BILATERAL INVESTMENT TREATIES

HISTORY, POLICY, AND INTERPRETATION

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Chapter 7

Nondiscrimination

7.1 INTRODUCTION

The principle of nondiscrimination is the heart of investment neutrality, one of the key elements of liberal economic theory. Investment flows, under the principle of investment neutrality, should be allocated by market forces rather than by political intervention. In theory, this promotes the most efficient allocation of resources and promotes economic development. A nondiscriminatory investment regime also imposes fewer transaction costs on the host state because its investment regime is necessarily more uniform across different investments and investors.

The principle of nondiscrimination is additionally an important element of a favorable investment climate. At a minimum, it permits the investor to operate free of competitive disadvantages, that is, on a level playing field, to use the metaphor from Chapter 1. In some cases, it may improve the host state's treatment of covered investments or investors because the beneficiary of the protection gains the favorable treatment accorded to host-state investors or investors of favored third countries. That is, the principle of nondiscrimination multiplies the effects of host-state policies favoring particular investments or investors by requiring the extension of those policies to all investments or investors entitled to nondiscrimination.

The principle of nondiscrimination is also a key element of the rule of law. The rule of law contemplates that like cases will be treated in a like manner, that all actors will receive equal justice under the law.

Finally, the principle of nondiscrimination tends to promote other core principles of the BIT—reasonableness, transparency, and security—because the host state's treatment of its own nationals in particular is likely to be rational, visible and relatively stable.

Although nondiscrimination can promote other BIT principles, the relationship is adequate, and effective compensation for expropriation or may not guarantee a right of free transfer of payments related to investment, with the result that covered investment has greater security than domestic investment. Even where the host state's laws are strongly protective of the security of all investment, BITs provide covered investors uniquely with the right to investor-state arbitration. While BITs purport through the nondiscrimination principle to level the playing field, the other principles in some respects may tilt the playing field in favor of the covered investor or investment. Although this result may be inconsistent with the principle of nondiscrimination, it is not inconsistent with any of the BIT provisions, which guarantee nondiscriminatory treatment only for covered investments and investors.

The principle of nondiscrimination does not prohibit all differences between the treatment of covered investment and the treatment of other investment. Such a prohibition would eviscerate the host state's legitimate regulatory authority, which necessitates treating differently situated investments dissimilarly. For example, competition policy may require prohibiting the merger of two large investments, but not the merger of two much smaller investments.

Thus, the principle of nondiscrimination prohibits unreasonable discriminations. A discrimination is unreasonable if it is unrelated to a legitimate regulatory interest. For example, in the context of the BITs, preferring one investment over another on the grounds of nationality is not a legitimate regulatory interest.

Tribunals have used two different approaches for distinguishing between permissible and impermissible discriminations. In some cases, they have held explicitly that the nondiscrimination principle prohibits only unreasonable discriminations. This approach is most likely to be used in the case of the fair and equitable treatment provision or the unreasonable or discriminatory measures provision. In other cases, they have held that the nondiscrimination principle prohibits only discriminations between covered investment and certain selected investments, often termed "comparators." This approach is most often used in the case of a national or MFN treatment provision, particularly where the provision requires equivalent treatment of investments "in like circumstances" (or similar language). Thus, the appropriate comparators are those in like circumstances with the covered investment. An investment and a comparator may be considered in like circumstances if there is no legitimate regulatory reason for treating them differently. Either approach, however, may be used with any kind of nondiscrimination provision. Either approach permits the host state to treat investments differently for legitimate regulatory reasons, but not on the basis of their nationality or for other arbitrary reasons.

Ultimately, both approaches pose the same question: whether the host state has a legitimate reason to treat a covered investment differently than another investment. If so, a tribunal may say that the other investment is not in like circumstances with the covered investment or that the discrimination is reasonable. Both characterizations of the situation should rest on the same analysis.

Some tribunals may consider, first, whether the covered investment and the comparator are in like circumstances and then, second, whether any discrimination between them is reasonable. That is, they may employ both approaches. As the discussion indicates, they, in effect, ask the same question twice.

7.2 MOST FAVORED NATION AND NATIONAL TREATMENT

7.2.1 Structure and Policy

The great majority of BITs include guarantees of national and most favored nation (MFN) treatment for covered investments or investors.[1] National treatment provisions appear somewhat less frequently than MFN treatment provisions. National and MFN treatment provisions have parallel structures and thus they will be discussed together to the extent possible.

The national and MFN treatment provisions always comprise at least three components: a beneficiary, a comparator, and an obligation of equivalency. Some provisions include a fourth component defining their scope of application. Most such provisions also contain a fifth component identifying special exceptions to which one or both obligations are subject.

The beneficiary is the person or asset entitled to national or MFN treatment. In BITs, the beneficiary of the MFN and national treatment provisions is usually the investment,[2] but in some provisions it is the investor.[3] The definitions of investment and investor thus are critical to determining which persons or assets are protected. Clearly, a BIT that guarantees nondiscrimination to both the investor and the investment provides a more favorable investment climate.

Where a BIT guarantees a right of establishment, ideally the investor should be named as a beneficiary. Although an entity that qualifies as an investment may seek to establish an investment, often the entity establishing an investment falls within the definition of a covered investor but not of a covered investment. If the investor is not a beneficiary of the standard, then any commitment of MFN (or national) treatment with respect to establishment may be lost as a practical matter. If only an investment is a beneficiary and the host state denies permission to establish the investment, no entity entitled to claim the protection of the national of MFN treatment provision comes into existence. Other situations also may exist where the host state's conduct is directed at the investor rather than the investment and thus naming the investor as a beneficiary could expand the scope of treaty protection.[4]

1 On National Treatment generally, *see* Andrea K. Bjorklund, "National Treatment," in *Standards of Investment Protection* (August Reinisch, 2008). On MFN treatment generally, *see* Andreas P. Ziegler, "Most-Favoured-Nation (MFN) Treatment," in *id.* and Pia Acconci, "Most-Favoured-Nation Treatment," in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Frederico Ortino, and Christoph Schreuer, eds. 2008).

2 *See, e.g.*, United Kingdom-Bosnia-Herzegovina BIT, Art. 3(1); Netherlands-Ethiopia, Art. 3(2); Thailand-Argentina BIT, Art. 4(1); Australia-India, Art. 4(1)–(2); Sweden-Kazakhstan BIT, Art. 3(1); Mexico-Iceland BIT, Art. 3(2); Germany-Timor-Leste, Art. 3(1); Canada-Uruguay BIT, Art. IV(1); Cambodia-Vietnam BIT, Art. III(2); Egypt-Zambia, Art. 3(1); (MFN only); Chile-Indonesia BIT, Art. IV(2).

3 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1); Austria-Armenia BIT, Art. 3(3); Thailand-Argentina BIT, Art. 4(2); Australia-India, Art. 4(3) (MFN only); Mexico-Iceland BIT, Art. 3((3); Germany-Timor-Leste, Art. 3(2); Canada-Uruguay BIT, Art. IV(2); United Kingdom-Bosnia-Herzegovina BIT, Art. 3(2); Egypt-Zambia BIT, Art. 3(2) (MFN only).

4 For an example, *see* the discussion of *RosInvestCo v. Russia* in Section 7.2.3.

The comparator is the person or asset the treatment of which sets the standard that must be met. Once again, the definitions of the terms "investor" and "investment" are critical, but here they are critical for purposes of establishing the content of the standard, rather than the scope of its application. If an entity is not an investor or an investment, then the host state's treatment of that entity is not relevant for purposes of establishing the content of the MFN or national treatment standard. For example, if the term "investor" includes state enterprises, then the host state's treatment of its own state enterprises defines the treatment that must be accorded to a covered investor that is entitled to national treatment. If state enterprises are excluded, however, then the host state may discriminate in favor of its own state enterprises without violating the national treatment provision.

Two general problems arise with respect to identifying the comparator. The first problem is determining whether every potential comparator that falls within the literal language of the provision should be treated as relevant. Thus, for example, it must be determined whether national treatment requires that covered investment be treated as favorably as any investment of the host state or only certain investment of the host state. Some BITs explicitly address this question by providing that the appropriate comparator is one that is "in like situations"[5] or "in like circumstances"[6] with the beneficiary. Such language, however, is absent from most BITs.

Yet, it would seem that the concept of MFN and national treatment assumes that the treatment of covered investment shall be compared only to the treatment of comparable investments. The purpose of national treatment, for example, does not require that covered investment be treated as favorably as every investment in the host state in every respect. For example, a large automobile manufacturing plant located in a major urban area and owned by a covered investor might be required to satisfy various municipal regulations on matters such as land use that would not be applied to a small domestically owned grocery store located in a remote rural area. Read literally, the national treatment standard would seem to be violated in such a case because the covered investment was treated less favorably than a domestic investment. Yet, the different treatment can be justified by the fact that the covered investment and the domestic investment are not in the same situation. They are in different sectors of the economy, they are on different scales, and they are situated in areas of radically different population densities. Nor is the automobile plant being put at a competitive disadvantage. The host state can be allowed the different treatment based on the dissimilar circumstances of the two investments without defeating any of the purposes of the national treatment provision. To apply the national treatment standard literally and to require that the two investments be treated the same would impose a senseless restriction on host-state regulatory discretion. As this example illustrates, the MFN and national treatment standards not only may, but must, be interpreted to require that the treatment of covered investment or investors be evaluated only with respect to the treatment of comparable investments or investors. Even where a phrase such as "in like situations" or "in like

5 *See, e.g.*, United States-Argentina BIT, Art. II(1).

6 *See, e.g.*, Mexico-Iceland BIT, Art. 3(2)–(3); Canada-Uruguay BIT, Art. IV; Japan-Vietnam BIT, Art. 2.

circumstances" does not appear in the provision, such a limitation should be treated as implicit.

The BITs provide little guidance concerning the meaning of the phrase "in like situations" or "in like circumstances," which should be treated as synonymous.[7] It has been argued that, in the case of national treatment, for example, the ideal comparator is an investment that is identical to the beneficiary in every respect except nationality. Given that it may not be possible to find such a comparator, this view regards choosing the comparator that is most like the beneficiary as a second-best solution. In other words, the phrase "in like circumstances" would be interpreted as if it read "in the most like circumstances." Obviously, the effect of this interpretation is potentially to weaken the provision by eliminating a large number of comparators. The covered investment may have been treated less favorably than a large number of potential comparators, but if it is treated no less favorably than the closest comparator then no violation of the standard would be found. Further, where a covered investment is comparable to other investments in different ways, the question is of which is the most comparable may not have an obvious solution.

Alternatively, one might treat as a comparator any investment in the same sector of the economy. The argument in favor of this approach is that one purpose of the relative standards is to ensure a level playing field among competitors and this purpose is served by prohibiting discrimination among competitors. Presumably, an investment's competitors are other investments in the same sector of the economy. Equating "like circumstances" with operating in the same sector of the economy, however, presents some potential difficulties. One is that no other investment in the same sector may exist. Another is that sectors can be described at different levels of generality, which allows the test to be manipulated easily.[8] In addition, ensuring competitive equality does not exhaust the purpose of a nondiscrimination provision. For example, a nondiscrimination provision also promotes a favorable investment climate by prohibiting at least some forms of arbitrary treatment and it promotes the rule of law by requiring equal treatment under the law.

A better approach is to consider whether the differences between the beneficiary and the comparator are relevant to the host state's legitimate regulatory objectives. A regulatory objective is legitimate only to the extent that it is consistent with BIT principles. For example, if a covered investment and a comparator were subject to different environmental regulations, one would consider whether the different treatment of the investment and the comparator was based on a legitimate regulatory objective. Environmental preservation would be such an objective, while economic protectionism would not be. If the different treatment was based on environmental preservation, then the beneficiary and the comparator would be regarded as in unlike circumstances and the different treatment would not violate the MFN or national treatment standard. If the different treatment was based on economic protectionist objectives, then the beneficiary and comparator would be regarded as in like circumstances because the

7 The two appear interchangeable, for example, in U.S. BIT practice. *See* Kenneth J. Vandevelde, *U.S. International Investment Agreements* 252 (2009).

8 *See* Section 7.2.3.

difference was not related to a legitimate regulatory objective. Treating them differently would violate the national or MFN treatment provision.

As this suggests, where no obvious comparator exists, the covered investment or investor should be permitted to show a violation of the national or MFN treatment provision by demonstrating that its treatment was the result of a discriminatory motive. For example, if an investment was subjected to adverse treatment because it was a foreign investment, then it would seem clear that the investment did not receive national treatment. A discriminatory motive should be provable by circumstantial evidence, such as the inability of the host state to articulate a legitimate nondiscriminatory motive for its treatment of the investment.

The second general problem raised by the identification of the comparator is that the host state may treat some comparators more favorably than others. For example, a host state may discriminate among its own investments. Assuming that all are appropriate comparators, the question arises as to which potential comparator establishes the required standard of treatment: the one receiving the best treatment, the one receiving the worst treatment, or some other comparator, such as one receiving the typical treatment. As a practical matter, this problem may arise infrequently because many of the putative comparators might be found not to be in like circumstances with the beneficiary. Where it does arise, however, BITs rarely provide any explicit guidance.

The solution may turn on the level of generality at which one defines the purpose of the MFN and national treatment standards. At a very low level of generality, the purpose of the MFN and national treatment provisions is to preclude discrimination based on nationality. On that assumption, the most poorly treated comparator would set the standard. As long as the beneficiary were treated no less favorably than a national investment or an investment of the most favored nation, one could not say that the beneficiary had been treated unfavorably on the basis of nationality.

At a higher level of generality, the purpose of the MFN and national treatment provisions, like any nondiscrimination provision, is to establish a level playing field and thereby promote market-based allocations of capital as well as a rules-based investment regime. On that assumption, the most poorly treated comparator would not set the standard because treatment in accordance with that standard would not level the playing field between the beneficiary and other potential comparators.

This is an issue with respect to which clarification in the text of the BIT would be desirable. In fact, a few BITs do provide some clarification with respect to this issue in one context. The context is that of a federal system in which political subdivisions may discriminate against investments from other political subdivisions. For example, in the case of the United States, California might enact a law that provided California corporations with more favorable treatment than corporations of the other 49 states. The U.S. BITs have adopted explicit language providing that, in this situation, the appropriate comparator for purposes of the national treatment provision is investments of the other political subdivisions.[9] Thus, in the example, California would be required to accord covered investment with treatment no less favorable than that which it accords

9 *See, e.g.*, United States-Argentina BIT, Art. II(8).

to investment of any of the other 49 U.S. states, rather than the treatment it accords to California investments. Interestingly, the NAFTA adopts the contrary approach. National treatment under the NAFTA requires treatment no less favorable than the political subdivision provides to its own investments.[10] Thus, California would be required to treat covered investment as favorably as it treats California investment. Under the NAFTA approach, the national treatment standard favors covered investment over some domestic investment.

The third component of a relative standard is the equivalency requirement. This component of the standard identifies the way in which the beneficiary must be treated relative to the comparator. The most common formulation requires that the beneficiary receive treatment "no less favorable" than that accorded to the comparator.[11] This language permits the beneficiary to be treated more favorably than the comparator. It also permits the beneficiary to receive different treatment than the comparator, provided that the different treatment is not less favorable. Cases may arise in which a dispute exists as to whether the different treatment accorded to covered investment is less favorable.

In the case where an MFN provision requires no less favorable treatment and the host state provides more favorable treatment to the covered investment than it accords to investment of other nations, the investment of these other nations can be expected to invoke the MFN provision of BITs applicable to them so as to elevate the treatment they receive. Thus, in a setting where all foreign investment is covered by an MFN treatment provision, an investment of one foreign nationality may be provided more favorable treatment than investment of other foreign nationalities, but to do so will trigger an obligation to elevate the treatment of all other foreign investment. That is, where all investment has the benefit of MFN treatment, it is actually not possible, at least in theory, to treat one investment more favorably than another. Each time the treatment of one investment is raised above the level accorded to other investments, those other investments become entitled to that same treatment.

Some BITs require that the beneficiary receive "the treatment" that the comparator receives.[12] This language does not preclude providing the beneficiary with more favorable treatment. That is, the host state is obligated to provide the same treatment, not prohibited from providing better treatment. This formulation, however, does seem to preclude providing treatment that is different, but equally favorable.[13]

As between these two formulations, the "no less favorable" formulation would seem preferable. First, it provides the host state with the flexibility to make inconsequential

10 *See* NAFTA Art. 1102(3).

11 *See, e.g.*, BLEU-Sudan BIT, Art. 4(2); Netherlands-Ethiopia BIT, Art. 3(2); United Kingdom-Bosnia-Herzegovina BIT, Art. 3; Finland-Armenia BIT, Art. 3(1); Austria-Armenia BIT, Art. 3(3); Denmark-Ethiopia BIT, Art. 3; Thailand-Argentina BIT, Art. 4(1); Cambodia-Vietnam BIT, Art. III(2); Chile-Indonesia BIT, Art. IV(2).

12 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1).

13 Compare Article XVII of the General Agreement on Trade in Services, which explicitly provides that treatment no less favorable may include formally identical or formally different treatment, provided that it does not modify the conditions of competition in favor of service suppliers of the member according the treatment.

distinctions, which may serve administrative convenience in some cases. At the same time, the requirement of no less favorable treatment implies the possibility of more favorable treatment, language that may be more appealing to investors than the alternative formulation, which connotes treatment that is neither better nor worse, although, as has been discussed, it permits better treatment. In some cases, however, the "no less favorable treatment" formulation is not politically acceptable to one of the BIT parties, at least in the context of national treatment, precisely because of its connotation that foreign investment may receive better treatment than domestic investment.

An ambiguity exists with respect to the scope of the word "treatment." In one sense, the word could be read narrowly to refer to specific benefits provided to the comparator. In another sense, the word could be read more broadly to refer to the entire relationship between the host state and the comparator.

An example will illustrate the potential significance of this ambiguity. As will be discussed in greater detail below, one function of an MFN treatment provision is to require the host state granting MFN treatment under a BIT to accord to covered investment the same benefits guaranteed by that same host state under any other BIT to which it is a party. Thus, if the treaty containing the MFN treatment provision, sometimes described by commentators as "the basic treaty,"[14] does not include a guarantee of fair and equitable treatment, a covered investment nevertheless would be entitled to fair and equitable treatment if the host state has promised fair and equitable treatment to investments under any other BIT. Where the term "treatment" is given its narrow reading, the benefit of fair and equitable treatment is considered "the treatment" guaranteed by the MFN treatment provision. Yet, the BIT with the fair and equitable treatment standard may include various other provisions that qualify the standard, such as an exception for measures necessary to protect a state's essential security interests. Where the term "treatment" is given its broad reading, the entire relationship between the host country and the investment created by the BIT with fair and equitable treatment standard would be considered "the treatment." Thus, covered investment under the basic treaty would be entitled to fair and equitable treatment qualified by the essential security interests exception.

On purely textual grounds, either reading of the term "treatment" is defensible. The practice of tribunals, however, is to employ the narrow reading of the term.[15] The explanation may be a practical one. The broader the term "treatment" is read, the more difficult it is to determine whether the beneficiary has been denied the treatment to which it is entitled. In the example above, the effect of reading the term "treatment" broadly, taken to its logical conclusion, would be to substitute the entire BIT applicable to the comparator for the BIT applicable to the beneficiary. As a result of the narrow reading of the term "treatment," covered investments may claim specific benefits granted by the host state to other investments, without necessarily being subject to accompanying

14 This terminology was employed by the International Court of Justice in the *Case Concerning the Anglo-Iranian Oil Company* (United Kingdom v. Iran), 1952 I.C.J. Rep. 93.

