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A NEW GENERATION OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE AMERICAS: IMPACT OF INVESTOR-STATE DISPUTE SETTLEMENT OVER INVESTMENT RULE-MAKING

Roberto Echandi[1]

[1] Program Director, Small Economy Trade & Investment Center (SETIC). This paper is being written in partnership with the secretariat of UNCTAD, on the basis of several research projects in which the author has participated as consultant with the latter. However, the opinions and views expressed in this paper do not represent the position of UNCTAD, and fully fall under responsibility of Roberto Echandi.

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I. Introduction

During the last decade, an increased number of Investor-State dispute settlement (ISDS) cases have generated an growing body of jurisprudence touching upon key procedural and substantive aspects of investment law. This paper purports to take stock of the major developments in the interpretation of procedural and substantive provisions of IIAs,[1] and examine their impact over the evolution of investment rule-making in recent agreements negotiated in the Americas. In particular, this paper will argue that international ISDS experience over the last decade has influenced the development of a new generation of IIAs in the Americas. These new group of IIAs is comprised mostly by investment chapters negotiated in the context of free trade agreements negotiated between several Latin American countries and the United States. This paper asserts that investment disputes have influenced the refinement of the provisions of this new generation of IIAs as well as the inclusion of a series of procedural and substantive innovations in these agreements.

In addition to this introduction, this paper contains four additional sections. Section II will present an overview of the context in which investment negotiations have taken place over the last decade. Section III focuses on the major developments in the ISDS jurisprudence during the period. Section IV focuses on how the ISDS experience has impacted the investment rule-making in the Americas. In particular, the section will infer the main features of new generation of IIAs and explain how such features respond to challenges derived from the interpretation of substantive and procedural provisions included in previous IIAs. Section V addresses the implications of all these developments for the countries of Latin America, and also presents some final reflections on next steps that countries of Latin America could take to implement the lessons learned from the ISDS experience.

II.- Trends in the negotiations of IIAs over the last decade: overview and international context

An overview of the context in which the negotiations of IIAs have taken place over the last decade comprises five major trends. First, the number of IIAs negotiated world-wide has increased dramatically over the last ten years. By the end of 2005, the cumulative number of bilateral investment treaties (BITs) stood at almost 2500. [2] The universe of IIAs includes some renegotiated BITs. By the end of 2005, more than 90 BITs were the product of renegotiation.

Furthermore, in recent years, and in particular in the Americas, international investment rules have increasingly been adopted as part of regional trade agreements. These agreements, in addition to containing a variable range of trade liberalization and promotion provisions, contain commitments to liberalize and/or to protect investment flows between the parties. The number of economic integration agreements worldwide has been growing steadily and, by end 2005, exceeded 230. At least 48 new agreements were concluded between 2004 and end 2005, and at least 67 others were under negotiation. Thus, while the rate at which new BITs are being concluded has slowed down, the rate at which new economic integration agreements (EIAs) with investment provisions have been concluded is increasing.[3]

A second trend characterizing the context in which IIAs have been negotiated over the last decade is negotiations of these treaties are increasingly comprising an expanded range of issues. Numerically, traditional BITs limited to the protection of established foreign investment continue dominating the IIA universe. Nevertheless, a growing number of BITs include more sophisticated investment protection provisions as well as liberalization commitments. Also, regional trade agreements with investment provisions show a high degree of variation in their scope and content, extending to services, intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, the environment, and labor rights.

Third, international investment rules are becoming increasingly sophisticated. Some recent IIAs include significant revisions of the wording of various substantive treaty obligations. One major impetus for these revisions was the conclusion and implementation of the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States. Arbitrations under the investor-state dispute resolution provision of NAFTA raised issues or resulted in arbitrations that prompted the parties to reconsider some of the language used in their IIAs. For example, the United States subsequently modified the language of its BITs and EIAs to clarify the meaning of "fair and equitable treatment" and the concept of indirect expropriation. Both changes were intended to limit the scope that arbitral tribunals might otherwise have given to the relevant provisions of the BITs.

As discussed below, some recent IIAs have also made significant innovations in investor-state dispute resolution procedures. An objective is to increase transparency by authorizing open hearings, publication of related documents, and the submission of *amicus curiae* ("friend of the

court") briefs by non-disputants who have an interest in the outcome of the dispute. Another goal of the innovations is to promote judicial economy by providing for early dismissal of frivolous claims and by attempting to prevent the presentation of the same claim in multiple fora. Other changes, intended to foster sound and consistent results, include provisions for an appeals mechanism and for consultation with the treaty parties on certain issues.

