kapitel 1 enthält die Beschreibung des Umfangs des Untersuchungsgegenstandes sowie eine Definition der Begriffe und der strukturellen Merkmale. Kapitel 2 behandelt die geschichtliche Entwicklung des Standards des vollen Schutzes und der Sicherheit ("full protection and security"). Die Darstellung führt Gründe für den schrittweisen Verlust des diesbezüglichen Einvernehmens, welches durch die westlichen Staaten während der kolonialen Expansion erzielt worden war, an; behandelt die Kodifikation der Freundschafts-, Handels- und Schifffahrtsabkommen, das Aufkommen bilateraler Investitionsschutzabkommen und den Misserfolg des Versuchs der Kodifikation eines multilateralen Instruments des Investitionsschutzes. Die besondere Bedeutung dieser historischen Perspektive liegt darin, dass der maßgebliche Unterschied zwischen dem Standard des vollen Schutzes und der Sicherheit ("full protection and security") und anderen Schutzstandards wie beispielsweise jenem der fairen und gerechten Behandlung der Anleger ("fair and equitable treatment") aus der unterschiedlichen geschichtlichen Entstehung erklärt werden kann. Dieser Umstand ist bedeutsam, da hiervon die Anwendung des Schutzstandards des vollen Schutzes und der Sicherheit ("full protection and security") betroffen sein könnte.

Abschnitt II behandelt mit der Darstellung der Quellen, der Interpretation und des Umfangs drei grundlegende Aspekte des gegenständlichen Schutzstandards. Kapitel 3 enthält die Abhandlung der unterschiedlichen Quellen des Standards, wie insbesondere völkerrechtliche Investitionsabkommen, Völkergewohnheitsrecht und Schiedssprüche. Jede der Quellen wird einer eigenständigen Analyse unterzogen. Verschiedene Beispiele unterschiedlicher Formulierungen des Standards in Investitionsschutzabkommen, regionalen und bilateralen Abkommen und Verträgen werden dargestellt und besprochen. Zudem umfasst die Untersuchung bedeutsame Staatenpraxis im Bereich des Völkergewohnheitsrechts sowie Schiedssprüche. Besondere Fragestellungen in Bezug auf

die Merkmale der jeweiligen Quelle werden herausgearbeitet. Problemstellungen hinsichtlich der wechselseitigen Beziehung der Quellen sowie deren Einfluss auf den Inhalt des Standards werden aufgeworfen und einer Lösung zugeführt. Das vierte Kapitel befasst sich mit grundlegenden Fragen der Auslegung, insbesondere der Bedeutung der Wiener Vertragsrechtskonvention im Rahmen des Interpretationsvorgangs. Dieses Kapitel unterzieht die Begriffe "Schutz" ("protection") und Sicherheit ("security") einer Analyse hinsichtlich ihrer inhaltlichen Bedeutung, da dieser Auslegung im Licht der Allgemeinen Auslegungsregeln gemäß der "gewöhnlichen, seinen Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung" (Artikel 31(1) der Wiener Vertragsrechtskonvention) große Wichtigkeit zukommt. Überdies werden in diesem Kapitel die bedeutsamsten Mittel des Auslegungsvorgangs, insbesondere die Wortinterpretation, die Auslegung nach Ziel und Zweck, die systematische Interpretation und die Auslegung nach dem Willen der Parteien dargestellt. Abschließend werden Fragen betreffend der Rolle und Auswirkung des Völkergewohnheitsrechts im Rahmen des Auslegungsvorgangs besprochen sowie die Problempunkte der bedeutenden Stellung des Völkergewohnheitsrechts trotz der ständig steigenden Zahl an bilateralen Investitionsschutzabkommen (BITs) und anderer Instrumente des Investitionsrechts problematisiert. Kapitel 5 behandelt den Inhalt des Standards des vollen Schutzes und der Sicherheit ("standard of full protection and security"), sowie insbesondere konzeptuelle Fragen der diesen Standard bedingenden materiellen Elemente. In diesem Kapitel werden außerdem jene grundlegenden Aspekte thematisiert, die sich stellen, wenn ein Staat einer "due diligence" Prüfung hinsichtlich der Frage unterzogen wird, ob er seiner Verpflichtung zur Einhaltung des vollen Schutzes und Sicherheit ("full protection and security") nachgekommen ist. Weiters wird die Anwendung des Standards dahingehend untersucht, ob und in welchem Umfang der Standard über physische Sicherheit hinausgehenden Schutz und Sicherheit ("protection and security") gewährleistet. Die Untersuchung behandelt überdies die Frage, ob und in welchem Umfang der Entwicklungsgrad im Empfangsstaat die Anwendung des Standards in Einzelfällen beeinflussen kann. Untersucht werden mögliche Überschneidungen dieses Standards mit anderen Grundsätzen des Investitionsrechts wie beispielsweise jenem der fairen und gerechten Behandlung der Anleger ("standard of fair and equitable treatment"), der Enteignung oder der Rechtsverweigerung.