15 *See Siemens v. Argentina* (Germany-Argentina BIT), Decision on Jurisdiction, para. 120, where this problem is discussed explicitly.

detriments to which those other investments are subject. Thus, a promise of no less favorable treatment in practical effect may be a promise of more favorable treatment.

The term "treatment" is ambiguous not only as to its scope, but also as to its content. For example, in the case of the MFN treatment provision, the issue has arisen whether the term refers to the treatment accorded to comparators under the substantive provisions of other BITs or whether it refers to the treatment accorded to comparators under the procedural as well as the substantive provisions of other BITs. On textual grounds, the word "treatment" certainly could include treatment with respect to procedural rights as well as with respect to substantive rights. Indeed, in a positivist conception of law in which rights exist only to the extent that they are enforceable, the distinction between substantive and procedural rights may be of no practical significance and thus a reading of treatment that included one and not the other could be seen as arbitrary. Certainly, the BIT principle of due process, which is reflected in the procedural provisions of the BITs, is as important as other BIT principles, such as security, nondiscrimination, and reasonableness. Thus, reading the MFN treatment provision to apply to rights of security granted by another BIT, but not to rights of due process, also seems arbitrary. Yet, as will be seen in Section 7.2.3, tribunals are divided with respect to the question of whether the term "treatment" includes procedural rights. Some host states have argued that, regardless of the treaty language, they never intended the term "treatment" to refer to procedural rights. Further, as also discussed below and in Section 7.2.3, disputes provisions of a BIT are often complex and thus applying a single clause of the disputes provision of one BIT to a disputes process prescribed by another BIT potentially threatens the coherence of the latter BIT.

A fourth component of the national and MFN treatment provisions that sometimes appears is language establishing the scope of these provisions. Although the provision often simply requires national or MFN "treatment," in some BITs the concept of treatment is qualified by additional language. The most common qualification provides that national and MFN treatment is required with respect to the management, maintenance, operation, use, enjoyment, and sale or other disposal of the investment, or words to similar effect. This qualification may apply either where the beneficiary is the investor,[16] or where it is the investment.[17] One effect of this language, where it applies to the investor, is to clarify that the investor is protected in its capacity as an investor. That is, the investor is entitled to national or MFN treatment only where it is engaged in activities in connection with investment. Another effect of this language may be to exclude dispute resolution provisions from the scope of the MFN treatment provision.[18] Thus, where this language appears, an investor or investment protected under one BIT may not be entitled to the benefit of the investor-state disputes provision in another BIT concluded by the host country.

16 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1); Austria-Armenia BIT, Art. 3(3); Thailand-Argentina BIT, Art. 4(2); Australia-India, Art. 4(3) (MFN treatment only); Mexico-Iceland BIT, Art. 3(3); Germany-Timor-Leste, Art. 3(2); Canada-Uruguay BIT, Art. IV(2).

17 Austria-Armenia BIT, Art. 3(3); United Kingdom-Bosnia-Herzegovina BIT, Art. 3(2).

18 *See* Section 7.2.3.

Occasionally, the qualifying language emphasizes the breadth of the provision's scope, such as where the provision applies to "all matters relating to the treatment of investment"[19] Some of the U.K. BITs include language confirming that the treatment includes treatment under certain enumerated articles of the BIT, among which are the articles on dispute resolution.[20]

In some BITs, the qualifying language specifies that the national and MFN treatment obligations apply to the establishment of investment, as well as the treatment of investment once established.[21] Thus, these BITs guarantee to covered investors or investments the right to establish or acquire investment in any case where host state (in the case of national treatment) or third state (in the case of MFN treatment) investors are entitled to establish or acquire investment.

A fifth component of the national and MFN treatment provisions that appears in many BITs comprises a set of exceptions. The MFN and national treatment provisions are more commonly subject to exceptions than other provision of the BITs. Two exceptions appear widely in BITs.

First, these provisions commonly are subject to an exception for matters of taxation. The most common version of this exception provides that the MFN treatment provision does not apply to any advantage granted pursuant to an international agreement relating wholly or mainly to taxation.[22] Many countries have concluded bilateral taxation treaties, especially treaties to prevent double taxation, and the effect of this formulation of the taxation exception is to exclude concessions made in those treaties from the MFN treatment or, in some cases, national treatment, obligation. Indeed, in some cases, the BIT explicitly excludes advantages granted under a double taxation treaty,[23] as opposed to taxation treaties generally. The stipulation that the treaty apply "mainly" to taxation ensures that concessions under a treaty are not excluded from the scope of the MFN treatment provision merely because of a few references to taxation in the treaty. For example, the BITs themselves occasionally allude to matters of taxation, if only to exclude them, and those references do not convert the BITs to agreements dealing with taxation that are outside the scope of BIT MFN provisions. Another common version of this exception is broader and applies not only to advantages conferred by international agreements, but also advantages conferred by domestic legislation relating

19 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1).

20 *See, e.g.*, United Kingdom-Bosnia-Herzegovina BIT, Art. 3(3).

21 *See* Section 9.3.1.

22 *See, e.g.*, Denmark-Ethiopia BIT, Art. 4; United Kingdom-Bosnia-Herzegovina BIT, Art. 7; Thailand-Argentina BIT, Art. 5; Sweden-Kazakhstan BIT, Art. 3(3); Indonesia-India, Art. 4(2); Chile-Indonesia BIT, Art. IV(3); Finland-Thailand BIT, Art. 4(2); Germany-Timor-Leste, Art. 3(4) (no qualifying language requiring that the agreement relate wholly or mainly to taxation); Austria-Armenia BIT, Art. 3(4) (no qualifying language requiring that the agreement relate wholly or mainly to taxation).

23 *See, e.g.*, Netherlands-Ethiopia, Art. 4; Australia-India, Art. 4(4); Egypt-Zambia, Art. 3(3); Germany-Timor-Leste, Art. 3(3).

wholly or mainly to taxation.[24] Some BITs simply exclude "tax matters" from the scope of these provisions.[25]

The taxation exception is based on a couple of considerations. One is that the complexity of tax matters may render them unsuitable for the generalizing effect of an MFN provision.[26] As already noted, tax matters are often addressed in separate treaties that are largely limited to taxation. The taxation exception reduces the possibility of duplication or contradiction between the BIT and tax treaties. Further, tax matters generally are the responsibility of a department within the government that is different from the department that is responsible for negotiating BITs. BIT negotiating teams typically do not include members with expertise in tax matters.

The taxation exception also may apply to the national treatment obligation. To the extent that it applies to benefits under domestic legislation relating to taxation, this exception provides an important way in which host states can provide assistance to domestic enterprises without having to extend the same assistance to foreign investments. Subsidies can be provided to domestic enterprises in the form of tax measures, such as reduced tax rates, tax deductions, tax credits, and accelerated depreciation schedules.

A second exception commonly found in national and MFN treatment provisions is one for advantages granted pursuant to an agreement establishing a customs union, free trade area, or other organization for economic integration.[27] Some BITs refer only to customs unions or free trade areas,[28] although it is not clear to what extent this language would be narrower in practice because organizations of economic integration are likely to include a free trade area or customs union and thus presumably would fall within the exception. Occasionally, a BIT includes multilateral agreements on investment in the exception as well.[29] As part of their economic integration into a customs union or free trade area, countries often make deep concessions to other countries in exchange for similarly deep concessions. A BIT party may be unwilling to grant those same concessions to any other country unless that country makes the same concessions that were granted by the other members of the customs union or free trade area. In effect, this exception curtails benefits to the free rider, a country that seeks through a

24 *See, e.g.*, Denmark-Ethiopia BIT, Art. 4; United Kingdom-Bosnia-Herzegovina BIT, Art. 7; Thailand-Argentina BIT, Art. 5; Australia-India, Art. 4(4); Sweden-Kazakhstan BIT, Art. 3(3); Indonesia-India, Art. 4(2); Germany-Timor-Leste BIT, Protocol, Para. 3(b)(tax legislation providing special tax treatment for nationals); Austria-Armenia BIT, Art. 3(4)(no qualifying language requiring that the agreement relate wholly or mainly to taxation).

25 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1); Cambodia-Vietnam BIT, Art. III(4); Mexico-Iceland BIT, Art. 3(5).

26 The "generalizing effect" is discussed in greater detail below and in Section 7.2.3.

27 *See, e.g.*, BLEU-Sudan BIT, Art. 4(1); Denmark-Ethiopia BIT, Art. 4; Austria-Armenia BIT, Art. 3(4); United Kingdom-Bosnia-Herzegovina BIT, Art. 7; Netherlands-Ethiopia, Art. 3(3); Thailand-Argentina BIT, Art. 5; Australia-India, Art. 4(4); Cambodia-Vietnam BIT, Art. III(3);); Egypt-Zambia, Art. 3(3); Mexico-Iceland BIT, Art. 3(4); Indonesia-India, Art. 4(2); Chile-Indonesia BIT, Art. IV(3).

28 *See, e.g.*, Sweden-Kazakhstan BIT, Art. 3(2); Germany-Timor-Leste, Art. 3(3).

29 *See, e.g.*, Austria-Armenia BIT, Art. 3(4).

BIT MFN provision to gain the benefit of concessions made by the other BIT party to other countries without having to grant in exchange the concessions that were given by those other countries.

A few BITs, following an approach first utilized by the United States,[30] allow each party to specify in an annex sectors or matters with respect to which that party reserves the right to deny MFN treatment, national treatment, or both.[31] Typically, this technique is used where the BIT guarantees MFN and national treatment with respect to the right to establish investment and not merely to investment once established. The exceptions may apply to the establishment of investment, the treatment of investment after establishment, or both.

BITs with this exception thus employ national and MFN treatment provisions that are both broader and narrower than those of other BITs. The provisions are broader in that they apply to the right of establishment, a very important feature of these provisions, but are narrower in that they may be riddled with sectoral exceptions. The sectoral exceptions may be seen as the price of applying these provisions to the right of establishment, because few, if any, countries are willing to grant complete national treatment with respect to the right of establishment.[32] Yet the technique allows exceptions to be made to the treatment of investment once established as well.

To promote transparency, the most recent U.S. BITs separate the list of sectors into two annexes.[33] One annex lists existing nonconforming measures that a party reserves the right to maintain. The other annex lists sectors in which a party reserves the right to adopt future nonconforming measures. This approach necessitates including a definition of an existing measure. In these BITs, an existing measure includes a measure in force at the time the BIT was concluded as well as a prompt renewal of any such measure.[34] Thus, a measure that is allowed to lapse for a sufficient period of time ceases to be an existing measure and it may be reenacted only if the host state has reserved the right to adopt future measures in that sector of the economy. A measure that is amended does not cease to be an existing measure provided that the amendment does not increase the measure's nonconformity with the BIT.[35] This latter rule sometimes is referred to as a "one-way ratchet" because it permits a measure to be amended so as to decrease its nonconformity with the BIT, but the measure may not be amended so as to increase its nonconformity.

Other exceptions to the national and MFN treatment provisions sometimes appear. Some BITs exclude concessions made under the World Trade Organization agreements,[36] while other BITs exclude government procurement programs, subsidies

30 *See, e.g.*, United States-Egypt BIT, Art. II(3)(a).
31 *See, e.g.*, Canada-Uruguay BIT, Annex I(1)–(2).
32 *See* Sections 9.1–9.3.
33 *See, e.g.*, United States-Uruguay BIT, Art. 14.
34 *Id.*, at Art. 14(1)(b).
35 *Id.* at Art. 14(1)(c).
36 *See, e.g.*, United States-Ecuador BIT, Art. II(10) (exception future agreements within the framework of the GATT); Canada-Thailand BIT, Art. III(3)(b) (exception for future agreements negotiated within the framework of the GATT or its successor organization and liberalizing trade in services).

and grants.[37] Some BITs have a specific exception to the national and MFN treatment provisions for measures of public security, public order, or public health or morality[38]

Although the national and MFN treatment provisions are similar in structure, their functions are different. The national treatment provision is antiprotectionist. It eliminates state-created competitive advantages for domestic investments and investors and, if it applies to the establishment of investment, opens the economy to foreign investors. As this suggests, the national treatment provision can impose a substantial impediment to certain host state policies. For example, many countries have economic policies that require some forms of state intervention to assist local industries in their development. Often, these policies are based on the infant industry argument, that is, the argument that that some new enterprises can be competitive once they achieve a certain scale or maturity, but are not competitive prior to that. Under this argument, free market principles are not inconsistent with state support for that industry until such time as it becomes competitive. Indeed, such support arguably facilitates the operation of the market and increases its competitiveness because the support permits enterprises that otherwise would be excluded to enter the market. Free entry, of course, is a key premise of market economics. A variation of this argument applies to mature industries, which may have become temporarily uncompetitive, but if sustained for a period of time by state support could again become competitive and contribute to the contestability of the market. Such assistance is inconsistent with the national treatment obligation, unless the same assistance is provided to foreign investments. Yet, providing assistance to competing foreign investments may defeat the purpose of the assistance to the domestic enterprises. Moreover, developing countries can ill afford to provide indiscriminate financial assistance to multinational enterprises from developed countries. If assistance must be provided on a national treatment basis, then the developing country may be best served by providing no assistance at all. Further, many countries believe that domestic enterprises should occupy, perhaps exclusively, certain sectors of the economy. One common justification for this belief is national security: a country should not be dependent upon foreign enterprises for goods or services critical to its national defense. Another justification is cultural: preservation of the national culture may necessitate that domestic enterprises have a presence in sectors of the economy such as news and entertainment. States may want domestic enterprises to have a presence in a particular sector of the economy as a matter of national prestige. States also may want to protect domestic enterprises from foreign competition simply to promote the economic welfare of those involved in the domestic enterprises.

The MFN treatment provision is a generalizing provision. As a result of the MFN treatment provision, every BIT concluded by a country is as strong as the strongest BIT concluded by that country. In fact, every BIT concluded by a country is as strong as a hypothetical BIT composed of the strongest provisions of every other BIT concluded by that country. Thus, the effect of MFN treatment provisions is to render many

37 *See, e.g.*, United States-Uruguay BIT, Art. 14(5).
38 *See, e.g.*, Germany-Timor-Leste, Protocol, para. 3(a)

of the differences among BITs concluded by any one country largely irrelevant.[39] If a country has guaranteed a particular kind of treatment to investment in any BIT, then at least in the case of substantive treatment it generally has guaranteed that treatment to investment covered by any BIT with an MFN treatment provision.

Most countries have little reason to discriminate among classes of foreign investors, perhaps except where the host state has entered into an economic integration agreement and wishes to extend special preferences to investments from other members. This problem can be and is addressed through a special exception to the MFN treatment provision, already described.

One difficulty presented by an MFN treatment provision is that it potentially creates the phenomenon of the free rider, already discussed in connection with the customs union exception. The free rider problem can inhibit the deepening of treaty commitments in at least two ways. First, some states may object to offering MFN guarantees because they wish to avoid free riders. Second, some states may refuse to make strong commitments to treaty partners because through the MFN provision they can obtain the benefit of any commitments made by the partner to third countries, without offering the strong commitments in exchange. That is, these states wish to operate as free riders. One way to address the free rider problem, apart from specific exceptions to limit the range of agreements upon which the free rider may ride, is to adopt a conditional MFN treatment provision. Under a conditional MFN treatment provision, a country is entitled to benefits granted by its treaty partner to third countries only if that country grants the same benefits to its treaty partner. Thus, a country cannot free-ride upon commitments made by its partner. It must purchase those concessions by offering the same commitments to its partner. Such a provision, however, reduces to some degree the generalizing effect of an MFN treatment provision. Thus, a conditional MFN treatment provision would not benefit the investment in the circumstance in which BIT MFN treatment provisions most often are invoked. The typical invocation of a BIT MFN treatment provision arises where an investment covered by a BIT claims entitlement to some protection accorded to foreign investment by another BIT concluded by the host state. Under a conditional MFN treatment provision, the investment would be entitled to that protection only if its home state granted that protection to investments of the host state. Yet, the most likely way that the investor could prove that the home state had made such a grant would be to show that the grant was included in the BIT between the home and host states, in which case the investment already would be entitled to the protection and would not need the benefit of the MFN treatment provision. In any event, BITs rarely use conditional MFN treatment provisions.

Another difficulty presented by an MFN treatment provision is that the generalizing effect of the provision impedes efforts to modify a host state's investment policy over time. The provision perhaps presents little problem if a host state wishes to expand the obligations it assumes under its BITs. Each obligation, once assumed with respect to

39 As will be discussed in Section 7.2.3, some tribunals have held that the term "treatment" in the MFN treatment provision does not apply to all BIT provisions. Thus, according to these tribunals, an investor may not claim the benefit of every provision in a BIT concluded by the host country.

one treaty partner, is by virtue of the MFN treatment provision extended to every other treaty partner. The provision presents a more substantial problem if a host state wishes to reduce the obligations it is assuming under its BITs. Although it can eliminate the obligation from future BITs, future BIT partners still will be entitled by the MFN treatment provision in their BITs to the benefit of the obligation as it exists in earlier BITs.

To address this problem, the United States, in some of its BITs, has excluded from its MFN treatment provision any benefit extended under any prior agreement.[40] This allows the parties to diminish the protection extended in later agreements, relative to that guaranteed in earlier agreements. In the absence of such an exclusion, a covered investment in a later BIT could invoke the MFN treatment provision and demand the same level of treatment guaranteed under an earlier BIT. Under the exclusion, investments covered by earlier BITs do receive the benefit of increases in the level of protection in later BITs. In effect, the exclusion operates as a one-way ratchet with respect to investment under any particular BIT, which can gain but not lose protection as a result of later BITs. It allows the treaty program as a whole, however, to move in either direction, raising or lowering the level of protection accorded under the BITs. In the absence of this exclusion, the MFN provision would function as a one-way ratchet with respect to the BIT program as a whole because later BITs would increase the protection guaranteed under earlier BITs, while attempts to decrease protection in later BITs would be prevented by the existence of earlier BITs. In effect, this exclusion eliminates the one-way ratchet in the BIT program as a whole, while retaining it with respect to investment covered under any particular BIT. For this exclusion to be effective, the omitted obligation must be omitted from all subsequent BITs. If it appears in a later BIT, then an exception for obligations in earlier BITs will be futile because the obligation will have been assumed by virtue of its presence in a later BIT, the obligations of which are applicable through the MFN provision.

A third difficulty presented by the MFN treatment provision is that it can render complex provisions incoherent. Where the MFN treatment provision is used to claim the benefit of a simple provision, such as the fair and equitable treatment standard, the consequences for covered investment may be substantial, but adding that obligation to the other obligations of the applicable BIT is not conceptually difficult. Where the MFN provision is used to claim the benefit of a clause in a complex provision, however, determining how this clause shall be integrated into another BIT may be quite difficult conceptually. The best example is the provision that is usually the most complex of any in the BITs, the investor-state disputes provision. This provision sometimes includes an interrelated series of clauses, which may incorporate entire bodies of arbitration rules adopted by organizations such as ICSID or UNCITRAL. The BIT with the MFN provision that has been invoked may include a complex investor-state disputes provision that is quite different from that in the BIT the benefit of which has been claimed. One BIT, for example, may call for ICSID arbitration while the other BIT may call for arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Integrating a clause designed to operate within

40 *See, e.g.*, United States-Uruguay BIT, Annex II.

one system into a provision that contemplates a different system may threaten the coherency of the latter system. The problem is exacerbated where multiple clauses from different investor-state disputes provisions of different BITs are incorporated into the BIT with the MFN provision. As will be seen, some states have contended that the MFN provision should not be interpreted to apply to dispute resolution provisions and, in fact, the text of some BITs does seem to exclude the investor-state disputes provision from the scope of the MFN provision.[41] Yet, a few BITs make clear that the MFN provision does apply to the dispute resolution provisions.[42] Tribunals have divided over the circumstances in which an MFN provision should be held to apply to investor-state disputes provisions.[43] In any event, claimants to date generally have not sought to use the MFN treatment provision in a way that raised the coherence problem to any significant degree. Thus, the problem of coherence has been largely a hypothetical concern.