Fourth, over the last decade, there has been an increased of South-South cooperation as far as negotiation of IIAs is concerned. Although, developed countries seeking to protect their investments continue to be the most active treaty makers, many developing countries are also very dynamic in the process of concluding IIAs. This partly reflects their emerging status as sources of outward investment. For example, China has concluded 117 BITs and is second only to Germany in the number of BITs concluded. Egypt is likewise among the "top ten" BIT signatories. Futher, there is a clear trend towards increased South-South cooperation in the conclusion of IIAs. For example, in 2004 and 2005, 48 BITs between developing countries were signed.[4] The move towards greater South-South cooperation in investment matters is also evident in the conclusion of regional trade agreements with investment provisions. By end 2005, at least 86 such agreements had been signed, including 66 since 1990. Another 24 of those agreements with investment provisions among developing countries were under negotiation.[5]

The fifth trend characterizing the context in which IIAs have been negotiated is the focus of this paper, and is the increased number of investor-State disputes. The number of investor-state disputes submitted to arbitration has increased substantially in recent years. For example, while at the end of 1994 only three investment treaty-related disputes had been brought to the World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID), there were 102 pending arbitration proceedings by the end of 2005. Additionally, more than 90 treaty-based arbitrations not involving ICSID had been instituted at the end of 2005, compared to only two at the end of 1994. This point is further developed in Section III below.

III. The evolving jurisprudence in the interpretation of IIAs over the last decade

A. Statistical Overview[6]

Provisions concerning investor-State dispute settlement have been included in IIAs since the 1960s. However, the use of these provisions to institute arbitral proceedings has been rare until recently. Since 1987 – when the first investor-State dispute based on a BIT was recorded under the arbitral proceedings of ICSID[7] – until April 1998, only 14 BIT-related cases had been brought before ICSID, and only two awards and two other settlements had been issued (UNCTAD, 1998 p.140). However, since the late 1990s, the number of cases has grown enormously. The cumulative number of treaty-based cases has risen to at least 226 by the end of 2005 , with 136 brought before ICSID (including ICSID's Additional Facility) and 90 before other arbitration fora.

International investment disputes can also arise from contracts between investors and governments; a number of such disputes are (or have been) brought before ICSID, other

institutional arbitration systems or ad-hoc arbitration. They have not been included in these data, except where there is also a treaty-based claim at stake. More than two-thirds (70 percent) of the 226 known claims were filed within the past four years, with virtually none of them initiated by governments.[8]

The surge in the number of claims can be attributed to several factors. First, increases in international investment flows lead to more occasions for disputes, and more occasions for disputes combined with more IIAs are likely to lead to more cases.[9] Second, with larger numbers of IIAs in place, more investor-State disputes are likely to involve an alleged violation of a treaty provision and more of them are likely to be within the ambit of agreed dispute settlement procedures. Another reason may be the higher complexity of recent IIAs, and the regulatory difficulties in their proper implementation. Further, as news of large, successful claims spreads, more investors may be encouraged to utilize the investor-State dispute resolution mechanism. Greater transparency in arbitration (e.g. within the NAFTA) may also be a factor in giving greater visibility to this legal avenue of dispute settlement.

At least 61 governments – 37 of them in the developing world, 14 in developed countries, have faced investment treaty arbitration[10]. 42 claims have been lodged against Argentina, 39 of which relate at least in part to that country's financial crisis. The number of claims against Argentina peaked in 2003 with 20 claims, and receded to 8 new claims in 2004 and 5 new cases in the first 10 months of 2005. Mexico has the second highest number of known claims (17), most of them falling under NAFTA, and a handful under various BITs. The United States has also faced a sizeable number (11). India (9 claims), the Czech Republic (8), Egypt (8), Poland, the Russian Federation and Ecuador (7 each) also figure prominently, followed by Canada (6) and the Republic of Moldova (5).

The rise in investment disputes has had two significant effects. First, these disputes are yielding awards that interpret the legal obligations of the contracting parties, which in turn has caused some countries to reexamine and reconsider the scope and extent of such obligations. As will be explained in section IV below, ISDS experience over the last decade has had a significant impact on investment rulemaking in the Americas, leading some countries to develop a "new generation" of IIAs with distinct normative features.

Second, the rise in investment disputes poses a particular challenge for developing countries. Their financial implications can be substantial, both from the point of view of the costs of the arbitration proceedings and the awards rendered. Information about the level of damages being sought by investors tends to be patchy and unreliable. It is, nonetheless, clear that some claims involve large sums. Furthermore, even defending against claims that are not ultimately successful entails a significant financial cost.