Abschnitt III behandelt Fragen der Verletzung des Standards. Kapitel 6 befasst sich mit der Darstellung und Analyse der Verletzungen des Standards und deren

unterschiedlichen Ausformungen. Dieses Kapitel untersucht die Frage, ob bestimmte, auf Fakten basierende Szenarien darstellbar sind, in denen regelmäßige Verstöße zu erwarten sind. Dieses Vorgehen ist bedingt durch die unterschiedlichen Ausprägungen der Verletzungen. Die Identifikation dieser Formen und unter welchen Umständen diese auftreten können hilft bei der besseren Darstellung der Gefahren für einen Investor nach erfolgter Investition. Das abschließende Kapitel 7 enthält die Zusammenfassung der Forschungsergebnisse sowie die Schlussbemerkungen.

ABSTRACT OF DOCTORAL THESIS:
FULL PROTECTION AND SECURITY IN INTERNATIONAL LAW

The thesis covers one of the investment standards of international investment law, namely the full protection and security standard. The thesis can be divided into three parts and seven chapters.

In Part I, the study is introduced in terms of structure and substance. Chapter 1 provides a description of the scope of the research topic and a definition of its terms and structure. Chapter 2 covers the historical development of the full protection and security standard. A discussion about the reasons why the consensus, which had been reached amongst nations during the colonial expansion of Western Powers, came to an end; the codification of Friendship, Commerce and Navigation treaties; the emergence of bilateral investment treaties and the failure of multilateral attempts to codify an instrument providing for investment protection will be undertaken. The historical perspective is of considerable importance due to the fact that one of the defining differences between the standard of full protection and security *vis-à-vis* other standards, e.g. the standard of fair and equitable treatment, is their different historical origin. This issue is important as it could affect the application of the full protection and security standard.

Part II deals with three fundamental issues concerning the standard: sources, interpretation and content. Chapter 3 contains a discussion dealing with the various sources of the standard, such as international investment treaties, customary international law, general international law and arbitral awards. Each source will be studied independently. Various examples of different formulations of the standard in bilateral investment treaties, regional and multilateral treaties will be examined and discussed. In addition, state practice relevant within the context of customary international law and various arbitral awards will be discussed and issues concerning the nature of each source addressed. Questions relating to the relationship between these sources of law and to what extent these sources have on the substantive content of the standard will be asked and answered. Chapter 4 will discuss general issues with regard to interpretation, such as to what extent the Vienna Convention on the Law of Treaties influences the process of interpretation. The chapter will address the substantive meaning of “protection” and

“security”, not least because of the important role which the objective meaning of these concepts play when interpreted through the prism of “ordinary meaning” as prescribed by Article 31(1) of the Vienna Convention. In addition, the chapter will address the most relevant tools of interpretation, most notably textual interpretation, object and purpose, contextual interpretation and whether the intention of the parties can be ascertained. Finally, questions concerning the ever-present role and influence of customary international law during the process of interpretation will be discussed and issues dealing with the important role of customary international law despite the ever-growing number of BIT and other instruments addressed. Chapter 5 deals with the content of the standard of full protection and security, including conceptual issues relating to the substantive elements of which the standard consists. Moreover, the chapter will ask questions as to which underlying issues are needed to explore when a due diligence assessment is made in order to determine whether a state has fulfilled its obligations to provide protection and security. Furthermore, a discussion about the standard’s application will address whether and to what extent the standard provides for protection and security that goes beyond physical security. In addition, the study will focus on whether and to what extent a host state’s level of development can affect the application of the standard in individual cases. The possible overlap between the standard and other investment principles, e.g. the standard of fair and equitable treatment, expropriation and denial of justice, is addressed.