Many BITs that guarantee both MFN and national treatment include language indicating that the beneficiary is entitled to the more favorable of the two standards.[44] Often the language is more precise, stating that the treatment to be accorded is that which is more favorable to the investor[45] or more favorable from the investor's point of view.[46] Such language merely makes explicit that which otherwise would be implicit. A guarantee of both MFN and national treatment necessarily requires that the beneficiary receive the benefit of both, including that which is more favorable. More generally, BIT obligations typically are cumulative.[47] That is, the host state is not excused from complying with one provision on the ground that it has complied with a different provision.

7.2.2 MFN Treatment: Origins

As discussed in Section 2.1.1, MFN provisions were common in the early FCNs. Prohibitions on discrimination also appeared in the earliest BITs. Article 1(2) of the first BIT, the 1959 Germany-Pakistan BIT, provided that "capital" in the territory of one party y"shall not be subjected to any discriminatory treatment on the ground that ownership of or influence upon it is vested in nationals or companies" of the other party, although this right to nondiscrimination was subject to existing local law. Further, Article 2(1) prohibited either party from subjecting to discriminatory treatment any activities "carried on in connection with investments, including the effective management, use or enjoyment of such investments" unless specifically permitted in the "documents of admission" of the investment, language that essentially was an early

41 *See* below and Section 7.2.3.
42 *See, e.g.*, United Kingdom-Bosnia-Herzegovina BIT, Art. 3(3).
43 *See* Section 7.2.3.
44 *See, e.g.*, Sweden-Kazakhstan BIT, Art. 3(2).
45 *See, e.g.*, Austria-Armenia BIT, Art. 3(3); Netherlands-Ethiopia, Art. 3(2); Thailand-Argentina BIT, Art. 4(1)–(2); Mexico-Iceland BIT, Art. 3(2)–(3).
46 *See, e.g.*, Denmark-Ethiopia BIT, Art. 3(1)–(2).
47 *See S.D. Myers v. Canada* (NAFTA), Partial Award, paras. 292–294.

form of the prohibition on unreasonable or discriminatory measures that appears in many BITs.[48]

The first Belgium-Luxembourg Economic Union (BLEU) BIT, signed with Tunisia in 1964, required that each party provide to covered investments "at least the same security and protection that it grants to those of its own nationals or to the investments of nationals and companies of third states."[49] This language was similar to that which had appeared in many FCNs.[50] Thus, MFN as well as national treatment were elements of the BLEU BIT practice from the beginning. The reference to national treatment, however, quickly disappeared. For example, the BLEU's third BIT, concluded with Indonesia in 1970, provided, at Article 1(3), that "[t]he protection guaranteed by paragraphs 1 and 2 of this article [guaranteeing admission in accordance with host state law, fair and equitable treatment, and full protection] shall at least be equal to that enjoyed by nationals of any third State and may in no case be less favorable that that recognized by international law." This formulation became typical of the BLEU BITs until the current decade, during which the BLEU BITs more commonly guarantee to covered investors MFN treatment "in all matters relating to the treatment of investments"[51] and "with respect to the operation, management, maintenance, use, enjoyment and sale or other disposal of investments."[52]

The first Italian BIT, concluded with Guinea in 1964, guaranteed MFN treatment to covered investment.[53] This provision did not apply to advantages deriving from a customs union agreement or an agreement to prevent double taxation. This remains Italy's approach today, although the Italian BITs also include an exception for trade agreements even if they do not establish a customs union or free trade area[54] and the Italian BITs sometimes extend MFN treatment to activities in connection with an investment.[55]

The Swiss, Dutch, and Kuwaiti BITs of the 1960s did not initially contain any general, explicit prohibition on discrimination among foreign investors, although they did require fair and equitable treatment. By 1968, however, the Dutch BITs guaranteed to covered investment the same protection as investment of any third state.[56] By the mid-1980s, the Dutch BITs guaranteed MFN "treatment," with exceptions for benefits resulting from economic integration or taxation agreements.[57]

The first Danish BIT, concluded with Madagascar in 1965, included an MFN treatment provision linked to fair and equitable treatment. Article 6 of that treaty required fair and equitable treatment, which in no case was permitted to be less than national or MFN treatment. In 1968, however, Denmark deleted the fair and equitable treatment standard and incorporated instead a general requirement of national and MFN treatment

48 *See* Section 5.3.
49 BLEU-Tunisia BIT, Art. 1.
50 *See* Section 2.1.
51 BLEU-Sudan BIT, Art. 4(1); BLEU-D.R. Congo BIT, Art. 4(2).
52 *See, e.g.*, BLEU-Sudan BIT, Art. 4(2); BLEU-D.R. Congo BIT, Art. 4(2).
53 Italy-Guinea BIT, Art. 5.
54 *See, e.g.*, Italy-Nicaragua BIT, Art. III; Italy-Jordan BIT, Art. 3; Italy-Pakistan BIT, Art. 3.
55 *See, e.g.*, Italy-Nicaragua BIT, Art. III; Italy-Pakistan BIT, Art. 3.
56 *See* Netherlands-Indonesia BIT, Art. 5.
57 *See, e.g.*, Netherlands-Sri Lanka BIT, Art. 5; Netherlands-Philippines BIT, Art. 4.

with respect to "any similar enterprise."[58] Denmark did not conclude any more BITs until 1980. When it resumed its program, the national treatment obligation was omitted as was the "similar enterprise" qualification, but an exception for agreements on double taxation was added.[59] In 1988, Denmark modified its practice again It adopted a general MFN and national treatment obligation, with an exception for taxation agreements,[60] while also restoring the fair and equitable treatment standard. In the mid-1990s, Danish practice required fair and equitable treatment, which in no case shall be less than national and MFN treatment, although the national and MFN treatment obligations were subject to exceptions for customs union agreements and matters of taxation [61]

The first Swedish BIT, concluded in 1965 with Ivory Coast,[62] was similar to the early Danish BITs, as was the first Austrian BIT, concluded with Romania in 1976.[63]. Switzerland concluded a BIT with Tanzania in 1965 that guaranteed to covered investment treatment no less favorable than that accorded to any similar investment,[64] but its BITs in the mid-1960s more typically were consistent with the early Danish BITs.[65] Sweden's BIT program went into hiatus in 1967. When the program resumed in 1978, the fair and equitable treatment standard was placed in a separate paragraph from the MFN treatment standard and the MFN treatment standard was made subject to a customs union exception.[66]

Given its omission from several early BIT programs, perhaps not surprisingly the MFN treatment provision did not appear in the 1967 OECD Draft Convention on the Protection of Foreign Property. The convention did include general prohibitions on discrimination. The 1959 Abs–Shawcross Convention also had contained no MFN treatment provision. The International Code of Fair Treatment for Foreign Investment proposed by the International Chamber of Commerce in 1949 contained extensive provisions on nondiscrimination, but these seem not to have influenced the content of the BITs.

The MFN treatment provision became more common in the 1970s, although it still was not universal. For example, an MFN provision became routine in the Swiss BITs beginning in the early 1970s,[67] sometimes with a customs union exception.[68]

58 *See, e.g.*, Denmark-Indonesia BIT, Art. III.
59 *See, e.g.*, Denmark-Romania BIT, Art. 3; Denmark-China BIT, Art. 3.
60 *See, e.g.*, Denmark-Republic of Korea BIT, Art. 3, Denmark-Peru BIT, Art. 3; Denmark-Venezuela BIT, Arts. 3–4.
61 *See, e.g.*, Denmark-Mongolia BIT, Arts. 3(1),4; Denmark-India BIT, Arts. 3(1), 4; Denmark-Nicaragua BIT, Arts. 3–4; Denmark-Ethiopia BIT, Arts. 3–4; Denmark-Croatia BIT, Art. 3; Denmark-Cuba BIT, Arts. 4–5; Denmark-Kyrgyz Republic BIT, Arts. 3–4.
62 Sweden-Ivory Coast BIT, Art. VI.
63 Austria-Romania BIT, Art. 3(1).
64 Switzerland-Tanzania BIT, Art. 1(2).
65 *See, e.g.*, Switzerland-Costa Rica BIT, Art. 1(2); Switzerland-Togo BIT, Art. 7; Switzerland-Malta BIT, Art. 5.
66 *See, e.g.*, Sweden-Egypt BIT, Art.2; Sweden-Yugoslavia BIT, Art. 2.
67 *See, e.g.*, Switzerland-Egypt BIT, Art. 3; Switzerland-Indonesia BIT, Art. 4(3); Switzerland-Sudan BIT, Art. 3.
68 *See, e.g.*, Switzerland-Egypt BIT, Art. 3; Switzerland-Jordan BIT, Art. 2(3).

French BITs concluded in the early 1970s required that each party provide the same security and protection to covered investments that it provides to nationals of any third country.[69] By 1974, the term used was "treatment" rather than "security" and a customs union exception was added.[70] A tax exception appeared by 1980.[71]

The United Kingdom's first BIT, signed with Egypt in 1975, prohibited treatment of investment that was less favorable than that accorded to investment of third states.[72] The United Kingdom-Egypt BIT also guaranteed MFN treatment to investors of the other party with respect to the management, use, enjoyment, or disposal of their investments. These provisions, however, did not apply to treatment extended by virtue of an agreement establishing a customs union or free trade area or an agreement or legislation relating wholly or mainly to taxation.[73]

Austria's first BITs, concluded in the mid-1970s, included a general MFN provision, which provided a floor to the fair and equitable treatment standard.[74] The MFN treatment provision, however, soon was separated from the fair and equitable treatment provision[75] and was made subject to exceptions for customs union agreements, border trade agreements, and taxation agreements.[76] Although the early Austrian BITs varied with respect to whether MFN treatment was owed to investments or investors, by the 1990s the Austrian BITs made clear that it was owed to both.[77] In the more recent Austrian BITs, the MFN obligation applies to treatment with respect to the management, operation, maintenance, use, enjoyment, sale, or liquidation of an investment, as opposed to all treatment generally,[78] and the separate exception for border trade agreements has been eliminated.[79]

Kuwait, which began its BIT program in 1964, did not include general MFN treatment obligations until the 1980s,[80] with customs union and taxation exceptions being typical of these agreements. The MFN treatment provisions often applied to both investments and investors. Some Kuwaiti BITs required that the investments or investors be "in like situations."[81]

The United States' first BIT, with Egypt, signed in 1982, guaranteed MFN treatment to covered investment. The U.S. BITs, however, included three innovations in MFN practice.

69 *See, e.g.*, France-D.R. Congo BIT, Art. 2; France-Indonesia BIT, Art. 3.
70 *See, e.g.*, France-Egypt BIT, Art. 3.
71 *See, e.g.*, France-Sri Lanka BIT, Art. 6.
72 United Kingdom-Egypt BIT, Art. 3(1).
73 *Id.*, Art. 7.
74 *See, e.g.*, Austria-Romania BIT, Art. 3(1); Austria-Malaysia BIT, Art. 3(2).
75 *See, e.g.*, Austria-China BIT, Art. 3(1).
76 *See, e.g.*, Austria-Malaysia BIT, Art. 3(3); Austria-China BIT, Art. 3(3).
77 *See, e.g.*, Austria-Republic of Korea BIT, Art. 3(1); Austria-Cape Verde BIT, Art. 3(1).
78 *See, e.g.*, Austria-Bosnia-Herzegovina BIT, Art (3)(3); Austria-Libya BIT, Art. 3(3); Austria-Jordan BIT, Art. 3(3); Austria-Armenia BIT, Art. 3(3).
79 *See, e.g.*, Austria-Bosnia-Herzegovina BIT, Art (3)(4); Austria-Libya BIT, Art. 3(4); Austria-Jordan BIT, Art. 3(4); Austria-Armenia BIT, Art. 3(4).
80 *See, e.g.*, Kuwait-China BIT, Art. 3; Kuwait-Hungary BIT, Art. 3; Kuwait-Czech Republic BIT, Art. 4; Kuwait- Ethiopia BIT, Art. 4; Kuwait-Croatia BIT, Art. 4.
81 *See, e.g.*, Kuwait-Ethiopia BIT, Art. 4; Kuwait-Croatia BIT, Art. 4.

First, in the U.S. BITs, the obligation of MFN treatment applied not only to the treatment of investments once established, but to the right of investors to establish investments. The U.S. BITs would remain unique in this regard until the conclusion of the NAFTA. A right of national and MFN treatment with respect to the establishment of investment now can be found as well in the Canadian and Japanese BITs.[82]

Second, the U.S. BITs guaranteed MFN (and national) treatment to investments and to certain activities associated with investments. The U.S. BITs abandoned the protection for associated activities in its 1994 model negotiating text.

Third, beginning with the BITs based on its 1991 model negotiating text, the U.S. BITs permitted the parties to specify, in a treaty annex, sectors of the economy to which the MFN treatment obligation does not apply. Prior to that, the U.S. BITs generally allowed sectoral exceptions only to the national treatment obligation.

The U.S. BITs require treatment as favorable as that granted only to investments in like situations with covered investment. As has been noted, some concept of comparability is inherent in any nondiscrimination provision. The U.S. BITs, however, in using the phrase "in like situations" provided a verbal formula for ascertaining which investments shall be compared to the covered investment. As already noted, some earlier Danish BITs had included language guaranteeing MFN treatment to "similar enterprises."[83]

Finland's first BIT, which also was with Egypt, although it was concluded in 1980, at Article 2(2) was similar to article 3(1) of the United Kingdom-Egypt BIT. The Finland-Egypt BIT, however, excepted more favorable treatment granted pursuant to a customs union agreement or granted under a previously existing bilateral agreement. At the beginning of the 1990s, Finland added an exception for taxation agreements.[84] For a time in the early 1990s, MFN treatment was included in the Finnish BITs as a floor for the full protection and security standard or the fair and equitable treatment standard, but that approach was abandoned.[85] Beginning in the mid-1990s, some Finnish BITs guaranteed MFN treatment for investors as well as investments.[86] Recent Finnish BITs continue to guarantee MFN treatment to both investments and investors, although the right of MFN treatment has been modified in two ways in some Finnish BITs. First, the required treatment sometimes applies to the right to establish investment.[87] Second, the required treatment, at least in the case of investor, sometimes was qualified to refer only to treatment with regard to the management, maintenance, use, enjoyment, and disposal of investments,[88] as well as in some cases the establishment of investments.[89]

82 *See, e.g.*, Japan-Vietnam BIT, Art. 2; Canada-Uruguay BIT, Art. 3.

83 *See, e.g.*, Denmark-Indonesia BIT, Art. III.

84 *See, e.g.*, Finland-Czechoslovakia BIT, Art. 4(3); Finland-Estonia BIT, Art. 4(3).

85 *See, e.g.*, Finland-Czechoslovakia BIT, Art. 4(1); Finland-Estonia BIT, Art. 4(1); Finland-Chile BIT, Art. 3(1).

86 *See, e.g.*, Finland-Thailand BIT, Art. 4(2); Finland-Brazil BIT, Art. 3(2); Finland-Peru BIT, Art. 3(2).

87 *See, e.g.*, Finland-Belarus BIT, Art. 4; Finland-Armenia BIT, Art. 3; Finland-Algeria BIT, Art. 3.

88 *See, e.g.*, Finland-Croatia BIT, Art. 3; Finland-Azerbaijan BIT, Art. 4.

89 *See, e.g.*, Finland-Belarus BIT, Art. 4; Finland-Armenia BIT, Art. 3; Finland-Algeria BIT, Art. 3.

At the beginning of the 1990s, the United Kingdom added a new paragraph to its investor-state disputes provision specifying that, "[f]or the avoidance of doubt," the treatment provided by the MFN treatment provision shall apply to the provisions of Articles 1 to 11, which constitute the entire BIT except for the articles on territorial extension, entry into force, duration, and termination.[90] More particularly, the new language confirms that the MFN treatment obligation extends to dispute resolution. This provision remains virtually unchanged in the U.K. BITs.[91] A number of U.K. BITs that were concluded beginning in the 1980s include language noting that special incentives granted to stimulate the creation of local industries are considered compatible with this provision, provided that they do not significantly affect the investment and activities of nationals and companies of the other party in connection with an investment.[92]

As this discussion indicates, the MFN treatment provision became common in BITs only in the 1970s. Further, the structure of the provision was the subject of significant variation in the early history of the provision, with some developed countries that were among the first to launch BIT programs continuing to modify their provisions significantly even into the 1990s.

7.2.3 MFN Treatment: Arbitral Practice

Several investment disputes have arisen under the MFN treatment provision of various BITs.[93] In the typical case, the claimant alleges that the host state has denied to a covered investment or investor treatment that is as favorable as that guaranteed by the host state to investments or investors of a third country. For example, the claimant may allege a violation of the MFN treatment provision on the ground that the claimant's investment did not receive fair and equitable treatment, which is guaranteed by the host state to investments of investors of third countries. Or, the claimant may allege a violation of the MFN treatment provision on the ground that it was not permitted to submit a claim to investor-state arbitration on the same terms that would apply to an investor covered by the host state's BIT with a third country. In these cases, tribunals never require that the claimant prove that third-country investments or investors actually have received the guaranteed treatment, but only that they are guaranteed the treatment and that the claimant has not received treatment as favorable as that which is guaranteed to the third-country investments or investors. For example, the claimant is not required to prove that investments or investors of a third country actually receive fair and equitable treatment, but only that they are entitled to it. Further, in these cases,

90 *See, e.g.*, United Kingdom-Burundi BIT, Art. 3(1).

91 *See, e.g.*, United Kingdom-Bosnia-Herzegovina BIT, Arts. 3, 7.

92 *See, e.g.*, United Kingdom-Papua New Guinea BIT, Art. 3(3); United Kingdom-Jamaica BIT, Art. 3(3).

93 For additional commentary on the cases, *see* Okezie Chukwumerije, "Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations," 8 *Journal of World Investment and Trade* 597 (2007).

tribunals never consider whether the claimant is in like circumstances with a particular investment or investor covered by the host country's BIT with a third country. Indeed, it may be that no investor or investment covered by the BIT with a third country even exists. Thus, in the typical case, the claimant is relying upon the generalizing effect of an MFN treatment provision and asking the tribunal to treat the claimant or its investment as if it were covered by one or more provisions in the host state's BIT with a third country.

The general MFN treatment provision typically confers a right to no less favorable treatment. Thus, to gain the benefit of the provision, the covered investment or investor must demonstrate that investments or investors of another state have received or have been guaranteed more favorable treatment, a demonstration that may not always be easy. In *AAPL v. Sri Lanka*, a case arising under the United Kingdom-Sri Lanka BIT, the tribunal rejected the claim that Sri Lanka's BIT with Switzerland provided more favorable treatment than its BIT with the United Kingdom.[94] Specifically, the tribunal was unpersuaded that Sri Lanka's BIT with Switzerland imposed a strict liability standard on the parties, as opposed to the due diligence standard imposed by the full protection and security standard of Sri Lanka's BIT with the United Kingdom.