B. Interpretation of IIAs: Dispute Settlement Procedural Issues

One of the main effects of the dramatic increase in the number of treaty-based investor-State disputes over the last decade has been to generate a growing body of jurisprudence in international investment law. Numerous investor-State arbitration tribunals have interpreted

provisions of IIAs dealing with key substantive standards of protection and treatment to foreign investors and their investments. Arbitration tribunals have also dealt with issues related to the procedural aspects of investor-State dispute settlement (hereinafter “ISDS”) mechanisms included in most IIAs. This section presents an overview of the evolving case law with respect to key procedural matters related to ISDS. Section C below will focus on the incipient jurisprudence related to substantial issues.

From the outset, the reader should be aware of two important caveats. First, any analysis attempting to identify trends in the evolution of jurisprudence related to IIAs has to be extremely cautious. Any questions in this context neither could nor should be answered in the abstract as the wording of each IIA is unique and must be construed according to its own terms. In this regard, this paper only attempts to illustrate some salient findings concerning specific cases and to evidence the implications of using particular models of treaty language.

Second, the jurisprudence on the procedural aspects of ISDS is often based on the interpretation of not only the ISDS provisions of the applicable IIA, but also on the specific wording of other international arbitration conventions. Traditionally, ISDS provisions in numerous IIAs have tended to be general and laconic –in particular in the case of the traditional model of BITs -, and have often been limited to specify the different arbitration venues available to the investor for the adjudication of the dispute. Thus, numerous procedural aspects of the arbitration process are often not regulated in the texts of the IIAs themselves. Instead, numerous treaties have frequently tended to rely on existing arbitration rules to clarify these matters, principally on the ICSID Convention and/or the UNCITRAL Arbitration Rules[11] As the majority of the treaty-based investor-State disputes have been submitted to ICSID, it is not surprising that a significant part of the jurisprudence related to ISDS procedural aspects in fact deals with the interpretation of the ICSID Convention and its interaction with the applicable IIA.

Most of the procedural issues addressed in recent disputes have tended to concentrate on questions related to the jurisdiction of the arbitral tribunals to hear a particular case. However, arbitral tribunals have also dealt with other procedural matters related to the conduct of the investor-State dispute settlement proceedings.

1. The definition of investor: indirect claims/ownership and control

In determining the scope of application of the IIAs, and consequently, the jurisdiction of arbitral tribunals, a key aspect relates to the definition of the *investor* entitled to use the *investor*-State dispute settlement procedures. On this particular subject, recent ISDS jurisprudence has tended to concentrate on two broad categories: First, in order to determine whether they have jurisdiction *ratione personae*, arbitral tribunals have addressed the question of the relevant criteria to determine the nationality of a natural and/or legal person. The second category relates to the rights that minority shareholders, non-controlling and indirect shareholders may have under ISDS provisions of the IIAs.

The experience in the application of IIAs over the last decade has evidenced that the determination of whether a particular natural person is a covered investor, and thus entitled to

use the ISDS provisions under the applicable treaty, is often not a straightforward matter. The relevance of this question has been particularly important for cases submitted to ICSID, as Article 25 (1) of the ICSID Convention explicitly provides, *inter alia*, that the *"…jurisdiction of the Centre shall extend only to those legal disputes arising directly out of an investment, between a Contracting State… and a national of* ***another*** *Contracting State…"* (emphasis added). The parameter repeatedly used by arbitration tribunals in order to determine whether a person is a national of a particular State has tended to be the law of the State whose nationality is claimed.
For instance, in *Champion Trading v. Egypt* [12] the tribunal examined the facts taking into consideration the Egyptian law on nationality. Pointing out to the undisputed fact that the claimants had made transactions related to the investment at stake by referring to their Egyptian nationality, the arbitral tribunal found that the investors had dual nationality, and thus, that it lacked jurisdiction over the claims. The tribunal found that under the ordinary meaning of Article 25(2)(a) of the ICSID Convention dual nationals are excluded from invoking the protection of the Convention against the host country of the investment of which they are also citizens.[13]

The pattern of referring to the national law of the State whose nationality is being claimed in order to determine whether a particular investor is a national of that State is also illustrated by the case *Soufraki v. United Arab Emirates*.[14] In that case, the claimant, an investor born in Italy who later became a citizen of Canada, sought the protection of the BIT between Italy and the UAE (1995). Under Italian law, Italian citizens acquiring another nationality and residing abroad automatically loose their Italian nationality. However, Italian legislation also allows former citizens to automatically re-acquire Italian nationality by taking up residence in Italy for a period of no less than one year.[15] In this particular case, the tribunal based its decision on the provisions of the applicable Italian legislation, and found that pursuant to Italian law, the claimant had effectively lost his Italian nationality, and had not effectively demonstrated that he had complied with the residence requirements necessary to regain the Italian nationality.