Part III deals with issues relating to the violations of the standard. In Chapter 6, the violations of the standard and their many manifestations will be addressed and analyzed. The chapter will address whether certain fact-based scenarios can be established in which the standard is most commonly violated. This is necessary due to the fact that a violation can take many forms. The identification of these forms and under what circumstances they might arise will provide for a clearer picture about the dangers which an investor is faced with after having made the investment. Finally, Chapter 7 contains a summary of findings and conclusionary remarks.

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EDUCATION

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- 1/09- Ph.D. Candidate at the University of Vienna in International Investment Law. Thesis title: Full Protection and Security in International Law. Thesis supervisor: Prof. Dr. Mmag. August Reinisch LL.M. (NYU), head of the International Law Faculty at the University of Vienna.
- 9/07-10/08 LL.M. in International Legal Studies from the University of Vienna with distinction. Final thesis: Targeted Sanctions and Accountability of the United Nations Security Council. Supervised by Prof. Dr. Mmag. August Reinisch LL.M. (NYU), head of the International Law Faculty at the University of Vienna.
- 6/02 Attorney at law. Authorization from the Minister of Justice in Iceland to practice as an attorney is dated June 14, 2002.
- 9/00 Cand. jur. from the University of Iceland. Final thesis: Letters of Comfort. Supervised by Mr. Þorgeir Örlygsson LL.M., judge at the Icelandic Supreme Court and a former judge at the EFTA Court.
- 1/00-6/00 Exchange student at the University of Aarhus, Denmark. Main studies: Comparative Constitutional Law, Insurance law (Versicherungsrecht) and Guarantee law (Kautions- und Garantierecht).
- 9/94-8/00 Studies at the Law Faculty at the University of Iceland.
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CAREER HISTORY

5/12-present	Partner at JURIS Law Firm.
2/11-07/11	Lawyer (temporary position) at the EFTA-Court in Luxembourg.
1/09-12/10	Part-time legal counsel in various assignments for JURIS Law Firm in Reykjavik (www.juris.is), in particular concerning intellectual property law, administrative law and investment law.
9/08-12/08	Graduate Legal Intern at the United Nations office in Vienna, UNODC Terrorist Prevention Branch.
4/07-10/07	Legal counsel at LOGOS Law Firm (www.logos.is) in Reykjavik, Iceland, and London, United Kingdom, dealing with EU/EEA law concerning the MiFID Directive and various international transactions dealing with investment.
2/01-4/07	Attorney at law at JURIS Law Firm in Reykjavik (www.juris.is) working in legal counselling, in various court cases and assignments for numerous clients, including multinational companies and various public institutions, such as the Ministry of Justice and the Ministry for Foreign Affairs.
2/02-5/03	Lecturer in Procedure Law at the Law Faculty of the University of Iceland.
5/02	Liason officer at the Ministry for Foreign Affairs in connection to the Ministerial Council Meeting of NATO's foreign ministers in Reykjavik. Liason officer for the Romanian delegation.
9/00-2/01	The deputy of the District Commissioner of Selfoss, Iceland.

OTHER RESPONSIBILITIES

03/13-	Lecturer in International Economic Law at the University of Iceland.
11/08-present	ILDC Reporter for Oxford University Press pertaining to Iceland: International Law in Domestic Courts (ILDC).
1/08-10/08	Contribution to the database of the Oxford University Press with regard to Iceland: International Law in Domestic Courts (ILDC).
6/03-6/07	On the board of directors of Codex Publishing House, a publisher of law books in Iceland.
8/04-1/05	Assistance with the publication of the doctor thesis: "The principles against bias of the Administration Act No. 37/1993" written by Dr. Páll Hreinsson, a judge at the EFTA Court, a former judge at the Supreme Court of Iceland and a former professor at the law faculty at the University of Iceland.
10/97-10/98	On the Editorial Committee of Ulfjotur, Law Review, University of Iceland.

PUBLICATIONS

- Opening Pandora's box: a refusal of a president to sign a bill from parliament, published in *Zeitschrift für öffentliches Recht*, Springer (2010). See further <http://www.springerlink.com/content/k6j7354m7660620l/>.
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- The Right to Education Revisited: A State's Right to Limit the Number of Foreign Students that Enter its Education System (Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française, ECJ (Grand Chamber), Judgment of 13 April 2011, C-73/08) published in the *European Law Reporter* (2011). See <http://www.elr.lu>.
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