Similarly, in *ADF Group v. United States*, Article 1105 of the NAFTA guaranteed to investment treatment in accordance with international law, including fair and equitable treatment and full protection and security. The claimant argued that the MFN treatment provision of the NAFTA entitled it to rely on the fair and equitable treatment and full protection and security standards of BITs concluded by the United States with Albania and Estonia in which the fair and equitable treatment and full protection and security standards were not characterized as requirements of customary international law, but were guaranteed in terms that implied that they could require greater protection than is required by customary law. The tribunal was not persuaded, however, that the fair and equitable treatment and full protection and security standards as they appeared in these two BITs guaranteed more favorable treatment than the standards as they appeared in the NAFTA.[95]

An early decision that is invoked in many claims involving the MFN treatment provision is the decision on jurisdiction in *Maffezini v. Spain*. In that case, an Argentine claimant submitted a claim to arbitration against Spain under the Argentina-Spain BIT. That BIT provided that an investor could submit a claim to arbitration only if the investor had first submitted the claim to the local courts and 18 months had elapsed since the claim was submitted. The claimant had not satisfied that condition. Spain's BIT with Chile, however, contained no such condition. The claimant argued that the MFN treatment provision of the Argentina-Spain BIT, which guaranteed MFN treatment to covered investments "[i]n all matters subject to this Agreement," required Spain to grant the claimant the same treatment, i.e., the right to submit a claim to arbitration without first submitting the claim to local remedies for a period of 18 months. The tribunal observed that an MFN treatment provision applies only to the subject

94 Award, para. 54.
95 Award, para. 194.

matter of the "basic treaty," that is, the treaty in which appears the MFN treatment provision on which the claimant relies. The tribunal took note of the fact that the MFN treatment provision in the Argentina-Spain BIT guaranteed MFN treatment with respect to "all matters" covered by the treaty. The tribunal found that dispute resolution is inextricably related to the protection of foreign investment, which is the purpose of the BIT, and thus an MFN treatment provision applies to provisions relating to dispute resolution. The tribunal further observed, however, that the MFN treatment provision should not be used to override public policy considerations that the parties might have envisaged as fundamental conditions for their acceptance of the agreement. For example, the MFN treatment provision could not be used to avoid an exhaustion of local remedies requirement, to avoid a provision that resort to local remedies foreclosed resort to international arbitration, or to permit the claimant to choose a different forum than that authorized in the basic treaty. In this case, however, in light of the negotiating history of the treaty between Spain and Argentina and the practice of Spain and Argentina in not consistently including in their other BITs a requirement such as that in the Argentina-Spain BIT, the tribunal did not believe that the requirement to pursue local remedies for a period of 18 months was a fundamental question of public policy. Accordingly, the MFN treatment provision entitled the claimant to the treatment accorded by Spain under the Chile-Spain BIT, meaning that the claimant was entitled to submit its dispute to arbitration without first invoking local remedies.

The *Maffezini* award was instantly controversial. Yet, much could be said in support of the award. Long before *Maffezini* was decided, MFN treatment provisions were understood to generalize treaty benefits, i.e., to extend the benefits accorded by a state in one treaty to all other states with which it has concluded a treaty with an MFN provision applicable to that benefit. The question that elicited the controversy, however, was precisely whether the MFN treatment provision, in fact, is applicable to treatment in the form of remedies. Certainly, in many BITs, including the BIT at issue in *Maffezini*, the language is broad enough to apply to remedies. The treaty in *Maffezini*, for example, applied the MFN treatment provision to "all matters subject to this Agreement" and clearly dispute resolution was a matter subject to the BIT. Further, the distinction between rights and remedies that critics of *Maffezini* asserted that the award had improperly disregarded is a distinction that on principled grounds is difficult to defend. As noted at the beginning of Chapter 10, substantive rights are defined as a practical matter by the extent of their enforcement through disputes provisions. Thus, the host state's consent to investor-state arbitration as a means of enforcing its substantive commitments to covered investment is part of the favorable treatment that the host state provides to covered investment. More generally, the investor-state disputes provision is one of the most important provisions of the BIT and thus ensuring that investors of one nationality receive treatment no less favorable than investors of another nationality generally would require that the former receive the procedural as well as the substantive treatment accorded to the latter. The due process principle of the BITs, embodied in the investor-state disputes provision, is not less important than the principles embodied in other provisions. Further, an investment sometimes is owned by investors of different nationalities. In the event of injury to the investment, claims may be submitted to arbitration by multiple claimants asserting rights under different BITs. Assuming that all of the BITs have an MFN provision, each claimant is likely to be able to claim the benefit of substantive rights granted to any of the claimants, although there is no guarantee that different tribunals will interpret the rights similarly under the facts of the particular dispute. Eliminating differences in remedial provisions may allow claims to be heard contemporaneously either by a single tribunal or by tribunals with overlapping memberships. Such a procedure could advance both efficiency and fairness.

Still, host states when named as respondents in investor-state arbitrations often have objected to the application of the MFN treatment provision to remedial provisions on at least four grounds. One is that they never intended the MFN treatment provision to apply to remedial provisions and thus they have been subjected to the tribunal's jurisdiction in a case not within the scope of their consent to jurisdiction. In many cases, however, it may be more accurate to say that the parties never thought about the issue either way. Host states that raise this objection typically have no *travaux prèparatoires* of any kind demonstrating that application of the MFN treatment provision to disputes provisions was contrary to their intent. That said, however, the objection that this result is contrary to the parties' intention, even if it cannot be proven, may well be correct in some or even many cases, especially in the case of BITs concluded after the issuance of the *Maffezini* award, which focused the attention of many governments on this issue. If states do intend to exclude dispute resolution from the scope of the MFN treatment provision, they could ensure this result in at least some cases by adopting language in their future BITs so specifying. The omission to include such language in the face of so many tribunal decisions applying the MFN treatment provision to dispute resolution would cast doubt on the sincerity of at least some claims that MFN treatment provisions are not intended to apply to dispute resolution provisions. A second ground is that as a matter of policy these countries are opposed to granting the remedial rights that are being claimed by virtue of the MFN treatment provision, although they would not be in the position of having to grant such rights to the claimant had they not agreed to grant them to at least some potential claimants under another BIT. Thus, the objection cannot be that the host state does not wish to grant those procedural rights, but only that it does not wish to grant those procedural rights to investors or investments covered by this treaty. That is, the host state is arguing that, notwithstanding the inclusion of a nondiscrimination provision in the BITs, the host state in fact does wish to discriminate among foreign investments in at least some respects related to the BIT. That position is buttressed by the third ground, that every treaty is a unique balance of rights and duties and to pluck rights from another agreement and transport them into this agreement disturbs that balance. Such plucking, however, is precisely the function of the MFN treatment provision. MFN treatment provisions generalize treaty rights and thereby eliminate distinctions in the type of treatment provided to investments or investors of different nationalities, including to investments or investors not contemplated when the right was first granted. The fourth ground is that, as noted above, application of the MFN treatment provision to complex provisions like investor-state disputes provisions potentially can disrupt the coherence of the treaty and create interpretive difficulties, although in the disputes that have arisen to date such a problem has not yet occurred.

Most tribunals have followed the reasoning in *Maffezini*. In *Gas Natural v. Argentina*, a tribunal again had before it a dispute arising under the Spain-Argentina BIT, although in this case the nationalities of the parties were reversed relative to the situation in *Maffezini*. A Spanish claimant sought to avoid the requirement that it submit its claim to local remedies for 18 months on the ground that the MFN treatment provision in the BIT entitled it to rely upon the United States-Argentina BIT, where no such requirement exists. The tribunal noted that investor-state arbitration has been a crucial element in the protection accorded by BITs and that the MFN treatment provision of the Spain-Argentina BIT explicitly applies to "all" matters subject to the BIT. Argentina's argument that to disregard the 18-month requirement would be inconsistent with its public policy was belied by the fact that most of Argentina's BITs lacked any such requirement. Argentina could not rest its argument on the importance of the exhaustion of local remedies requirement, because the 18-month clause did not require exhaustion of local remedies, but only a resort to them for 18 months. Accordingly, the claimant was entitled to avail itself of the more favorable treatment provided by the investor-state disputes provision in the United States-Argentina BIT.[96] Indeed, the tribunal went on to say that

> [u]nless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute resolution.[97]

In *Suez & Interaguas v. Argentina*, another Spanish investor submitted a claim against Argentina under the Spain-Argentina BIT, this time seeking to avoid the 18-month local remedies requirement on the ground that such a requirement did not appear in the France-Argentina BIT. The tribunal emphasized the breadth of the term "all matters" and the parties' failure to list dispute resolution among the matters excluded from the provision. Regarding the interpretation of the text, the tribunal declined Argentina's invitation to interpret the MFN treatment provision narrowly and held that the ordinary meaning of the language should be adopted. The tribunal noted that, with regard to investment promotion and protection, dispute resolution is as important as other matters governed by the BIT and, therefore, rejected the argument that application of the *ejusdem generis* principle would result in exclusion of dispute resolution from the scope of the provision. The tribunal distinguished the award in *Plama v. Bulgaria*, discussed below, on the basis of differences in the treaty text, evidence from the negotiating history of the BIT at issue in *Plama* that had no counterpart in the Spain-Argentina BIT, and the much more limited effect of applying the MFN treatment provision to dispute resolution in this case than in *Plama*. The tribunal also

96 The tribunal noted that its decision did not appear to be inconsistent with the award of any other tribunal, citing *Siemens v. Argentina* and *Maffezini v. Spain*. The tribunal did note the different result in *Salini v. Jordan*, but remarked that the *Salini* tribunal itself had rested its decision on the particular language of the BIT, which differed from that in *Gas Natural*.

97 Decision on Jurisdiction, para. 49.

rejected the assertion in *Plama* that arbitration provisions are subject to stricter rules of interpretation than other provisions of a BIT.

In *Siemens v. Argentina*, article 3 of the Germany-Argentina BIT prohibited a party from according to covered investments, companies, or nationals of the other party "a less favorable treatment of activities related to investments" than it grants to investments, companies, or nationals of any third state. The tribunal noted that the terms "treatment" and "activities" were unqualified and therefore were not limited to transactions of a commercial or economic nature. Article 4(4) additionally required MFN treatment in all matters covered in Article 4, which included a guarantee of full protection and legal security of investments, a requirement of compensation for expropriation, and a requirement of national treatment with respect to compensation for losses due to war or civil disturbance. The tribunal rejected the argument that its interpretation of Article 3 would render Article 4 superfluous. The tribunal noted that Article 4 addressed matters of special importance to the parties, which could account for the inclusion of an additional MFN treatment provision to deal with those matters.[98] The tribunal cited *Maffezini* with approval and conceded that the word "treatment" in the Germany-Argentina BIT was narrower than the phrase "all matters subject to this Agreement" that had been at issue in *Maffezini*, but concluded that the Germany-Argentina BIT language nevertheless was sufficiently broad to include dispute settlement. Accordingly, the German claimant was entitled to invoke the MFN treatment provision to avoid the requirement in the Germany-Argentina BIT that a dispute be submitted to local courts for 18 months prior to its submission to arbitration because such a requirement was not in the Chile-Argentina BIT. The tribunal found insufficient evidence that the requirement of submission to local remedies was a sensitive public policy or essential part of consent, particularly given that it did not consistently appear in contemporaneous treaties concluded by the parties. The tribunal also rejected the argument that the fact that the investor-state dispute provision of the Germany-Argentina BIT departed from the German model agreement proved that it was a specially negotiated provision, the effect of which should not be modified by application of the MFN provision. The tribunal would not speculate as to the reasons for the departure from the model language and believed that the treaty language should be interpreted in accordance with the clearly expressed intention of the parties. Indeed, the tribunal explained, the very purpose of an MFN treatment provision is to generalize treaty protections and thereby negate the effect of specially negotiated provisions. The tribunal also rejected the argument that, if one benefit of the Chile-Argentina BIT was to be claimed, then the Chile-Argentina BIT should be applied in its entirety. Allowing the German claimant to select provisions from the Chile-Argentina BIT of which to claim the benefit did not elevate the German investor over a Chilean investor because a Chilean investor in Argentina, if it was covered by a treaty with an MFN treatment provision, could claim the benefits of the Germany-Argentina BIT.

98 In *Wintershall v. Argentina*, discussed below, the tribunal gave a different interpretation to this language.

In *National Grid v. Argentina*, the claim arose under the United Kingdom-Argentina BIT, which also required submission of a claim to local remedies for 18 months prior to submission to international arbitration. The claimant argued that the MFN treatment provision of the United Kingdom-Argentina BIT entitled it to rely on the United States-Argentina BIT, which does not include such a requirement. The MFN treatment provision of the United Kingdom-Argentina BIT on which the claimant relied contained two paragraphs of particular relevance. Article 3(1) provided that neither party shall subject covered investments to "treatment" less favorable than that which it accords to investments of third states. Article 3(2) guaranteed MFN treatment to covered investors "as regards their management, maintenance, use, enjoyment or disposal of their investments." As it happened, the United Kingdom had inserted in the MFN treatment provision of BITs concluded after 1991 a sentence reading, "For the avoidance of doubt it is confirmed that treatment provided in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement." The articles listed include the investor-state dispute resolution provision. Such language, however, did not appear in the United Kingdom-Argentina BIT. Further, the United Kingdom had exchanged notes with Panama agreeing that the MFN treatment provision in their BIT did not extend to dispute settlement. Even if it were inferred from this practice that the United Kingdom regarded dispute resolution as within the scope of the MFN treatment provision, no evidence existed concerning whether Argentina concurred in this view. Thus, the tribunal found that the external evidence of the parties' intent was inconclusive. The tribunal held that, in light of the context in which the MFN treatment provision was concluded, which included the importance of dispute resolution procedures to investment protection, the term "treatment" includes dispute resolution.

The award in *National Grid* avoided explicitly answering some obvious questions. The first is the question of identifying the paragraph of the MFN treatment provision on which the tribunal relied. The first paragraph guaranteed an unqualified MFN "treatment" and thus was the most obvious choice. The first paragraph, however, guaranteed MFN treatment to the investment. The claimant was not the investment or the owner of the investment, but a minority shareholder in the investment. This leads in turn to a question as to whether the treatment of an investment includes access to dispute resolution for its minority shareholders. Were the first paragraph the full extent of the MFN treatment provision, one reasonably could conclude from the award that treatment of investment does indeed extend to the ability of even minority shareholders to protect their rights in the investment. Yet, the United Kingdom-Argentina BIT had a second provision guaranteeing to MFN treatment to investors, but only as regards their management, maintenance, use, enjoyment, or disposal of their investments. This raises the question of whether the protection accorded to the investor is different from that accorded to the investment or whether the qualifying language was intended not to limit the scope of the word "treatment" but only to indicate that the treatment did indeed have to relate to the investment in some way and was not a right to MFN treatment of an investor in all matters. Of course, even if the language were considered to qualify the word "treatment," the tribunal could conclude that the qualifying language nevertheless is broad enough to include dispute resolution, as indeed at least two tribunals already have.[99] In short, the tribunal's decision clearly can be justified based on the language of the treaty, but that justification might rest on any of several different lines of reasoning and the award does not indicate which of these lines formed the basis of the decision.

In *Suez & Vivendi v. Argentina*, the tribunal addressed explicitly the issues avoided in *National Grid*. In that case, a Spanish claimant sought to assert a claim under the Spain-Argentina BIT, while a British claimant sought to assert a claim under the United Kingdom-Argentina BIT. Both BITs required that disputes be submitted to local remedies for 18 months and both claimants sought to avoid this provision by claiming through the MFN treatment provision of their respective BITs the benefit of the France-Argentina BIT, which had no such requirement. As it happened, the tribunal in *Suez & Vivendi* was composed of the same three arbitrators as the tribunal in *Suez & Interaguas*, discussed above, in which a Spanish claimant made the same argument regarding the MFN treatment provision under the Spain-Argentina BIT as the Spanish claimant in *Suez & Vivendi*. With regard to the claim by the Spanish claimant, the tribunal employed the same reasoning and often the same language that it employed in *Suez & Interaguas*, and reached the same result, i.e., consistent with *Maffezini* the MFN treatment provision could be used to claim the benefit of the remedies provision in the France-Argentina BIT. With regard to the claim by the British claimant, the tribunal faced essentially the same argument as that made by the British claimant under the United Kingdom-Argentina BIT in *National Grid*. The tribunal applied the same reasoning to the United Kingdom-Argentina BIT provision that it applied to the Spain-Argentina BIT provision. The tribunal in *Suez & Vivendi* acknowledged that the language of the United Kingdom-Argentina BIT was different from that in the Spain-Argentina BIT, but, as had the tribunal in *National Grid*, it interpreted the word "treatment" as broad enough to encompass dispute resolution. Although the tribunal in *Suez & Vivendi* did not explicitly identify the paragraph of the MFN treatment provision upon which it was resting its decision, the tribunal did find that dispute resolution is related to investors' "management, maintenance, use, enjoyment or disposal of their investment" and in particular is related to the "maintenance" of an investment.[100] By interpreting the language of Article 3(2), it implied that it was resting its decision on the paragraph applicable to the investor rather than that applicable to the investment, although it may only have been indicating that the additional language did not affect the result.

Reasons exist to question the *Suez & Vivendi* tribunal's interpretation of the phrase "management, maintenance, use, enjoyment, or disposal of investment." Footnote 13 to the draft Free Trade Agreement of the Americas (FTAA), dated November 21, 2003, records that one delegation proposed inclusion in the negotiating history of a footnote in which the parties note the *Maffezini* decision and then record their shared understanding that the MFN article of the FTAA is expressly limited to matters with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other dispositions of investments and that this does not encompass international dispute resolution mechanisms and therefore could not reasonably lead to a conclusion

99 *See Suez & Vivendi v. Argentina* and *RosInvestCo v. Russia*, discussed below.
100 Award, para. 57.

similar to that of the *Maffezini* case.[101] Language similar to that in Article 3(2) of the United Kingdom-Argentina BIT appears in the U.S. BITs and it is understood in those BITs not to apply to dispute resolution.[102] An explicit statement to that effect appears in a footnote included in the negotiating history of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).[103] Thus, in light of these examples of state practice, the tribunal may have interpreted the language too broadly.

Yet, a second award supports the interpretation in *Suez & Vivendi*. In *RosInvestCo v. Russia*, a case arising under the United Kingdom-Russia BIT, the investor-state disputes provision applied only to certain claims involving an expropriation, such as claims concerning the amount of compensation (but not the fact of the expropriation itself). The claimant, wishing to assert a claim that an expropriation had occurred, sought to incorporate through the general MFN treatment provision a broader investor-state disputes provision in the Denmark-Russia BIT, which applied to "any dispute . . . in connection with an investment." The general MFN treatment provision included two clauses. One guaranteed MFN treatment to investment, while the other guaranteed to investors MFN treatment with respect to their management, maintenance, use, enjoyment, or disposal of investments. The tribunal held that the "treatment" of the "investment" did not include the availability of an investor-state disputes provision of another treaty for the purpose of alleging an expropriation.[104] Rather, access to arbitration affected the rights of the investor rather than the investment. The tribunal held, however, that in the second clause, which guaranteed MFN treatment to the investor, the terms "uses" and "enjoyment" did implicate the availability of investor-state arbitration of an expropriation claim. Thus, the tribunal had jurisdiction over the expropriation claim.[105] The tribunal in *RosInvestCo* thus reached the same result as the tribunals in *National Grid* and in *Suez & Vivendi*, applying similar MFN provisions, although it was more explicit about its rationale, answering questions not completely answered by either of those awards. In *RosInvestCo*, the identity of the beneficiary of the MFN provision was crucial. Other tribunals, however, have rejected the argument that the application of the MFN treatment provision depends on whether the MFN treatment is granted to the investment or the investor.[106]

Application of the principle in *Maffezini* does not necessarily mean that the claimant will prevail in its attempt to apply the MFN treatment provision to the disputes provisions of another treaty. For example, in *Yaung Chi Oo v. Myanmar*, the Singaporean claimant submitted a claim against Myanmar to arbitration under the ASEAN Agreement for the Promotion and Protection of Investments, but sought to base the jurisdiction of the tribunal on the provisions of the Myanmar-Philippines BIT, which

101 The text is available at http://www.ftaa-alca.org.
102 Kenneth J. Vandevelde, *U.S. International Investment Agreements* 248 (2009).
103 *Id.* at 318.
104 Decision on Jurisdiction, para. 129.
105 Decision on Jurisdiction, para. 133.
106 *See Plama v. Bulgaria* (Cyprus-Bulgaria BIT), Decision on Jurisdiction, para. 190; *Siemens v. Argentina* (Germany-Argentina BIT), Decision on Jurisdiction, para. 92.

the claimant argued should be applied through the MFN treatment provision of the ASEAN agreement. The tribunal rejected this argument because the two treaties called for arbitration before different bodies and utilizing different appointing authorities. In short, the tribunal wished to avoid the coherency problem identified above.