The trends in recent ISDS jurisprudence regarding the determination of jurisdiction *ratione personae* regarding natural persons entail important implications, which should be considered by government officials when negotiating IIAs. First, when drafting the wording of ISDS provisions in IIAs, negotiators should bear in mind that the jurisdiction *ratione personae* of arbitral tribunals, in particular those under ICSID, will be determined not only by the relevant provisions of the IIAs, but also according to the objective criteria established by Article 25 of the ICSID Convention.

Second, in principle, the question of whether a particular person is a covered national under an IIA will be determined in accordance with the domestic legislation of the State whose nationality is claimed. However, tribunals have recognized the importance of the existence of an effective link between the investor and that State.

Third, there may be potential conflicts between certain IIAs and the ICSID Convention. First, some BITs leave open the possibility for a natural person possessing the nationality of both BIT parties under their respective laws to claim treaty protection. In these cases, some of these BITs provide that a person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.[16] In this regard, it should be noted that,

pursuant Article 25 of the ICSID Convention, such kind of investors would not be able to submit a claim under ICSID, even if, in principle, the applicable IIA envisaged that possibility. Those investors would have to submit their claims under any other arbitration forum –if any— envisaged in the ISDS provisions of the treaty.

A second potential conflict between ISDS provisions in certain IIAs and the ICSID Convention may arise as some IIAs contain a definition of "investor", which includes not only citizens but also individuals who qualify as permanent residents under domestic law.[17] Although Article 25(2)(a) of the ICSID Convention does not require the claimant to have the nationality of the particular contracting party of the IIA the protection of which is being invoked, it necessitates the investor to be a national of a Contracting State of the Convention. Thus, a permanent resident of a country A, despite being a covered investor under the IIA, may yet be prevented to submit a claim under the ICSID Convention if its country of effective citizenship is not a Contracting State of that Convention.

Regarding the issue of the determination of nationality of legal entities, as in the case of natural persons, one of the issues frequently addressed by various ISDS arbitration tribunals has been the kind of link that a particular legal entity needs to have with the countries that are parties to the applicable IIA in order to consider such entity as a covered investor under the agreement.

With respect to juridical persons, three different criteria –in different combinations—have been traditionally used in IIAs to define their nationality. These are the place of incorporation, the location of the company's seat –also referred to as the "*siége social*", "real seat" or "principal place of business" – and the nationality of ownership or control.

The ICSID Convention does not specify any particular criteria to ascribe the nationality of a legal entity for purposes of determining the jurisdiction *ratione personae* of arbitral tribunals. Article 25(2)(b) envisages two different situations under which ICSID tribunals may have jurisdiction *ratione personae* when the claimant is a juridical person. One establishes the general principle according to which the legal entity must have the nationality of a Contracting State different from the host State on the date the consent for arbitration was given. The second alternative addresses the case when the legal entity, despite having the nationality of the host State, is nevertheless treated as foreign as a result of being controlled by foreigners.

As regards the general principle, ICSID tribunals have traditionally tended to apply the criterion of incorporation or seat rather than control when determining the nationality of a juridical person.[18] This trend is illustrated by numerous ICSID cases such as in *Southern Pacific Properties v. Egypt*, where the claimants were considered from HongKong China because they were Hong Kong corporations domiciled in Hong Kong China;[19] or in *Kaiser Bauxite v. Jamaica*, where the claimant was found to be from the United States because "Kaiser Bauxite" was a private corporation organized under the laws of the State of Nevada.[20] An interesting case is the *Tokios Tokeles v. Ukraine*, a dispute brought under the Lithuania-Ukraine BIT, in which the claimant was a corporate national of Lithuania, although 99 percent of the shareholders were nationals of Ukraine. In that case, the majority of the members of the arbitral tribunal considered that under the terms of the BIT and the ICSID Convention, the nationality of the state of

incorporation of the investor - and not the nationality of the controlling shareholders - was decisive for the standing of the claimant.[21]

ICSID tribunals, however, have also granted a significant degree of deference to the criteria agreed by the parties in order to determine the nationality of legal entities, as far as those criteria are reasonable. This approach was applied in *Autopista Concesionada de Venezuela v. Venezuela*[22], where the tribunal determined, based on the terms agreed by the parties to the dispute, that the nationality of the corporate claimant - an enterprise incorporated in Florida but controlled by Mexican investors - was American.[23]

The second scenario addressed by Article 25(2)(b) of the ICSID Convention entails a situation, in which the parties to the dispute agree to consider a legal entity constituted or having the seat in the host country as a foreign investor because of foreign control. This clause therefore establishes two requirements: First, that there is an agreement between the parties to the dispute to treat a legal entity of the host State as foreign; and second, that such legal entity is effectively controlled by foreigners.

Regarding the first requirement, a number of IIAs explicitly provide that companies constituted in the host country but controlled by nationals of another contracting party shall be treated as nationals of the latter.[24] Other IIAs give standing not to the company established in the host State, but to the controlling investor on behalf of the company.[25]
A different situation occurs when the IIA does not contain any proviso like the ones referred to above. In such a scenario, the determination of whether an ICSID tribunal has jurisdiction *ratione personae* when the claimant is a legal person of the host country but controlled by foreign nationals would have to be made on a case-by-case basis.

According to various ICISD tribunals, the test would be met if the specific circumstances of the case clearly indicate that this was the intention of the parties. For instance, several tribunals, such as in *Liberian Eastern Timber Corporation (LETCO) v. Liberia*[26] and *Klöckner Industrie-Anlagen GmbH and others v. Cameroon*[27], have considered that the mere existence of an ICSID clause in a contract with a local company constitutes an agreement to treat that legal entity as a national of another Contracting State. In *Amco Asia Corporation and others v. Indonesia*,[28] the tribunal found that the ICSID Convention does not require a formal agreement to treat a local company as foreign because of foreign control.[29]

Determining actual control over legal entities is not a simple matter. ICSID tribunals have developed an increasing awareness of the need to take a differentiated approach when dealing with this question. Various tribunals have asked whether foreigners own a majority of the shares of the enterprise concerned.[30] This parameter has been used in cases such as *Klöckner v. Cameroon*, where the tribunal found that the local company SOCAME was under the majority control of foreign interests because Klöckner and its European partners had subscribed to 51 per cent of SOCAME's capital. [31] In *LETCO v. Liberia*, French investors owned 100 percent of its shares although the company LETCO had been incorporated in Liberia[32] The missing foreign control was the decisive element in *Vacuum Salt v. Ghana* for the tribunal to determine its lack of jurisdiction. In that case, the tribunal found that only 20 percent of the shares of the company

incorporated in Ghanawere in foreign hands, while 80 percent were owned by nationals of Ghana.[33]

In conclusion, as said above with regard to natural persons, the ISDS jurisprudence concerning the determination of jurisdiction *ratione personae* on juridical persons has significant consequences for IIA negotiations. Negotiators should take into account that the jurisdiction *ratione personae* of arbitral tribunals, in particular those under ICSID, will be determined not only by the relevant provisions of the IIAs, but also according to the objective criteria established by Article 25 of the ICSID Convention.

Second, the issue of whether a particular legal entity is a covered investor under an IIA will be determined, in general, in accordance with the criteria explicitly agreed in the treaty. Thus, if the contracting parties to an IIA purport to treat local companies of the host State as foreign investors because of foreign control, it is advisable to explicitly provide for such possibility in the text of the agreement.

Third, there may be potential conflicts between the text of certain IIAs and the ICSID Convention. Although the latter does not define the concept of juridical persons, its wording suggests that legal personality is a requirement for the application of Article 25(2)(b). However, some IIAs include associations without legal personality in their definitions of "companies". This could leave those associations without any *jus standi* [???] before ICSID, given that for purposes of the Convention the precondition of legal personality is inherent in the concept of "juridical person" and is part of the objective requirements for arbitral tribunals to have jurisdiction *ratione personae*.

Turning to another aspect relevant for determining juridisction, one of the issues attracting significant attention in ISDS jurisprudence on jurisdiction over the last decade has been whether minority, non-controlling or indirect shareholders have *jus standi* before ISDS arbitral tribunals. This question has been the object of much discussion, in particular –although not exclusively-- in the context of the numerous cases submitted to ICSID arbitration against Argentina.