Some tribunals have been critical of the reasoning in *Maffezini*. For example, in *Salini Costruttori v. Jordan*, a case that arose under the Italy-Jordan BIT, the claimant sought to submit to arbitration a dispute involving a contract that contained a choice of forum clause. Article 9(2) of the BIT provided that "In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedures foreseen in such investment Agreement shall apply." The MFN provision, Article 3(1) of the BIT, provided that the parties shall grant investments "no less favourable treatment" than that accorded to investments of third states. The claimant argued that Jordan's BITs with the United States and the United Kingdom contained no such requirement as that which appeared in Article 9(2) and thus the claimant was entitled to submit its dispute to investor-state arbitration without satisfying such a requirement. The tribunal rejected this argument, however, holding that the MFN treatment provision of the Italy-Jordan BIT did not apply to dispute resolution because, unlike the provision in the *Maffezini* decision, it did not explicitly provide that it applied to "all matters" relating to investment. Further, article 9(2) of the Italy-Jordan BIT requiring recourse to previously-agreed dispute procedures suggested the existence of a policy contrary to the position urged by the claimant. The tribunal in *Salini* was careful to find textual differences between the MFN treatment provision that it was interpreting and the MFN treatment provision applied in *Maffezini*. As a result, the *Salini* award is not inconsistent in principle with the *Maffezini* award. Nevertheless, the *Salini* tribunal expressed concerns about the wisdom of the *Maffezini* decision. In particular, the tribunal feared that the public policy exception "may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping.'"[107] Whereas the tribunal in *Maffezini* seemed inclined to apply the MFN treatment provision to dispute resolution unless its text precluded application, the *Salini* tribunal seemed inclined not to apply the MFN treatment provision to dispute resolution unless its text explicitly applied to "all matters" related to investment.

In *Plama v. Bulgaria*, Article 4.1 of the Cyprus-Bulgaria BIT provided for ad hoc investor-state arbitration of disputes concerning the amount of compensation for expropriation. The claimant, however, did not rely upon this provision. Rather, the claimant submitted the claim to ICSID arbitration, asserting that the MFN treatment provision of the Cyprus-Bulgaria BIT entitled it to the benefit of Bulgaria's consent to ICSID jurisdiction in other BITs. The MFN treatment provision, Article 3.1, guaranteed to covered investment "a treatment" that is not less favorable than that accorded to investments of investors of third states. Article 3.2 excluded from this treatment privileges that either party accords to third-country investors by virtue of their participation in an economic community, customs union, or free trade area. The tribunal acknowledged that the failure to include dispute resolution in the list of exclusions implied that

107 Decision on Jurisdiction, para. 115.

dispute resolution was included within the term "treatment," but observed that the use of the word "privileges" with equal force could imply that only substantive protections were within the scope of the MFN treatment provision. The tribunal noted that the BIT was intended to provide favorable conditions for investment, but thought that such general statements were not sufficient to establish the intention of the parties to apply the MFN treatment provision to dispute resolution provisions and, citing Sir Ian Sinclair,[108] cautioned that undue emphasis on the object and purpose of a treaty could result in failing to adhere to the intention of the parties. The tribunal observed that BITs concluded by Bulgaria after the 1987 Cyprus-Bulgaria BIT and after the end of the communist regime included dispute resolution provisions authorizing resort to ICSID and that an attempted but unsuccessful renegotiation of the Cyprus-Bulgaria BIT in 1998 sought to revise the dispute resolution provision, from which it could be inferred that the parties themselves did not believe that the MFN treatment provision applied to dispute resolution provisions in other BITs. The tribunal held that a consent to arbitration must be "clear and unambiguous"[109] and that the word "treatment" did not constitute a clear and unambiguous incorporation by reference of dispute resolution procedures. In many cases, it also would be unclear whether a particular dispute resolution provision in another treaty was more favorable and therefore within the scope of an MFN treatment provision. The tribunal questioned whether one could infer from an MFN treatment provision an intent to incorporate "an entirely different mechanism" than that authorized in the BIT.[110] The tribunal also challenged the desirability of incorporating dispute resolution provisions as a matter of policy. Because such a clause allows the investor to select the provisions of another treaty the benefit of which it wishes to claim, applying the MFN treatment provision to dispute resolution could result in the host state's being confronted with a large variety of dispute resolution procedures and undermine efforts to harmonize dispute resolution.

This last point is particularly interesting, because one purpose of an MFN treatment provision is to harmonize treaty practice by allowing all covered investments and investors to claim the same treatment. Where claimants have different perceptions of what is the most favorable treatment, however, the application of an MFN treatment provision to a complex investor-state disputes provision could result in innumerable combinations of provisions, rather than the emergence of a single mechanism constituted of the most favorable clauses of the host state's BITs. As it happens, many of the cases that have addressed the application of the MFN treatment provision to the investor-state disputes provision have involved the claimant's efforts to avoid the same clause, one requiring resort to local remedies for 18 months, a clause that is in only a small number of BITs. To the extent that they were successful, they would have harmonized the host state's treaty practice rather than increased its variety. Other cases, like *Plama*, have involved efforts to avoid an unusually restrictive consent to jurisdiction limited only to certain claims, such as expropriation claims. Thus, in general, claimants have not sought to use the MFN treatment provision to create unique investor-state disputes

108 Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 130 (2d ed. 1984).
109 Decision on Jurisdiction, para. 198.
110 *Id.* at para. 209.

provisions tailored to their special circumstances, but to avoid unusual clauses that impose atypical restrictions on investor-state dispute resolution. This is not to say that the *Plama* tribunal's concern about disharmony would not arise in the future, but only that experience to date has not confirmed it. As it happens, the majority of the tribunals to address whether the MFN treatment provision could be used to avoid the 18-month requirement have decided in the affirmative, while tribunals addressing whether the MFN treatment provision could be used to avoid unusually restrictive consents to jurisdiction generally have decided in the negative.

The *Plama* tribunal disagreed with the *Maffezini* award because the latter did not require clear and unambiguous evidence that the MFN treatment provision applies to dispute resolution, but, in effect, interpreted the MFN treatment provision in the same way as every other provision of the BIT. The tribunal noted that the public policy exception in *Maffezini* did not appear anywhere in the text of the treaty and reflected a recognition by the *Maffezini* tribunal that applying the MFN treatment provision to dispute resolution could lead to undesirable results. The tribunal suggested that a better approach would be to adopt a rule that an MFN treatment provision does not incorporate dispute resolution provisions, in whole or in part, unless the MFN treatment provision "leaves not doubt" that the parties intended to incorporate them.[111] The tribunal observed that the *Maffezini* award is "perhaps understandable."[112] The 18-month local remedies requirement was "nonsensical" from a practical point of view and the tribunal in that case had sought a way to avoid it.[113] The *Plama* tribunal remarked, however, that the difficult exceptional circumstances of the *Maffezini* case should not form the basis of a general principle that would be applied in future cases not involving exceptional circumstances. The tribunal concluded by noting that its considerations were consistent with the award in *Salini*, although it had not relied on that award because the award had been issued after the parties submitted their pleadings.

In a sense, the tribunals in *Maffezini* and *Plama* were concerned about the same problem. In *Maffezini*, the tribunal was concerned about the potential consequences of applying the MFN treatment provision to dispute resolution provisions and thus created, with no basis in the text of the BIT, a public policy exception to its conclusion that an MFN treatment provision could apply to dispute resolution provisions. The *Plama* tribunal, similarly concerned, again without a basis in the text of the BIT, simply created a rebuttable presumption against the inclusion of investor-state disputes provisions within the scope of the MFN treatment provision, a presumption that could be overcome by clear and convincing evidence, which it defined as evidence that leaves no doubt.

In *Telenor v. Hungary*, the dispute resolution provision of the Norway-Hungary BIT applied only to disputes concerning the expropriation, war and civil disturbance, and transfers provisions. The claimant argued that the MFN treatment provision of the treaty allowed it to invoke the investor-state disputes provisions of other unspecified BITs concluded by Hungary. The MFN treatment provision of the Norway-Hungary BIT, at

111 *Id.* at para. 223.
112 *Id.* at para. 224.
113 *Id.*

Article IV, guaranteed to covered investment "treatment" no less favorable than that accorded to investments of investors of any third state. The tribunal "wholeheartedly endorsed[d]" the reasoning of the *Plama* award.[114] The tribunal found that the ordinary meaning of "treatment" is limited to the investor's substantive rights. To interpret the treaty otherwise, said the tribunal, would expose the host state to "treaty shopping," potentially allowing the investor to claim the benefit of selected clauses from a treaty, while disregarding others. Such an interpretation would invite uncertainty and instability, as it would be unclear whether the language of the treaty or the broader language of another treaty would be operative. In addition, where the parties have expressly limited the categories of disputes that may be submitted to arbitration, that interpretation would subvert their intention to limit the tribunal's jurisdiction. The tribunal held, therefore, that an MFN treatment provision should not be used to expand the jurisdiction of the tribunal to categories of disputes beyond those identified in the BIT itself in that absence of clear language that such is the intent of the parties. In this case, the tribunal noted that this was the only BIT that Norway had concluded with such a limitation, while Hungary's practice varied with respect to whether such a limitation was included. The tribunal inferred from this evidence that the parties had made a deliberate choice to limit arbitration to the categories specified in the BIT.

The tribunal also noted that three factors used by the tribunal in *Suez & Interaguas* to distinguish the *Plama* award militated in favor of distinguishing this case from *Suez & Interaguas*. The MFN treatment provision was more limited in *Telenor*, the prior treaty practice demonstrated the parties' intent not to broaden the scope of treaty rights, and the effect of the MFN treatment application sought by the claimant would go beyond merely removing a condition for invoking dispute resolution to expanding the jurisdiction of the tribunal.

The reasoning of the *Plama* tribunal also was adopted in *Berschader v. Russia*, a case arising under the Belgium-Luxembourg Economic Union-Russia BIT, which limited the investor-state disputes provision only to claims concerning the amount or mode of compensation for expropriation. The tribunal held that an MFN treatment provision would apply to an arbitration provision only if its terms clearly and unambiguously so provided. The tribunal found that the phrase "all matters covered by the present Treaty" did not include dispute resolution. The tribunal noted that the phrase could not be read literally, because it did not apply, for example, to provisions addressing the relationship between the two BIT parties. The tribunal noted that the MFN treatment provision had clarifying language under which it applied "particularly to Articles 4, 5 and 6."[115] The investor-state disputes provision was not among the articles listed. The tribunal observed that, given the uncertainty as to the application of the MFN treatment provision to investor-state arbitration, the BIT parties would have had a strong incentive to include the investor-state disputes provision in the clarifying language if they wished the MFN treatment provision to apply to it. The tribunal noted as well the longstanding policy of the Soviet Union, which had been Russia's predecessor as a party to the BIT, not to consent to arbitration of the issue whether an expropriation

114 Award, para. 90.
115 Award, para. 193.

had occurred, thus suggesting that the Soviet Union would not have intended the MFN treatment provision to apply to dispute resolution. For these reasons, the tribunal concluded that the MFN treatment provision did not clearly and unambiguously apply to arbitration clauses.

The tribunal followed the *Plama* award as well in *Wintershall v. Argentina*, a case arising under the Germany-Argentina BIT. In that case, the tribunal held that the term "treatment" did not apply to investor-state dispute resolution because to do so would allow an investor to circumvent the 18-month waiting period that the tribunal considered to be an element of Argentina's consent to arbitration. The tribunal also found support for its decision in Article 4(4) of the BIT, which guaranteed MFN treatment with respect to the matters covered in Article 4, which included the full protection and security provision and the expropriation provision and which were the provisions that underlay the claim in that case. The tribunal found that the special language of Article 4(4) had the effect of excluding matters relating to full protection and security and expropriation from the scope of the general MFN treatment provision, else Article 4(4) would have been superfluous.[116] Thus, the general MFN treatment provision did not apply to the claim at all. The only MFN treatment provision applicable the claim was that in Article 4(4), which applied only to the matters covered in Article 4, which did not include dispute resolution. The tribunal concluded that an MFN treatment provision should be interpreted to apply to dispute resolution only where its language clearly and unambiguously so indicates. Further, even assuming that the *Maffezini* award was followed, the tribunal held that the MFN provision should not be applied to permit the claimant to enjoy the benefit of the investor-state disputes provision in the United States-Argentina BIT, because that BIT provided for a fundamentally different system of arbitration than did the Germany-Argentina BIT. Specifically, the Germany-Argentina BIT required submission of claims to local remedies before their submission to investor-state arbitration, while the United States-Argentina BIT included an election of remedies clause under which submission of a claim to local remedies would preclude investor-state arbitration of that claim. Further, the Germany-Argentina BIT authorized ICSID arbitration, while the United States-Argentina BIT authorized the investor to choose between ICSID arbitration and ad hoc arbitration under the UNCITRAL Rules. Noting that the *Maffezini* award had said that the MFN provision should not be permitted to allow the investor to select a different system of arbitration, the tribunal found that refusing to allow the claimant to invoke the MFN provision to obtain the benefits of the investor-state disputes provision in the United States-Argentina BIT was consistent with *Maffezini*. The tribunal did not address the fact that the claimant was not seeking to utilize the MFN provision to obtain the right to submit

116 As noted above, in *Siemens v. Argentina*, the tribunal interpreted this as language of emphasis rather than language of exclusion. The *Wintershall* tribunal's interpretation is a counter-intuitive one that is justified only by the tribunal's effort to ensure that each provision of the BIT had some independent effect. In fact, however, BITs sometimes do include redundant clauses. The interpretation of the *Siemens* tribunal is likely the correct one, even if it does render a treaty provision superfluous. As the *Siemens* tribunal found, the language of Article 4(4) was likely included for emphasis.

the claim to arbitration under the UNCITRAL Rules, but only to avoid the 18-month local remedies requirements, precisely the use permitted by the *Maffezini* award.

In *Camuzzi v. Argentina*, the Belgium-Luxembourg Economic Union (BLEU)-Argentina BIT required that a claim be submitted to local courts for a period of 18 months prior to their submission to investor-state arbitration. The claimant argued that it should not be required to comply with this requirement because no such requirement appeared in the United States-Argentina BIT. As it happened, Argentina had not argued that the claimant had failed to meet this requirement and thus the tribunal did not need to consider whether it could be avoided through recourse to the MFN treatment provision of the BLEU-Argentina BIT. The tribunal noted that the dispute had been submitted to local courts and that 18 months would have passed without a solution and thus the requirement would have been met in any event.[117]

Some cases have involved efforts to use the MFN treatment provision to apply the substantive provisions, rather than the procedural provisions, of a host-state BIT with a third country. For example, in *MTD Equity v. Chile*, a Malaysian claimant submitted to arbitration a claim against Chile under the Malaysia-Chile BIT. Article 3(1) of that BIT guaranteed to investments "treatment" not less favorable than that received by investments of investors of any third state. The tribunal held that the MFN treatment provision allowed the claimant to rely on the fair and equitable treatment requirement and the prohibition on unreasonable or discriminatory measures in Chile's BIT with Croatia as well as the prohibition on unreasonable or discriminatory measures and the observance of obligations provision in Chile's BIT with Denmark. The tribunal reasoned that the MFN treatment provision should be interpreted in the manner that best protects investments. Further, the MFN treatment provision specified certain exclusions, notably those for tax treatment and benefits extended under regional cooperation agreements, and dispute resolution was not one of the matters expressly excluded.

In reply to: *Bayinder v. Pakistan*, the Turkey-Pakistan BIT did not include a fair and equitable treatment provision. The claimant argued that it was entitled, through the MFN treatment provision of that BIT, to the protection of that standard because it appeared in Pakistan's BITs with France, the Netherlands, China, the United Kingdom, Australia, and Switzerland. The tribunal accepted this argument for purposes of assessing jurisdiction.[118] Similarly, in *L.E.S.I. v. Algeria*, a case arising under the Italy-Algeria BIT, the tribunal permitted the claimant to obtain the benefit of the fair and equitable treatment standard in the BLEU-Algeria BIT, although the tribunal found no violation of the standard. In *CME v. Czech Republic*, the tribunal held that the MFN treatment provision of the Netherlands-Czech Republic BIT entitled the claimant to the benefit of the standard of compensation for expropriation prescribed by the United States-Czech Republic BIT.[119]

Some awards involved unsuccessful efforts to apply the MFN treatment provision to scope provisions, rather than substantive or procedural provisions. In *Tecmed v. Mexico*, a case arising under the Spain-Mexico BIT, the claimant sought to use the

117 Decision on Jurisdiction, para. 121.
118 Decision on Jurisdiction, para. 232.
119 Final Award, para. 500.

MFN treatment provision to obtain more favorable treatment with respect to the retroactive application of the BIT provided by the Austria-Mexico BIT. The tribunal rejected that argument, however, holding that matters relating to the agreement's temporal application, due to their significance and importance, must be specifically negotiated by the parties and cannot be impaired by application of the MFN treatment provision. In reaching this conclusion, the tribunal cited with approval the paragraphs of the *Maffezini* decision on jurisdiction in which it was held that the beneficiary of the MFN treatment provision should not be able to override fundamental public policy considerations.[120] In *MCI Power v. Ecuador*, the claimants argued that the MFN provision of the United States-Ecuador BIT entitled them to the protection of the preservation of rights provision of the Argentina-Ecuador BIT, but the tribunal rejected the argument.[121]

In *Société Générale v. Dominican Republic*, a case arising under the France-Dominican Republic BIT, the tribunal held that the MFN treatment provision could not be used to import a definition of "investment" from the CAFTA-DR.[122] This award seems clearly correct, because an asset must be an investment before the MFN treatment provision can apply at all. To permit an asset to use the MFN treatment provision to qualify itself as an investment entitled to use the MFN treatment provision would rest on circular reasoning.

In one case, the claimant sought unsuccessfully to utilize the MFN treatment provision to rely on the absence of a provision from a BIT between the host state and a third party. In *CMS Gas Transmission Company v Argentina*, the Argentina-United States BIT, on which the claim was based, included a clause that permitted either party to take measures necessary for the maintenance of public order or the protection of its own essential security interests. Argentina sought to invoke this clause to justify its modification of the tariff structure applicable to claimant's investment. The U.S. claimant contended that the clause was rendered inapplicable by the MFN treatment provision of the BIT because Argentina's BITs with other states did not include such a clause and thus the U.S. claimant was entitled to protection undiminished by the presence of the clause. The tribunal, however, rejected this argument. It held that the MFN treatment provision might be used to claim the benefit of a similar, but more favorable, clause in another treaty. It could not be used, however, to claim the benefit of the absence of a clause in another treaty.

In one case, *Parkerings-Compagniet v. Lithuania*, a case arising under the Norway-Lithuania BIT, the claimant did allege that it had been treated less favorably than a third-country investor, a rare case in which the MFN treatment provision is relied upon not for its generalizing effect but as a basis for compensation as a result of preferential treatment of a third-country investor. As discussed in Section 7.2.5, the tribunal found that the Norwegian claimant was not in like circumstances with the Dutch investor who was the beneficiary of the more favorable treatment. Thus, no violation occurred. The Norway-Lithuania BIT did not expressly impose a like circumstances condition

120 Award, para. 69, citing *Maffezini v. Spain*, Decision on Jurisdiction, paras. 62–63.

121 Award, para. 128.

122 Decision on Jurisdiction, para. 41.

on the MFN treatment provision, but the tribunal found such a condition to be inherent in the concept of MFN treatment.[123]

7.2.4 National Treatment: Origins

As noted in Section 7.2.2, prohibitions on discrimination appeared in the earliest BITs. Article 1(2) of the first BIT, the 1959 Germany-Pakistan BIT, provided that "capital" in the territory of one party "shall not be subjected to any discriminatory treatment on the ground that ownership of or influence upon it is vested in nationals or companies" of the other party, although this right to nondiscrimination was subject to existing local law. Article 2 set forth an early form of the unreasonable and discriminatory measures provision. Certainly, the references to discrimination were broad enough to include denials of national treatment.

The first Swiss BIT, concluded with Tunisia in 1961, included a national treatment provision linked to fair and equitable treatment. Article 1 of that treaty required fair and equitable treatment, which in no case was permitted to be less than national treatment.

The first Dutch BIT, concluded with Tunisia in 1963, required at Article 1 a "just and nondiscriminatory" treatment, which shall not be less than national treatment. This language quickly evolved to require the same "protection" as host-state nationals received.[124] By the mid-1980s, the Dutch BITs guaranteed national "treatment," with exceptions for benefits accorded under an economic integration or taxation agreement.[125]

The first Belgium-Luxembourg Economic Union (BLEU) BIT, signed with Tunisia in 1964, required that each party provide to covered investments "at least the same security and protection that it grants to those of its own nationals or to the investments of nationals and companies of third states."[126] This language was similar to that which had appeared in many FCNs. Thus, both national treatment and MFN treatment were elements of the BLEU BIT practice from the beginning. That said, however, the BLEU BITs over the next forty years typically contained no national treatment provision. Only in the current decade has the national treatment provision become a regular feature of the BLEU BITs.[127]

The first Danish BIT, concluded with Madagascar in 1965, like the Swiss-Tunisia BIT of four years before, included a national treatment provision linked to fair and equitable treatment. Article 6 of that treaty required fair and equitable treatment, which in no case was permitted to be less than national treatment. Danish practice ever since has, at times, linked fair and equitable treatment with nondiscrimination. In 1968, Denmark deleted the fair and equitable treatment standard and incorporated instead a

123 Award, paras. 368–369.

124 *See, e.g.*, Netherlands-Indonesia BIT, Art. 5.

125 *See, e.g.*, Netherlands-Sri Lanka BIT, Art. 5; Netherlands-Philippines BIT, Art. 4.

126 BLEU-Tunisia BIT, Art. 1.

127 *See, e.g.*, BLEU-Costa Rica BIT, Art. 4; BLEU-Sudan BIT, Art. 4; BLEU-D.R. Congo BIT, Art. 4.

general requirement of national treatment with respect to "any similar enterprise".[128] Denmark did not conclude any more BITs until 1980. When it resumed its program, the national treatment obligation was omitted.[129] In 1988, Denmark modified its practice again. It adopted a general national treatment obligation, with an exception for taxation agreements,[130] while also restoring the fair and equitable treatment standard. In the mid 1990s, Danish practice required fair and equitable treatment, which in no case shall be less than national treatment, although the national treatment obligation was subject to exceptions for customs union agreements and matters of taxation.[131]

The first Swedish BIT, concluded with Ivory Coast also in 1965, was similar[132] to the early Danish BITs. The Swedish BIT program went into a hiatus in 1967. When it resumed in 1978, the reference to national treatment was omitted. A general national treatment provision was inserted into many of the Swedish BITs beginning in the early 1990s[133] and such a provision is now typical.[134]

By the mid-1960s, no form of the national treatment provision was yet typical in the BITs. Perhaps not surprisingly, a national treatment provision did not appear in the 1967 OECD Draft Convention on the Protection of Foreign Property. Neither had one appeared in the 1959 Abs-Shawcross convention. The OECD draft convention did include general prohibitions on discrimination. The International Code of Fair Treatment for Foreign Investment proposed by the International Chamber of Commerce in 1949 contained extensive provisions on nondiscrimination, but these seem not to have influenced the content of the BITs.

State practice continued to be inconsistent in the 1970s. Early French BITs sometimes required that each party provide the same security and protection to covered investments that it provides to its own nationals.[135] Alternatively, they sometimes required fair and equitable treatment, which in no case shall be less than national treatment.[136] Sometimes a national treatment provision did not appear at all.[137] By the early 1980s, however, the French BITs included a general national treatment provision applicable to investments and associated activities.[138]

128 *See, e.g.*, Denmark-Indonesia BIT, Art. III.
129 *See, e.g.*, Denmark-Romania BIT, Art. 3; Denmark-China BIT, Art. 3.
130 *See, e.g.*, Denmark-Republic of Korea BIT, Art. 3, Denmark-Peru BIT, Art. 3; Denmark-Venezuela BIT, Arts. 3–4.
131 *See, e.g.*, Denmark-Mongolia BIT, Arts. 3(1),4; Denmark-India BIT, Arts. 3(1),4; Denmark-Nicaragua BIT, Arts. 3-4; Denmark-Ethiopia BIT, Arts. 3-4; Denmark-Croatia BIT, Art. 3; Denmark-Cuba BIT, Arts. 4–5; Denmark-Kyrgyz Republic BIT, Arts. 3–4.
132 Sweden-Ivory Coast BIT, Art. VI.
133 *See, e.g.*, Sweden-Chile BIT, Art. 3(1); Sweden-Bulgaria BIT, Art. 3(1); Sweden-Belarus BIT, Art. 3(1); Sweden-Republic of Korea BIT, Art. 3(1).
134 *See, e.g.*, Sweden-Kazakhstan BIT, Art. 3(1); Sweden-Croatia BIT, Art. 4(1); Sweden-Bosnia-Herzegovina BIT, Art. 3(1); Sweden-Ecuador BIT, Art. 3(1).
135 *See, e.g.*, France-D.R. Congo BIT, Art. 2; France-Indonesia BIT, Art. 3; France-Malaysia BIT, Art. 2.
136 *See, e.g.*, France-Egypt BIT, Art. 3.
137 *See, e.g.*, France-Singapore BIT.
138 *See, e.g.*, France-Equatorial Guinea BIT, Art. 4; France-Panama BIT, Art. 4.

Italy's 1975 BIT with Egypt included a general national treatment provision,[139] although such a provision did not become standard until the late 1980s.[140] Some Italian BITs also guarantee national treatment with respect to activities connected with an investment.[141]

The United Kingdom's BIT program consistently included a national treatment provision from the beginning. The first U.K. BIT, signed with Egypt in 1975, at article 3(2), guaranteed national treatment to covered investors with respect to the management, use, enjoyment, or disposal of their investments. Under Article 7, however, this provision did not apply to treatment extended by virtue of a customs union or free trade area agreement or an agreement or legislation relating wholly or mainly to taxation. A number of U.K. BITs that were concluded beginning in the 1980s included language noting that special incentives granted to stimulate the creation of local industries are considered compatible with the general national treatment provision provided that they do not significantly affect the investment and activities of nationals and companies of the other party in connection with an investment.[142]

The U.S. BIT program also adopted a consistent approach to national treatment from the beginning. Its first BIT, concluded with Egypt in 1982, guaranteed national treatment to covered investment, but brought several innovations to BIT practice.[143] First, in the U.S. BITs, the obligation of national treatment applied not only to the treatment of investments once established, but to the right of investors to establish investments. The U.S. BITs would remain unique in this regard until the conclusion of the NAFTA in 1992. A right of national and MFN treatment with respect to the establishment of investment now can be found as well in the Canadian and Japanese BITs.[144]

Second, the U.S. BITs guaranteed national treatment to investments and to certain activities associated with investments. The U.S. BITs abandoned the protection for associated activities in its 1994 model negotiating text.

Third, the U.S. BITs allowed each party to designate in an annex sectors of the economy in which it reserved the right to deny national treatment. Beginning with the 1991 model negotiating text, the U.S. BITs also authorized the parties to specify sectoral exceptions to the MFN treatment obligation.

The U.S. BITs required treatment as favorable as that granted only to investments in like situations with covered investment. As has been noted, some concept of comparability is inherent in any nondiscrimination provision.[145] The U.S. BITs, however, in using the term "in like situations" provided a verbal formula for ascertaining which

139 Italy-Egypt BIT, Art. II(1).
140 *See, e.g.*, Italy-Hungary BIT, Art. 3(1); Italy-Bangladesh BIT, Art. 3(1); Italy-Argentina BIT, Art. 3(1).
141 *See, e.g.*, Italy-Hungary BIT, Art. 3(2); Italy-Bangladesh BIT, Art. 3(2); Italy-Nicaragua BIT, Art. III(1).
142 *See, e.g.*, United Kingdom-Papua New Guinea BIT, Art. 3(3); United Kingdom-Jamaica BIT, Art. 3(3).
143 United States-Egypt BIT, Art. II.
144 *See, e.g.*, Japan-Vietnam BIT, Art. 2; Canada-Uruguay BIT, Art. 3.
145 *See* Section 7.1.

investments shall be compared to the covered investment. Some earlier Danish BITs had included language guaranteeing national treatment to a "similar enterprise."[146]

By the mid-1980s, the main forms of the national treatment provision were established in BIT practice. Yet the provision achieved its current level of prevalence in BIT practice only in the 1990s. Indeed, several countries that were among the first to inaugurate BIT programs adopted the national treatment standard only in the 1990s. For example, Kuwait began its BIT program in 1964, but a general national treatment obligation did not become typical of the Kuwaiti BITs until the 1990s.[147] The provision commonly guaranteed national treatment to both investments and investors. Some Kuwaiti BITs required that the investors or investors be "in like situations."[148]

Austria launched its BIT program in the 1970s, but a general national treatment standard did not regularly appear until the 1990s. The national treatment standard in the 1990s applied to both investors and their investments,[149] although in some cases the national treatment guaranteed to investors was limited to treatment with respect to the management, maintenance, use, enjoyment, operation, sale, and liquidation of investments.[150] In the more recent Austrian BITs, this qualification applies to the national treatment obligation with respect to both investments and investors.[151]

Finland began its BIT program in 1980, but the Finnish BITs began to guarantee national treatment to investments only in the mid-1990s.[152] Soon, national treatment was guaranteed to investors as well as investments.[153] Recent Finnish BITs continue to guarantee national treatment to both investments and investors, although the right of national treatment has been modified in two ways in some Finnish BITs. First, the requirement of national treatment often applies to the right to establish investment.[154] Second, the required treatment, at least in the case of investor, may not be treatment generally, but treatment with regard to the management, maintenance, use, enjoyment, and disposal of investments,[155] as well as in some cases the establishment of investments.[156]

7.2.5 National Treatment: Arbitral Practice

Several arbitrations have considered claims that the host state violated its national treatment obligation. In general, the awards have held that the national treatment

146 *See, e.g.*, Denmark-Indonesia BIT, Art. III.
147 *See, e.g.*, Kuwait-Czech Republic BIT, Art. 4; Kuwait-Ethiopia BIT, Art. 4; Kuwait-Croatia BIT, Art. 4.
148 *See, e.g.*, Kuwait-Ethiopia BIT, Art. 4; Kuwait-Croatia BIT, Art. 4.
149 *See, e.g.*, Austria-Cape Verde BIT, Art. 3(1); Austria-Croatia BIT, Art. 3(1).
150 *See, e.g.*, Austria-Republic of Korea BIT, Art. 3(1)-(2); Austria-Chile BIT, Art. 3(1)-(2).
151 *See, e.g.*, Austria-Bosnia-Herzegovina BIT, Art (3)(4); Austria-Libya BIT, Art. 3(4); Austria-Jordan BIT, Art. 3(4); Austria-Armenia BIT, Art. 3(4).
152 *See, e.g.*, Finland-Chile BIT, Art. 3(1).
153 *See, e.g.*, Finland-Republic of Korea BIT, Art. 3; Finland-Thailand BIT, Art. 4; Finland-Brazil BIT, Art. 3; Finland-Peru BIT, Art. 3(2).
154 *See, e.g.*, Finland-Belarus BIT, Art. 4; Finland-Armenia BIT, Art. 3; Finland-Algeria BIT, Art. 3.
155 *See, e.g.*, Finland-Croatia BIT, Art. 3; Finland-Azerbaijan BIT, Art. 4.
156 *See, e.g.*, Finland-Belarus BIT, Art. 4; Finland-Armenia BIT, Art. 3; Finland-Algeria BIT, Art. 3.

provision prohibits discrimination on the basis of nationality. Measures that explicitly treat comparable foreign and domestic investment differently would violate national treatment. Measures that do not explicitly treat foreign and domestic investment differently, but that have a disproportionate adverse impact on foreign investment (sometimes referred to as "*de facto* discrimination") also violate national treatment if the host state's intent was to discriminate against foreign investment. As will be seen, in at least one case a tribunal has held that even unintentional discrimination violates national treatment.

Most cases do not involve discrimination against foreign investment on the face of the measure. Rather, in the typical claim under the national treatment provision, a host-state measure that is textually neutral is alleged to have a discriminatory impact on foreign investment. For example, in *S.D. Myers v. Canada*, a case arising under the NAFTA, the claimant challenged Canada's ban on the export of a hazardous chemical known as PCBs. The claimant wished to export PCBs to the United States, where its facility would dispose of them for a fee. Thus, the effect of the ban was to foreclose S.D. Myers from the business of disposing of PCBs originating in Canada. The ban did not textually discriminate in any way against foreign investments. All companies, Canadian and foreign, were prohibited from exporting PCBs. The tribunal held that discrimination could be demonstrated either by the contents of the measure on its face or by its practical effect in creating a disproportionate benefit for nationals over non-nationals. Although the tribunal conceded that the measure on its face did not favor Canadian nationals over others, it found that the practical effect was to disadvantage the U.S. company, since no Canadian competitor needed to export PCBs in order to enter the market. The tribunal then inquired as to whether this discriminatory effect was the result of an intent to discriminate. It noted statements by Canadian officials to the effect that the ban would preserve the PCB disposal business for Canadian companies and found that the ban therefore violated national treatment. While Canada's desire to strengthen its industry was a legitimate goal, alternative ways consistent with NAFTA obligations were available for achieving that goal. For example, Canada could have granted subsidies to Canadian industry. Indeed, the fact that Canada eventually reopened its border to PCB exports demonstrated that the ban was not necessary to address the situation effectively.

While in *S.D. Myers* the claimant had proof of the host state's discriminatory intent, that is not always the case. In *Pope and Talbot v. Canada*, another case arising under the NAFTA, in an effort to resolve a trade dispute with the United States, Canada limited softwood lumber exports to the United States, assigning an export quota to each producer. The claimant alleged that it had received a less favorable treatment with respect to its quota. As explained below, the tribunal found that most of the Canadian producers with more favorable treatment were not in like circumstances with the claimant and thus were not appropriate comparators for purpose of applying the national treatment provision. Although the claimant apparently was regarded by the tribunal as in like circumstances with certain producers in British Columbia, the tribunal observed that the measures of which the claimant complained adversely affected a large number of Canadian producers. The tribunal thus could find no convincing evidence that the treatment of claimant's investment was based on nationality. Rather, the tribunal found that the manner of allocating quotas was a rational means of avoiding a trade dispute. Accordingly, the tribunal found no violation of national treatment.

Where evidence of a discriminatory motive is absent, a tribunal may be willing to presume discriminatory motive from the evidence of the discriminatory impact. For example, in *Feldman v. Mexico*, another case arising under the NAFTA, Mexico denied a company owned by a U.S. national a tax rebate for cigarettes sold for export, while at least three exporters of Mexican nationality were given the rebates. The tax law did not explicitly discriminate against foreign investment, but the law was applied in such a way that the foreign investment was treated differently than the domestic companies. The tribunal observed that the national treatment provision of the NAFTA, Article 1102, did not explicitly require that a discriminatory motive be shown, but seemed to require only proof of less favorable treatment. The tribunal nevertheless found, citing the U.S. Statement of Administrative Action regarding NAFTA, that Article 1102 prohibits only discrimination by reason of nationality. The tribunal observed that requiring a claimant to prove that discrimination is based on nationality could impose an insurmountable burden on the claimant, because such information may be available only to the government. The tribunal thus was willing to assume that the different treatment was based on claimant's nationality, in the absence of evidence to the contrary. The tribunal went on to find evidence that raised at least a "strong suspicion" that Mexico had acted on the basis of the claimant's nationality.[157] The tribunal accordingly found that Mexico had violated its obligation to provide national treatment.

In *Champion Trading v. Egypt*, a case arising under the United States-Egypt BIT, the claimant alleged that Egypt had violated the national treatment obligation by declining to make reimbursement payments to its investment, a cotton trading company, although such payments had been made to other cotton trading companies owned by Egyptian investors. The tribunal observed that, even assuming that claimant's investment were treated differently than local investment in like situations, "[t]he question would remain whether a difference of treatment in like situations could be permissible based on other objective grounds."[158] That is, the tribunal appeared to recognize that different treatment would not violate the national treatment obligation if it were justified on grounds other than nationality, i.e., if it were not the result of a discriminatory motive. In any event, as discussed below, the tribunal found that none of the companies that received the more favorable treatment were in like situations with the claimant's investment.

In *Occidental v. Ecuador*, a case arising under the United States-Ecuador BIT, the tribunal did not require proof of a discriminatory motive. In that case, Ecuador had administered a value-added tax (VAT) refund system in such a way that the claimant received less favorable treatment than domestic investments in like situations. Specifically, the claimant did not receive a refund of the tax on its exports, while domestic companies did. The tribunal found this difference in treatment to be a violation of the national treatment provision, although it acknowledged that the difference was not the result of an intent to discriminate against foreign investment, but rather the

157 Award, para. 182.

158 Award, para. 134.

result of an effort to administer a complex web of regulations. The finding of a violation where the difference in treatment was founded on legitimate regulatory objectives is inconsistent with the majority of the awards.

In some cases, a claim that the national treatment obligation has been violated fails because the claimant does not prove that the host-state measures affected the claimant differently than other investments. In *International Thunderbird v. Mexico*, a case arising under the NAFTA, the claimant alleged that Mexico's enforcement of the gambling laws against its investment violated the national treatment obligation. The tribunal found, however, that the Mexican authorities had sought to close not only claimant's operation, but Mexican gambling facilities as well. The tribunal observed that some facilities had been able to gain temporary injunctive relief in Mexican courts that allowed them to operate, but that the Mexican authorities were appealing those orders. The judicial branch, of course, is bound by BIT obligations just as the political branches are and thus judicial decisions that discriminated on the basis of nationality by allowing Mexican gambling facilities, but not the claimant's facility, to operate would violate the national treatment provision. In the case of the judicial branch, however, tribunals have held that it is the court system as a whole that is to be evaluated against the obligations of the BIT[159] and thus a claim that the judicial branch had violated the national treatment obligation could not arise while appeals were pending. The tribunal also acknowledged that some Mexican facilities were still operating, but found insufficient evidence to establish that Mexico had knowledge of these facilities and had deliberately allowed them to remain open.

The tribunal also engaged in an ambiguous discussion of whether establishing the claim would have required proof a discriminatory motive. The tribunal said,

> It is not expected from Thunderbird that it show *separately* that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor. That case is to be proven by a foreign investor, and, additionally the reason why there was a less favourable treatment.[160]

Thus, the tribunal seemed to suggest in the first sentence that the claimant need show only less favorable treatment and need not show that the less favorable treatment was motivated by nationality. The last sentence, however, seems to suggest that the claimant must prove the reason for the less favorable treatment, i.e., must show that it was motivated on improper grounds. To deepen the ambiguity, the tribunal cited *S.D. Myers*, where the tribunal found a discriminatory motive; *Pope & Talbot*, where the tribunal rejected the national treatment claim because it did not find a discriminatory motive; *Feldman*, where the existence of a motive was required but presumed; and *Occidental*, where no motive was required. Because the tribunal found no discrimination, however, it did not need to address the issue of a discriminatory motive.