The debate stems from the fact that in the 1970s, under traditional views of customary international law, individual shareholders did not have any mechanism to seek redress if damage was generated to the company in which they had shares. The landmark case cited in this regard is the *Barcelona Traction case*.[34]

Most of the disputes addressing the issue of shareholders' *jus standi* over the last decade have involved contracts between the government of the host State and companies. Despite of being locally incorporated, their shares were directly or indirectly owned by foreign investors submitting the claims. While in some cases, foreign investors held the majority of the capital stock, they had only a minority, non-controlling interest in others. In all of these disputes, the claimants sought protection under an applicable BIT, and in most cases the disputes were submitted to ICSID arbitration tribunals. In most of the disputes involving Argentina, the respondent --often referring to the *Barcelona Traction* case-- challenged the jurisdiction of the tribunals on the basis that shareholders were not entitled to submit a claim separately from the

entity directly owning the investment. For instance, in both *LG& E v. Argentina*[35]*, and CMS Gas Transmission Company v. Argentina*,[36] the claimants were indirect investors in the sense that they were minority shareholders in the local Argentine companies holding gas distribution licenses. Further, both *Siemens v. Argentina*[37], and *Azurix Corp .v. Argentina* involved shareholdings through indirectly owned and controlled subsidiaries.

In all of these disputes, ISDS arbitral tribunals have been consistent in providing minority, non-controlling and indirect shareholders *jus standi* under the ICSID Convention and the applicable IIA. These decisions relied mainly on three points, which are clearly illustrated by the tribunal's findings in *CMS v. Argentina*. In that case, the tribunal first distinguished between a situation of diplomatic protection and a situation in which the investor directly seeks redress for the damage suffered. Stressing the fact that the *Barcelona Traction* was a case related to diplomatic protection, the tribunal stated that it was not applicable to the factual situation of the dispute.[38]

In *CMS v. Argentina*, the tribunal not only draw the distinction between diplomatic protection and the direct right of action of individual investors, but also suggested that because of the worldwide expansion of IIAs, a new rule might have developed under customary international law.[39]

The second point made clear by the *CMS* tribunal in favor of providing *jus standi* to minority, non-controlling and indirect shareholders is based on the text of the ICSID Convention. As it does not define the term "investment", it cannot be concluded, in the tribunal's view, that the only investments covered by the Convention are those owned by majority or controlling shareholders.[40]

The third point which completes the reasoning of the tribunal in *CMS* in favor of providing *jus standi* to indirect, minority and non-controlling shareholders is the text of the applicable IIA. In the case at hand, Article I(1)(a) of the BIT between Argentina and the United States (1992) explicitly states that "investment" comprises "*every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party...*". Further, this definition explicitly provides that investment includes, " *a company or shares of stock or other interests in a company or interests in the assets thereof...*" . Thus, quoting the tribunal's decision in *Lanco International Inc. v. Argentina*[41], which had interpreted the same definition of "investment" of the Argentina-United States BIT, the *CMS* tribunal concluded that indirect, minority and non-controlling investors were covered investors under that agreement, and thus, had *jus standi* before the arbitral tribunal.

The *CMS Case* -- as the various other disputes addressing the issue of indirect, minority and non-controlling shareholders' *jus standi* -- illustrates the implication of using a broad definition of "investor" in IIAs. As most IIAs regard shareholdings or participation in a company as a form of investment, it follows that minority, indirect and non-controlling shareholders are entitled to claims in respect of their investments. In these situations, investors have standing not because they control the enterprise, but because their shares constitute the investment. Within this logic, the relative participation of a minority shareholder in the total capital stock of the company concerned is not relevant to determine jurisdiction.[42] In this regard, no case to date is known that

sets a lower limit on the value of a shareholding that would allow the investor-State dispute settlement procedures to be used, where such a requirement is not set out in the text of the treaty itself. Thus, this latter aspect is a point to which government officials should pay attention when negotiating IIAs.

2. Definition of "Investments" under IIAs and jurisdiction ratione materiae

Traditionally aimed at the protection of investment, most BITs define "investment" in a way that is both broad and open-ended, covering not only the capital that has crossed the borders, but also practically all other kinds of assets invested by an investor in the territory of the host country. A significant number of BITs have included a standard definition of "investment", covering *"every kind of asset"* owned or controlled by an investor of another Party. This broad conceptualization of "investment" is typically complemented by an illustrative list of assets that are included within the definition. Such lists commonly include five categories of assets, i.e. movable and immovable property, interests in companies –including both portfolio and direct investment— contractual rights, intellectual property and business concessions.