159 *See* Section 10.4.

160 Award, para. 177. Emphasis in original. Citations omitted.

The tribunal closed its discussion of the national treatment provision with a *dictum* that seemed to place a public policy limitation on the national treatment obligation. The tribunal observed that even if the claimant had proven that Mexico did not enforce its gambling laws uniformly and, in effect, selectively prosecuted the claimant on the basis of its nationality, "it would be inappropriate for a NAFTA tribunal to allow a party to rely on Article 1102 of the NAFTA to vindicate equality of nonenforcement within the sphere of an activity that a Contracting Party deems illicit."[161] This *dictum* seems questionable. The tribunal appears to say that on grounds of public policy it would decline to apply the national treatment provision to the enforcement of criminal laws. Covered investments are entitled to nondiscriminatory treatment, including in the application of criminal laws. As the tribunal said in *Feldman v. Mexico*, "Mexico is of course entitled to strictly enforce its laws, but it must do so in a non-discriminatory manner, as between foreign investors and domestic investors."[162] Further, a criminal law exception has no basis in the treaty text. Such unwritten exceptions obscure the treaty language, contrary to the transparency principle, and, to the extent that they are created by a tribunal after a dispute has arisen, they constitute a retroactive, *de facto* revision of the treaty that undermines the security principle. A state that wishes to exempt enforcement of its criminal laws from the application of the national treatment provision should do so through treaty language explicitly creating such an exception, thereby giving notice of the limits of treaty protection to investors. Finally, criminal law embodies many of a state's most important public policies and certainly foreign investments are and should be subject to a state's criminal laws to the same extent as other investments. Rarely, however, should a state have a legitimate reason to enforce its criminal laws on the basis of nationality. Indeed, the more important the public policy behind the law, the greater the need for consistent application of the law. It is in the area of criminal law, where sanctions are often the most severe and where transgressions are met with moral condemnation as well as the imposition of penalties, that the need for transparency, security and nondiscrimination is particularly important.

Another claim that failed because of the claimant's inability to prove discrimination was *ADF Group v. United States*, a case arising under the NAFTA. In that case, a Canadian company challenged a U.S. government requirement that the steel used in government-funded highway construction projects be of U.S. origin. The tribunal observed that the law did not on its face discriminate against steel owned by Canadian investors or against Canadian steel fabricators. All steel used in the highway project was required to be of U.S. origin, regardless of ownership.[163] The tribunal noted that such a regulation could give rise to a claim for *de facto* discrimination if it were shown that U.S. companies were inherently advantaged by a domestic content requirement.[164] The claimant, however, had submitted no evidence that it would have benefited economically from being allowed to use steel fabricated in Canada and thus had not established a claim of *de facto* discrimination.

161 Award, para. 183.
162 Award, para. 169.
163 Award, para. 156.
164 Award, para. 157.

Although an investment or investor seeking national treatment normally seeks the treatment accorded by the host state to its own nationals in its territory, the tribunal in *Maffezini v. Spain*, a case arising under the Argentina-Spain BIT, commented that the national treatment obligation also can require the treatment that the host state obtains through BITs for its nationals abroad. For example, if Spain concluded BITs with third countries entitling Spanish investors to fair and equitable treatment of their investments abroad, then Spain would be required to provide fair and equitable treatment to investments in its territory that were covered by a national treatment guarantee. The tribunal in *ADF Group v. United States*, a case arising under the NAFTA, cited this language from *Maffezini*, but found it inapplicable because the national treatment obligation of the NAFTA does not apply to government procurement programs, such as the highway construction project at issue in that case.

The national treatment obligation sometimes explicitly prohibits discrimination only as among investments (or, in some treaties, investors) "in like circumstances" or "in like situations." The two phrases are used interchangeably here. Several tribunals have addressed the meaning of "like circumstances." In general, tribunals have treated investments as in like circumstances where they have no differences that are related to legitimate regulatory objectives. That is, if the host state has legitimate regulatory reasons for treating the investments differently, then they are not in like circumstances and treating them differently will not violate the national treatment obligation.

In *Pope and Talbot v. Canada*, a case arising under the NAFTA, the tribunal observed that the meaning of "in like circumstances" varies according to the factual and legal contexts. In that case, the context included the investment-liberalizing objectives of the NAFTA and the entire softwood lumber trade dispute between Canada and the United States that had given rise to the measures about which the claimant was complaining. The tribunal also noted that any comparison should be of investments in the same economic sector. The tribunal went on to observe, however, that the inquiry did not end with that question. Specifically, the tribunal held that differences in treatment will presumptively violate the national treatment provision unless they have a "reasonable nexus to rational government policies" that do not distinguish on their face or in their effects between foreign and domestic companies and do not otherwise "unduly undermine" the investment liberalization objectives of NAFTA.[165] The tribunal found that different treatment of softwood lumber producers in provinces not covered by the agreement or new entrants in other provinces covered by the agreement were justified by rational policies to avoid the threat of U.S. retaliation and to provide for new entrants into the market. Therefore, these producers were not in like circumstances with the claimants. Within British Columbia, where claimant's investment was located, the tribunal found that a history of different treatment of coastal and interior producers prior to Canada's efforts to resolve the trade dispute meant that these groups of producers were not in like circumstances.

The *Pope & Talbot* approach to defining like circumstances was followed in *Parkerings-Compagniet v. Lithuania*, a case involving the Norway-Lithuania BIT and

165 Award, para. 78.

one of the rare cases where the term "like circumstances" is discussed in the context of the MFN treatment provision. Although the BIT did not expressly limit the MFN treatment provision to investors in like circumstances, the tribunal held that "[t]he essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances."[166] The tribunal also held that "two investors will not be in like circumstances if a justification of the different treatment is established."[167] The tribunal found that the Norwegian claimant's parking project was not in like circumstances with another project performed by a Dutch foreign investor because the former was larger and in a culturally sensitive area. That is, the different impact of the two projects was related to the host state's legitimate archeological and environmental policies.

The tribunal also followed the *Pope & Talbot* approach in *GAMI Investments v. Mexico*, another case arising under the NAFTA. In that case, Mexico expropriated 22 sugar mills, including Mexican-owned mills and five 5mills owned by a company in which the claimant was a minority shareholder. The tribunal found that no violation of the national treatment provision occurred, seeming to rest the decision on multiple grounds. Although the tribunal acknowledged that GAMI's investment was treated differently than some Mexican mills, the tribunal found that GAMI had failed to demonstrate that its circumstances were sufficiently like those of the nonexpropriated mills for the disparate treatment to violate the national treatment provision of the NAFTA. Mexico's decision to expropriate certain sugar mills and not others was not based on a discriminatory motive, but was "plausibly connected" to a legitimate policy of ensuring that the sugar industry was owned by solvent enterprises.[168]

The same approach was followed in *Champion Trading v. Egypt*, a case arising under the United States-Egypt BIT. In that case, the parties agreed that the claimant, a cotton trading company, was in like situation with other publicly- or privately-owned cotton trading companies. All these companies, purchased, ginned, and sold cotton. The claimant alleged a violation of national treatment because some such companies had received payments from the Egyptian government while others had not. The tribunal found, however, that in fact the claimant was not in a like situation with those cotton trading companies that received the payment. The payments were made to two groups of companies. One set of payments was made to companies to extinguish debts incurred prior to 1994, before the claimant's investment existed. These debts had arisen because prior to 1994 the government controlled the price at which cotton was purchased from farmers as well as the price at which it was sold, in some cases forcing cotton trading companies to suffer a loss. Ordinarily, of course, the date of incorporation might seem a trivial difference between two investments, but in this case the fact that the claimant's investment came into existence after 1994 was relevant to advancing the state's legitimate, nondiscriminatory policy of reimbursing all companies for debts incurred prior to that date as a result of the government pricing system. Thus, that

166 Award, para. 369.
167 Award, para. 375.
168 Award, para. 114.

policy served to distinguish the claimant's investment from recipients of the first type of payment. After 1994, the government allowed cotton trading companies to choose whether to purchase and sell their cotton through a cotton exchange at government fixed prices or to purchase and sell on the open market. A second set of payments reimbursed companies that had chosen to purchase and sell their cotton through the cotton exchange. The claimant's investment had chosen not to purchase through the exchange. The tribunal found that the claimant's investment could not be compared with other cotton trading companies that did purchase through the exchange. The payments were intended to reimburse the companies for losses associated with their purchase through the exchange and thus, the tribunal might have said, were a measure reasonably related to a legitimate nondiscriminatory policy. Finding that none of the companies that were said to receive more favorable treatment in the form of reimbursements was in a like situation with the claimant's investment, the tribunal found that Egypt had not provided more favorable treatment to local investments in like situations.

In *S.D. Myers v. Canada*, yet another case arising under the NAFTA, the tribunal said that the phrase should be interpreted keeping in mind the overall legal context, which would include the policy objectives of the relevant agreement, in that case the desire to protect the environment while avoiding trade distortions, and the need to protect the public interest. The tribunal noted that the concept of "like circumstances" invites an examination of whether the investors are in the same sector. The tribunal also noted that S.D. Myers was providing the same service as the Canadian companies that were more favorably treated and was in competition with them. Therefore, it was in like circumstances with the Canadian companies. Thus, despite the tribunal's discussion of policy objectives, it appears that the dispositive consideration in *S.D. Myers* was that the companies receiving different treatment were in the same sector and in direct competition.

One difficulty involved in the inquiry whether two investments are in the same sector is that the term "sector" can be defined at different levels of generality. A broadly defined sector could include the covered investment and many potential comparators, while a narrowly defined sector might include only the covered investment. Another difficulty is that operations can be aggregated in different ways such that two companies may have overlapping, but not entirely identical, operations. No criteria exist for determining the extent of the overlap necessary for two companies to be treated as being in the same sector. Further, in the contemporary world, an enterprise is not unlikely to assign various tasks to different corporate entities, including both affiliates and contractors. A technical or formalist preoccupation with identifying and assigning businesses to particular sectors could fail to take account of the reality of how investments are structured.

These problems are illustrated by the award in *S.D. Myers*. It has been argued that the investment in that case was not in the same sector as the Canadian companies with which its circumstances were compared because the investment was in the business of obtaining contracts for waste remediation but did not itself provide such services. Rather, such services were provided by a corporate affiliate. The Canadian companies, by contrast, were in the business of providing waste remediation services. It could be argued in reply that the Canadian companies also would have needed to obtain contracts to perform their services and thus they were in the same sector as S.D. Myers (obtaining contracts), although they were in another sector (providing services) as well. Indeed, as the tribunal found, the Canadian companies had lobbied the Canadian governments to ban PCB exports precisely because the covered investment was in a position to take business away from them. As this discussion illustrates, it is possible to characterize a business operation as involving a number of discrete tasks, each of which is said to be in a different sector.

These issues are illustrated as well by the award in *UPS v. Canada*, still another case arising under the NAFTA. In that case, the claimant was an overnight courier service claiming that it had been granted less favorable customs treatment than Canada Post. The tribunal concluded that the two enterprises were not in like circumstances, noting differences between the operation of an overnight courier service and a postal service, including the need for expedited treatment of courier deliveries, the greater security associated with courier shipments, the existence of contractual relationships between couriers and their clients, and the more detailed documentation provided by couriers. The tribunal observed that the claimant was in like circumstances with Canadian courier companies, with which the claimant was treated identically. Dean Ronald Cass wrote a dissenting opinion in which he concluded that the claimant and Canada Post were in like circumstances with respect to certain products. Dean Cass thus would have compared the treatment given to those aspects of the enterprises that were similar, while the tribunal compared the enterprises as a whole. Canada Post was in like circumstances with the claimant with respect to its courier service, but in the view of the tribunal it was not in like circumstances with the claimant with respect to general postal services.

In *Methanex v. United State*, one more case arising under the NAFTA, the tribunal held that the correct comparators of the claimant, a Canadian methanol producer, were U.S. methanol producers, who were treated in identical fashion by California's ban on methyl tertiary-butyl ether (MTBE) in gasoline, which eliminated the market for methanol in California. Methanex argued that the correct comparator was U.S. producers of ethanol, who were favored by the ban on MTBE because ethanol was a substitute for MTBE. The tribunal disagreed with the claimant, noting that ethanol is used as a fuel, while methanol is not. Rather, methanol is merely an ingredient in MTBE, which is the alternative to ethanol. In the course of its discussion, the tribunal commented that the phrase "in like circumstances" is not the same as the phrase "like products" used in trade agreements, although decisions in trade disputes could be considered for possible guidance in interpreting the phrase "in like circumstances."

In contrast to the award in *Methanex* is the award in *Occidental v. Ecuador*, a case arising under the United States-Ecuador BIT. In that case, the tribunal compared the claimant, which exported petroleum, with domestic companies that exported other products that were not in the same economic sector. The tribunal explained that "the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[169]

169 Award, para. 173.

In *Feldman v. Mexico*, another case arising under the NAFTA, the claimant's investment purchased cigarettes for export. The tribunal held that firms that purchase cigarettes for resale or export were in like circumstances with claimant, but that firms that produce cigarettes are not in like circumstances, even if they also export them. The parties actually agreed that the claimant was in like circumstances with Mexican-owned resellers of cigarettes for export and presumably for this reason the tribunal did not discuss the basis of its holding in any detail.

The question arises as to the consequences of being unable to identify an investment or investor in like circumstances with the claimant. In *Loewen v. United States*, yet another case arising under the NAFTA, the claimant had been a defendant in a civil action in Mississippi state court that was characterized by numerous references to the claimant's Canadian nationality and that resulted in a jury verdict against the claimant for $500,000,000. In addressing whether this conduct violated the national treatment provision, the tribunal alluded to the "critical problem" that it did not have an example of the treatment accorded in like circumstances by a Mississippi court to U.S. investors or investments.[170] The claimants argued that the plaintiff in the state court action was in like circumstances with them because all were litigants in the state court action. The tribunal found, however, that the circumstances of a plaintiff and a defendant were "very different."[171] Unable to find an appropriate comparator, the tribunal declined to consider the claimed violation of national treatment.

The approach of the *Loewen* tribunal is questionable. The purpose of the like circumstances requirement is not to permit the host state to engage in discriminatory action whenever no sufficiently close comparator exists. Rather, the purpose is to prevent unjustified discriminations, the assumption being that treating unlike investments differently is justifiable. Certainly, as the tribunal indicates, the circumstances of the two litigants were different. Yet, they nevertheless can be "like" within the meaning of the BIT if none of the differences is relevant to legitimate nondiscriminatory policies of the host state. The like circumstances test supports the policy behind the nondiscrimination provisions by attempting to remove from consideration comparators whose different treatment was based on legitimate, nondiscriminatory policies, but it was not intended to provide a technical defense for adverse treatment resulting from a discriminatory motive. Thus, as discussed in Section 7.1, even where no plausible comparator exists, the tribunal should find a violation if the treatment of the covered investment was the result of a discriminatory motive, that is, was not in furtherance of a legitimate host-state regulatory interest.[172]

170 Award, para. 140.

171 *Id.*

172 The award in *Loewen* can be contrasted with those in *Pope & Talbot*, *GAMI Investments*, and *Champion Trading*, discussed above, where the tribunal found a reasonable basis for treating the covered investment or investor differently than the putative comparators and concluded, therefore, that these comparators were not in like circumstances with the covered investment or investor. In those cases, then, the tribunal did inquire into the justification for the discriminatory treatment and, having found a nondiscriminatory justification, held that no violation of the BIT had occurred. That is, the awards in those cases adopted the approach proposed in Section 7.1, in that they apparently would have found a violation had the claimant been able to demonstrate

Nevertheless, tribunals in at least two other cases, *BG Group v. Argentina*, applying the unreasonable or discriminatory measures provision of the United Kingdom-Argentina BIT, and *Parkerings-Compagniet v. Lithuania*, applying the fair and equitable treatment standard of the Norway-Lithuania BIT, also have refused to find discrimination where no appropriate comparator could be identified.[173] By contrast, in *Noble Ventures v. Romania*, a case arising under the United States-Romania BIT, the tribunal recognized that in such a case a violation could be demonstrated by proving the existence of a discriminatory motive.[174]

7.3 WAR AND CIVIL DISTURBANCE

Many BITs include a provision requiring MFN and national treatment with respect to any compensation paid for losses sustained as a result of war or civil disturbance.[175] Some BITs that require both MFN and national treatment specify that the treatment to be accorded is that which is more favorable.[176] Even where this language does not appear, however, requiring that both be accorded implicitly requires that the investor receive the benefit of the more favorable treatment. Some BITs require only MFN treatment with respect to any such compensation.[177]

The war and civil disturbance nondiscrimination provision might seem largely redundant of the general national and MFN treatment provisions of the BITs. The war and civil disturbance nondiscrimination provision may offer protection beyond that accorded by the general national and MFN treatment provisions, however, in the case of BITs that include exceptions to the general national and MFN treatment provisions, to the extent that those exceptions do not apply to the war and civil disturbance provision. Some BITs, though, define the protection to be accorded under the war and civil disturbance nondiscrimination provision by reference to the general national and MFN treatment provision and thus may incorporate into the war and civil disturbance nondiscrimination provision any exceptions in the general national and MFN treatment provisions.[178]

that the discriminatory treatment was not the result of any legitimate host state policy. In *Loewen*, by contrast, the tribunal never inquired into the host state's justification or motive for the treatment of the covered investment.

173 *See* Sections 7.4 and 7.5.

174 *See* Section 7.4.

175 *See, e.g.*, United Kingdom-Bosnia-Herzegovina BIT, Art. 5(1); Netherlands-Ethiopia BIT, Art. 7; Germany-Timor-Leste BIT, Art. 5(3)-(4); Switzerland-Algeria BIT, Art. 6(2); Austria-Armenia BIT, Art. 6(1); Finland-Armenia BIT, Art. 6(1); Sweden-Kazakhstan BIT, Art. 5(1); Denmark-Ethiopia, Art. 6; Chile-Indonesia BIT, Art. VII; Australia-India BIT, Art. 8; Argentina-Thailand BIT, Art. 6(3); Cambodia-Vietnam BIT, Art. V; Mexico-Iceland BIT, Art. 5; Canada-Uruguay BIT, Art. VII; India-Indonesia BIT, Art. 6.

176 *See, e.g.*, Denmark-Ethiopia BIT, Art. 6; Finland-Armenia BIT, Art. 6(1); Chile-Indonesia BIT, Art. VII; Cambodia-Vietnam BIT, Art. V.

177 *See, e.g.*, BLEU-Sudan BIT, Art. 7(4); Egypt-Zambia BIT, Art.4.

178 *See, e.g.*, Switzerland-Algeria BIT, Art. 6(2).

Another distinctive feature of the war and civil disturbance nondiscrimination provision is that it grants nondiscriminatory treatment to investors whose investments suffer losses. At the same time, however, the typical provision seems not to grant any rights to the investments. By contrast, in many BITs, the general national and MFN treatment provision applies to investments, rather than to investors. This further distinguishes the war and civil disturbance nondiscrimination provision from the general national and MFN treatment provisions in many BITs. Thus, the language suggests that only where damage to the investment causes losses to the investor is the right to nondiscriminatory treatment guaranteed by the war and civil disturbance nondiscrimination provision. The right is to nondiscriminatory treatment with respect to compensation paid to the investors for their losses.

The war and civil disturbance nondiscrimination provision generally applies regardless of the person or entity that is responsible for the losses. That is, it applies even if the losses are entirely attributable to the action of private parties acting without any involvement of the government.

The war and civil disturbance nondiscrimination provision sometimes is accompanied by a second provision that requires payment of compensation for certain losses attributable to war and civil disturbance. The origins of and arbitral practice with respect to both of these provisions are discussed in Section 6.6.

7.4 UNREASONABLE OR DISCRIMINATORY MEASURES

Many BITs include a prohibition on unreasonable or discriminatory measures. This provision constitutes a general prohibition on at least certain forms of discriminatory treatment. It was introduced in Section 5.3, which should be consulted for a more thorough discussion of this provision.

The analysis of discrimination is conceptually the same under the unreasonable or discriminatory measures provision as it is under the national and MFN treatment provisions, discussed in Section 7.2. Yet, numerous differences exist in the provisions.

First, the unreasonable or discriminatory measures provision does not explicitly identify the beneficiary of its protection. The language of the provision typically prohibits unreasonable or discriminatory measures that impair the operation, maintenance, management, use, enjoyment, disposal and, in some cases, the establishment of the investment. Because the investor engages in all of these functions, the investor would seem to be a beneficiary of the provision. Yet the investment itself engages in some of these functions as well. Thus, both the investor and the investment may be a beneficiary of the provision.

Second, the unreasonable or discriminatory measures provision does not explicitly identify the relevant comparator. Obviously, a comparator must be used. If the provision is read to prohibit only unreasonable discriminations, then the correct comparators would be investments or investors that are different from the covered investment or investor only in ways irrelevant to the host state's legitimate regulatory objectives, essentially the same test as that which should be applied to determine whether investments are in like circumstances within the meaning of the national and MFN treatment provisions.

Thus, if two investments differ in ways relevant to a legitimate regulatory objective, then one investment is not an appropriate comparator for the other. This simply is another way of saying that any discrimination between the two investments with respect to those differences is not unreasonable.

As in the case of the national and MFN treatment provisions, one problem that may arise in the application of this provision is the absence of an appropriate comparator. In such a case, however, unreasonable or discriminatory treatment should be found where the host state's treatment of the investment is the result of an illegitimate motive or policy. For example, if the host state acted adversely to the covered investment solely for reasons of racial animosity, such conduct should be regarded as a violation of the unreasonable or discriminatory measures provision, even if no appropriate comparator can be found.

Third, the unreasonable or discriminatory measures provision makes no reference to nationality and thus any kind of discrimination would violate the literal language of the provision. Occasionally language can be found that seems to limit the provision to discrimination based on nationality,[179] but most awards do not mention such a limitation. In very few cases, however, has the tribunal discussed the meaning of the term "discriminatory" within the meaning of this provision. Tribunals appear to assume that the meaning of the term is self-evident. One case where the tribunal suggested a definition was *Saluka Investments v. Czech Republic*, a case arising under the Netherlands-Czech Republic BIT, where the tribunal held that nondiscrimination "requires a rational justification of any differential treatment of a foreign investor."[180] The tribunal also noted that the term has the same meaning in the application of this provision as it does in the application of the fair and equitable treatment provision. Thus, the language should be interpreted to prohibit only unreasonable discriminations. Even so, the provision could apply to discrimination among investors of the same nationality, if the discrimination was unreasonable.

Indeed, the unreasonable or discriminatory measures provision may reflect a more complex understanding of equivalency than the national and MFN treatment provisions. The national and MFN treatment provisions typically require treatment no less favorable than that accorded to the comparators. The assumption is that the covered investment and the comparator are similar and, therefore, should receive similar treatment. The prohibition on unreasonable or discriminatory measures, however, also may prohibit treating dissimilar investments similarly.[181] That is, it may be violated where the host state fails to recognize legitimate differences between investments. Disregarding legitimate differences in some cases could be regarded as a form of arbitrariness and thus an unreasonable or discriminatory measure.

179 *See LG&E v. Argentina*, discussed below.

180 Award, para. 460.

181 The tribunal suggested that such treatment would violate a prohibition on discriminatory treatment in *Parkerings-Compagniet v. Lithuania*, a case arising under the Norway-Lithuania BIT, although the tribunal also suggested that this would be true even under a national or MFN treatment provision. Award, para. 368.

Finally, unlike the national and MFN treatment provisions, the unreasonable or discriminatory measures provision is often subject only to any general treaty exceptions. The national and MFN treatment provisions, by contrast, often are subject to special exceptions for treatment provided under an economic integration agreement or tax treaties and legislation.

Most of the discussion in the awards generally involves either the identification of the proper comparative or a discussion of whether the discrimination is unreasonable. As has been noted, these two issues are conceptually the same. That is, the same analysis should determine whether a differently treated comparator is the appropriate comparator and whether the different treatment was reasonable. In most cases, the tribunals have found that any difference in treatment was justified by reasonable regulatory objectives. Thus, no violation of the provision was found.

For example, in *Enron v. Argentina*, a case arising under the United States-Argentina BIT, Argentina responded to an economic crisis by modifying the tariff structure applicable to the claimant's investment. The tribunal found that there had been no "capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors."[182] Similarly, in *Sempra Energy v. Argentina*, another case arising under that BIT, the tribunal echoed *Enron* in finding no "capricious, irrational or absurd differentiation" in the treatment of the claimant in relation to enterprises in other sectors of the economy.[183] In *CMS Gas Transmission Company v. Argentina*, a case arising under the same BIT and involving the same economic crisis, the tribunal noted that discrimination exists only if similarly situated investments are treated differently, but found no discrimination on the facts of the case. Thus, in none of these cases did the tribunal limit its inquiry to discrimination based on nationality. Rather, the tribunals focused on the reasonableness of any discrimination. Notably, tribunals in these cases were prepared to employ comparators in different economic sectors than the beneficiary.

In *National Grid v. Argentina*, a case arising under the United Kingdom-Argentina BIT, the tribunal noted explicitly that the provision applies to discrimination on grounds of nationality as well as on other grounds. The tribunal found no discrimination based on nationality because the emergency measures adopted by Argentina affected both local and foreign investors. With respect to other forms of discrimination, the tribunal considered whether the relevant comparators were investments in the same economic sector or whether investments in other sectors could serve as comparators. The tribunal noted that comparisons across sectors were possible, but that the different treatment of investments in different sectors was more likely to be justified by legitimate host state policies. For example, while Argentina's devaluation undoubtedly favored the export sector over investments in the electrical distribution sector, promoting exports is a principal reason to devalue the currency. That is, Argentina had a rational justification for a policy that favored the export sector. The tribunal found rational policy reasons for treating other sectors favorably as well. Hence, no violation of the provision had occurred.

182 Award, para. 282.

183 Award, para. 319.

The tribunal did find an unjustified discrimination in *Lauder v. Czech Republic*, a case arising under the United States-Czech Republic BIT. In that case, the tribunal found that the host state's requirement that the claimant participate in the operation of a television station as a co-venturer with a local company rather than as an equity investor in that local company was discriminatory because it was based on the claimant's foreign nationality. The Czech Republic was reacting to a public outcry that the tribunal concluded would not have occurred had the claimant been a domestic investor.[184] The tribunal also found, however, that no objection to the discriminatory treatment had been raised at the time.

In *Plama Consortium v. Bulgaria*, a case arising under the Energy Charter Treaty, the tribunal explained that discriminatory treatment "entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds."[185] In that case, some evidence suggested that some companies had received state assistance in complying with new environmental regulations, while the claimant's investment had not. The evidence was insufficient for the tribunal to make a finding, however.

Although most of the awards would limit violations of the provision to situations of unreasonable discrimination, a couple of tribunals seemed prepared to find a violation based merely on a discriminatory effect. For example, in *LG&E v. Argentina*, a case arising under the United States-Argentina BIT, the tribunal held that the obligation imposed by the unreasonable or discriminatory measures provision was not to discriminate against foreign investors and that "a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect."[186] Citing the *ELSI* case, the tribunal held that to establish discrimination, there must be an intentional discrimination in favor of a national against a foreign investor that is not taken under similar circumstances against another national. The tribunal found that Argentina had treated gas distribution companies more harshly than other utilities. Although the claimant had failed to prove that the discrimination was based on nationality, the tribunal nevertheless found a violation of the provision.[187] The award does require, however, that the beneficiary be compared to a comparator in similar circumstances. As has been noted, identifying a comparator in similar circumstances typically entails examining the justification for any difference in treatment and thus the discriminatory motive becomes relevant to that determination. The tribunal avoided the issue by assuming that the beneficiary was in similar circumstances with other utilities.[188]

In *Siemens v. Argentina*, a case arising under the Germany-Argentina BIT, the tribunal commented that "intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining

184 Award, para. 231.
185 Award, para. 184.
186 Award, para. 146.
187 Award, paras. 147–148.
188 Award, para. 148.

factor to ascertain whether it had resulted in nondiscriminatory treatment."[189] The comment was *dictum*, however, because the tribunal found that in light of its holdings with respect to other provisions of the BIT, a determination whether the nondiscriminatory treatment obligation was breached was unnecessary.

In some cases, the tribunal simply observes that the action of the host state was not discriminatory.[190] Alternatively, the tribunal may find discrimination without an elaborate analysis. For example, in *CME v. Czech Republic*, a case arising under the Netherlands-Czech Republic BIT and involving the same facts as the *Lauder* claim, the tribunal noted that the Czech government's action "smacks of discrimination" against the foreign investor.[191]

In at least two cases, the tribunal has considered the situation where no comparator exists. In *Noble Ventures v. Romania*, a case arising under the United States-Romania BIT, the claimant alleged that the host state's institution of judicial reorganization proceedings with respect to its investment violated the prohibition on arbitrary or discriminatory measures. The tribunal noted the absence of any evidence in the record that comparable proceedings had been instituted with respect to other investors. The tribunal continued,

> But that in itself does not exclude the possibility that the proceedings constituted a discriminatory measure because it is possible for a single measure to be discriminatory if proof to that effect is given. As one cannot rely on objective criteria in such situations, the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her, or its nationality.[192]

No such demonstration was made, however, and thus the tribunal found no violation of the standard. The award, however, reflects a recognition that the claimant may prove discriminatory treatment where no comparator exists by demonstrating that measures were adopted with a discriminatory motive.

A different approach was taken, however, in *BG Group v. Argentina*, a case arising under the United Kingdom-Argentina BIT. In that case, the tribunal accepted "for the sake of analysis" that a measure in breach of the national or MFN treatment standards would be discriminatory within the meaning of the prohibition on unreasonable or discriminatory measures.[193] In determining whether discrimination had occurred, the tribunal adopted the analytical framework used in *International Thunderbird v. Mexico*, a case arising under the NAFTA, to determine whether the national treatment standard was violated. The tribunal found that, while the claimant's gas distribution company may have been treated less favorably than other utilities, such as companies distributing electricity, these other companies were not shown to be in like circumstances with the claimant's investment. Thus, the tribunal could not hold that Argentina had discriminated

189 Award, para. 321.
190 *See, e.g., Genin v. Estonia* (United States-Estonia BIT), Award, para. 370; *MTD Equity v. Chile* (Malaysia-Chile BIT), Award, para. 196; *ADF Group v. United States* (NAFTA), Award, para. 194.
191 Partial Award, para. 612.
192 Award, para. 180.
193 Award, para. 355.

against the claimant.[194] As noted in Section 7.2.5, a similar approach was taken in *Loewen v. United States*, a case arising under the NAFTA, and in *Parkerings-Compagniet v. Lithuania*, a case arising under the Norway-Lithuania BIT, although the language in *Noble Ventures* seems sounder as a matter of principle.

Occasionally, a tribunal may not distinguish between unreasonable and discriminatory measures. This situation is discussed in Section 5.3.3. Further, because the fair and equitable treatment standard has been held to prohibit both unreasonable conduct and discriminatory conduct, tribunals do not always analyze the application of the prohibition on unreasonable and discriminatory measures separately from the application of the fair and equitable treatment standard. This too is further discussed in Section 5.3.3.

7.5 FAIR AND EQUITABLE TREATMENT

The vast majority of BITs require that the host state provide covered investment with fair and equitable treatment. This provision was introduced in Section 5.2. As was discussed there, some arbitral awards have held that the fair and equitable treatment standard includes a requirement of nondiscriminatory treatment. Further, fair and equitable treatment has been, from the beginning, linked to the nondiscrimination principle. Many BITs place the two standards in the same sentence. The notes to the 1967 OECD Draft Convention on the Protection of Foreign Property suggested that fair and equitable treatment included the nondiscrimination obligation and in the early 1980s the OECD queried its members as to whether it required more than that.[195] As in the case of the unreasonable or discriminatory treatment provision,[196] however, the fair and equitable treatment standard appears to prohibit only unreasonable discriminations.

For example, in *Eureko v. Poland*, a case arising under the Netherlands-Poland BIT, the tribunal held that Poland violated the fair and equitable treatment standard by failing to adhere to its privatization commitments. That failure was attributable to what the tribunal referred to as "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character."[197]

Similarly, in *Saluka Investments v. Czech Republic*, a case arising under the Netherlands-Czech Republic BIT, four major banks in the Czech Republic were in the process of privatization. The Czech government provided financial assistance to three of the banks, but not the one in which claimant had invested. The tribunal found no reasonable basis for the discrimination.

In *Parkerings-Compagniet v. Lithuania*, a case arising under the Norway-Lithuania BIT, the tribunal held that discriminatory conduct violates the fair and equitable treatment standard, although the claimant or its investment must be in like circumstances

194 Award, para. 360.
195 *See* Section 5.2.2.
196 *See* Section 5.3.1.
197 Award, para. 233.

with the comparator.[198] In that case, however, no comparator existed. The tribunal held, therefore, that it could not determine the existence of a violation.[199] As noted in Section 7.1, the dismissal of a claim because the tribunal cannot identify a comparator is a questionable result, although tribunals also have refused to find discrimination where no comparator exists in *Loewen v. United States*, a case arising under the NAFTA,[200] and *BG Group v. Argentina*, a case arising under the United Kingdom-Argentina BIT.[201] In any event, the tribunal noted that other discrimination claims on the basis of nationality would require the same analysis as under the MFN treatment provision clause and thus would be analyzed under that doctrine.[202]

In *Loewen v. United States*, a case arising under the NAFTA, a Canadian investor was sued by a U.S. company in a Mississippi state court. The trial featured numerous references to the Canadian nationality of the investor and the jury ultimately rendered a $500,000,000 verdict against the investor. The tribunal observed that, under Article 1105[203] of the NAFTA, the United States had a duty to provide a fair trial, free of sectional or local prejudice.[204] That is, the tribunal recognized the principle of nondiscrimination. Further, the tribunal found that the trial was "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[205] The claimant, however, had failed to appeal the adverse judgment. The tribunal held that the BIT protects foreign investment and investors against wrongful conduct by the judicial system as a whole.[206] The claimant had not allowed the U.S. judicial system the opportunity to remedy any deficiencies in the trial and therefore could not complain of a treaty violation.

In *Methanex v. United States*, a case arising under the NAFTA, the tribunal in *obiter dictum* observed that discriminatory treatment of investment generally would not violate NAFTA article 1105, which includes a requirement of fair and equitable treatment, although discrimination based on sectional or racial prejudice might constitute a violation. Thus, the *Methanex* tribunal questioned whether fair and equitable treatment requires nondiscriminatory treatment, although it did not dismiss the possibility entirely. To hold that the standard does not include the principle of nondiscrimination would represent a unique view of the standard. In any event, as has been noted, the remark was *dictum*. The tribunal found that California's ban on MTBE, which was the

198 Award, paras. 287–288. The tribunal relied on *Goetz v. Burundi* (BLEU-Burundi BIT), Award, para. 121.
199 Award, para. 290.
200 *See* Section 7.2.5.
201 *See* Section 7.4. *But see Noble Ventures v. Romania*, a case arising under the United States-Romania BIT, in which the tribunal reached a different result. The *Noble Ventures* award is discussed in Section 7.4.
202 Award, para. 291.
203 That article prohibits treatment inconsistent with customary international law, including fair and equitable treatment.
204 Award, para. 123.
205 Award, para. 137.
206 Award, para. 143.

basis of the dispute, applied equally to all investments and thus no discrimination had occurred.

7.6 THE INTERNATIONAL MINIMUM STANDARD

As noted in Section 5.4, some BITs require that investment be treated no less favorably than is required by customary international law. Treatment in accordance with customary law also may be required by several other BIT provisions.

Quite clearly, both the fair and equitable treatment provision and the prohibition on unreasonable or discriminatory measures include prohibitions on unreasonable discriminations. Moreover, some authority exists for concluding that both provisions are elements of customary law.[207] To the extent that either provision is part of customary law, customary law would include a general prohibition on discrimination.

A few cases have discussed briefly whether customary law includes a general prohibition on discriminatory treatment of foreign investment., apart from these treaty standards. The awards have not produced a consensus.

A couple of awards have suggested that no such prohibition exists. For example, in *Genin v. Estonia*, a case arising under the United States-Estonia BIT, in the course of its discussion of the prohibition on arbitrary and discriminatory measures in that BIT, the tribunal observed that

> [c]ustomary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals. Indeed, "even unjustifiable differentiation may not be actionable."[208]

In any event, the tribunal found no evidence of discrimination in the case before it.

Similarly, in *Methanex v. United States*, a case arising under the NAFTA, the tribunal observed that

> international law is clear. In the absence of a contrary rule of international law binding on the State parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens.[209]

The tribunal went on to observe that customary law has established some exceptions to this broad rule. The claimant had cited language from the NAFTA award in *Waste Management v. Mexico*, referring to a customary law prohibition on conduct that is discriminatory and exposes the investment or investor to sectional or racial prejudice,[210] which the tribunal interpreted as a reference to the award in *Loewen v. United States*,

207 As discussed in Section 5.2.1, considerable debate has occurred concerning whether fair and equitable treatment is an element of customary law. The OECD in its 1967 Draft Convention on the Protection of Foreign Property stated the view that both standards are required by customary law and the United States has taken that position as well. *See* Section 5.2.2.

208 Award, para. 368. The internal quotation was from Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 61–62 (1995).

209 Award, Part IV, Chapter C, para. 25.

210 *See* Section 5.4.

discussed below. The tribunal declined to address whether *Waste Management* was correct in asserting the existence of such a prohibition because, in any event, the claimant in *Methanex* had failed to demonstrate that it was the victim of discrimination.

A couple of other awards have suggested that such a prohibition does exist. For example, in *Loewen v. United States*, another case arising under the NAFTA, the tribunal held that a judicial decision that is "in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."[211] Further, as noted in Section 7.5, the tribunal found that the trial was "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment,"[212] although the claimants' failure to exhaust local remedies precluded their submitting a claim to investor-state arbitration.

Similarly, in *Parkerings-Compagniet v. Lithuania*, a case arising under the Norway-Lithuania BIT, the tribunal observed that the national and MFN treatment provisions "are treaty clauses that have the same substantive effect as the international treatment standard."[213] A violation would occur where the discrimination was unreasonable or lacking proportionality.[214] The tribunal found that the differences in treatment in that case were justified by legitimate host-state regulatory concerns. For example, the Norwegian claimant's parking facility was treated differently than a Dutch investor's parking facility because it was larger and located in a culturally sensitive area and thus the difference in treatment was justified by legitimate policies in favor of archeological and environmental preservation.[215]

The issue, however, rarely arises in BIT arbitrations. Virtually every BIT has a fair and equitable treatment standard and most have national and MFN treatment provisions. Many have prohibitions on unreasonable or discriminatory measures. Thus, a claimant in nearly every BIT claims has ample grounds under specific BIT provisions to allege an unlawful discrimination without the need to discuss customary law.

211 Award, para. 135.

212 Award, para. 137.

213 Award, para. 367.

214 Award, para. 368.

215 Award, para. 396.