The ICSID Convention does not define the term "investment". However, this concept has been interpreted broadly in ICSID practice and decisions. Over the years, arbitral tribunals have shown significant deference to what the contracting parties have agreed to consider as covered investments in the IIA. Thus, a wide fan of kinds of transactions -- not only in the form of foreign direct investment, but also portfolio investment -- has fallen within the definition of "investment". The logic behind this approach is the assumption that the notion of "investment" has been left to disposition of the parties in framing their consent to arbitration.[43] Among the particular assets that arbitration tribunals have considered to be "investments" for purposes of the ICSID Convention are, *inter alia*, shares in companies, public concession agreements, corporations organized under domestic law, loans, promissory notes, construction contracts, money spent in the renovation and development of a hotel and the setting up of a law firm.[44]

The fact that traditionally the term "investment" has been broadly construed for purposes of determining jurisdiction of arbitral tribunals under Article 25(1) of the ICSID Convention should not lead to the conclusion that arbitral tribunals have given parties total discretion to decide what kind of investments they can submit to ICSID.

Over the last ten years, several arbitration tribunals have stated that the term "investment" as used in Article 25(1) of the Convention has certain objective boundaries, which have to be respected in order to allow ICSID tribunals to have jurisdiction to hear a dispute. Three different cases seem to be particularly relevant regarding this question. The first is *FEDAX v. Venezuela*,[45] which, according to the tribunal, was the first ICSID case in which the jurisdiction of the Centre was objected on the grounds that the underlying transaction did not meet the requirements of an "investment" under the Convention.

This particular dispute was submitted by FEDAX, a company established under the laws of Curaçao, Netherlands Antilles, under the BIT between the Netherlands and Venezuela (1991). The claimant acquired, by way of endorsement, six promissory notes originally issued by the

Republic of Venezuela in connection with a contract made with a Venezuelan corporation. The main jurisdictional issue before the arbitral tribunal was whether the promissory notes held by FEDAX qualified as an *"investment"* with the meaning of Article 25(1) of the Convention.

The tribunal found that it had jurisdiction to hear the dispute, and based its reasoning on five main points. First, the tribunal noted that the ICSID Convention did not define the term "investment", thus leaving the definition to the consent of the parties. Second, the tribunal drew attention to the fact that within this broad framework for the definition of "investment" under the ICSID Convention, a number of transactions such as loans, suppliers' credits, outstanding payments, ownership of shares had been identified as qualifying as "investments" in given circumstances. Third, the tribunal noted that loans qualify as an "investment" within ICSID jurisdiction, and that promissory notes are evidence of a loan and a rather typical financial credit instrument. Fourth, the tribunal considered that that the definition of "investment" in the BIT between the Netherlands and Venezuela comprised "*every kind of asset*", including "*titles to money, to other assets or to any performance having an economic value*". Fifth, the tribunal stated:

> "…A promissory note is by definition an instrument of credit, a written recognition that a loan has been made. In this particular case the six promissory notes in question were issued by the Republic of Venezuela in order to acknowledge its debt for the provision of services under a contract… Venezuela had simply received a loan for the amount of the notes for the time period specified therein and with the corresponding obligation to pay interest."[46]

In *FEDAX v. Venezuela*, the tribunal respected to a significant degree the discretion of the parties in determining the meaning of the term "investment" for purposes of Article 25(1) of the ICSID Convention. However, and to some extent in contradiction to the analytical approach used in their decision, the *FEDAX* arbitrators took an important step that could be further developed by future arbitral tribunals. For the first time, and in a subtle way, they made reference to certain objective criteria to define the term "investment" for purposes of the ICSID Convention. In this regard, they stated the following:

> "The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately after –i.e. "volatile capital". The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, as substantial commitment and a significance for the host State development. …"[47]

After *FEDAX v. Venezuela*, another arbitral tribunal, in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Morocco,*[48] also favoured the approach towards an objective test for determining whether a particular transaction is an investment under Article 25(1) of the ICSID Convention. The dispute in *Salini v. Morocco* involved a contract for the construction of a highway, which was signed between two Italian companies and ADM, a Moroccan company controlled by the

State of Morocco. The respondent objected to the jurisdiction of the tribunal on multiple grounds, one of them was that the contract in question did not constitute an "investment" within the meaning of the ICSID Convention.

Despite recognizing that the parties, in principle, could consent on the kind of disputes, which could be submitted to the Centre, the tribunal went a step further than the *FEDAX Case*, and explicitly recognized the existence of objective criteria, which have to be met to consider a particular asset as an "investment" for purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon the existence of an "investment" within the meaning of the applicable IIA, in this case the BIT between Italy and Morocco (1990), but also on the basis of the ICSID Convention, in accordance with case law. Regarding to the topic under discussion, the decision of the arbitral tribunal includes several paragraphs which are self-explanatory, and that are worth quoting:

> "The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, **it would be inaccurate to consider that the requirement that a dispute be *"in direct relation to an investment"* is diluted by the consent of the Contracting Parties**. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre…
>
> The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale … the awards at hand only very rarely turned on the notion of investment. Notably, the first decision only came in 1997 (*Fedax case*, cited above). The criteria for characterization are, therefore, derived from cases in which the transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion on the issue in almost all the cases.
>
> **The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition**.
>
> In reality, these various elements are independent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. **As a result, these various criteria should be assessed globally**, even if, for the sake of reasoning, the Tribunal considers them individually here." [49] (emphasis added)

In *Salini v. Morocco*, the arbitral tribunal eventually found that the contract between ADM and the Italian companies constituted an "investment" pursuant to the terms of the BIT as well as Article 25 of the ICSID Convention. However, rather than focussing the analysis exclusively on the consent of the parties, the tribunal reached that conclusion only after testing whether the contract in question had met the overall objective criteria referred to above. In this regard, *Salini v. Morocco* represents a significant jurisprudential development.

The last step in the conceptual evolution of the meaning of the term "investment" under the ICSID Convention is the arbitral decision in *Joy Mining Machinery Limited v. Egypt*.[50] This case was the first time ever that an ICSID arbitral tribunal concluded that it lacked jurisdiction because the transaction involved in the dispute did not qualify as an "investment" under Article 25 of the Convention.

In *Joy Mining v. Egypt*, a British company alleged that it supplied mining equipment to an Egyptian State enterprise, IMC, for a project in Egypt under a contract requiring the claimant to put in place letters of guarantee. The claimant also alleged that although the equipment had been paid for, the guarantees were never released, and that it had been prevented by the Egyptian government from carrying out the commissioning and performance testing of the equipment, which was a prerequisite for the release of the guarantees. Thus, the claimant sought damages for the full value of the bank guarantees not released, and argued that Egypt had violated its obligations under the BIT with the United Kingdom, in particular by expropriating and depriving Joy Mining of the returns of its investment and by failing to accord fair and equitable treatment and full protection and security. Among other objections to jurisdiction, Egypt argued that the bank guarantees could not be considered as "investment" under the BIT and the ICSID Convention.

Following an objective approach towards determining whether the transaction involved was a covered investment under the BIT, the tribunal concluded that the guarantees were merely a contingent liability and an ordinary feature of a sales contract and, therefore, not an "investment".[51]

Making reference to the *FEDAX Case*, the claimant had argued that the guarantees fell within the definition of "investment" used in the BIT, which included *"claims to money or to any performance under contract having a financial value"*. However, the *Joy Mining* Tribunal was not persuaded by this argument, and stated the following:

> "...Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. The claim here is very different from that invoked in *Fedax* where the promissory notes held by the investor were the proceeds of an earlier credit transaction pursuant to which the State received value in exchange for its promise of future payment." [52]

Further, after applying the same test used by the tribunal in *Salini v. Morocco*, the tribunal concluded that the guarantees did not possess the essential qualities to qualify as an "investment"

under Article 25 of the ICSID Convention. Thus, ICSID jurisprudence on the term "investment" evolved from being an element on which the parties could basically freely agree upon towards becoming an idiom containing objective criteria.

> “The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision....”[53]

Further, the tribunal in *Joy Mining v. Egypt*, following the reasoning in the previous *Fedax v. Venezuela* and *Salini v. Morocco*, consolidated the four requirements that, taken together, characterize an "investment":

> “Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development. To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case.“[54]

The evolution of ICSID jurisprudence regarding the definition of “investment” under Article 25(1) of the Convention has significant practical implications for the negotiation and implementation of numerous IIAs. Despite the leeway of contracting parties to agree on whatever definition of "investment" they may seem fit, not everything on which they concur might be considered as “investment” under the ICSID Convention. This leads to the risk that disputes involving a covered investment under an IIA do not fall within the ICSID jurisdiction. This might force the parties to the dispute to attempt adjudicating the conflict under other arbitration mechanisms. Perhaps the most significant implication of this trend in ICSID jurisprudence is to make government officials to reconsider whether the definition of "investment" included in numerous IIAs can lead to situations in which certain transactions that are not investments according to the above criteria may nevertheless fall within the scope of application of the agreement.

3. Conflict of Jurisdiction: Investment Treaty Arbitration under IIAs and Jurisdiction over Contract Claims

The determination of the scope of application of the ISDS mechanisms in IIAs has been one of the most debated topics in ISDS jurisprudence over the last decade. In particular, the debate has focused on the issue of whether the jurisdiction of an arbitral tribunal constituted under an IIA is limited to address only breaches of substantive provisions of the agreement or whether the jurisdiction can be extended to address claims arising from breaches of an investment contract.

This question has divided practitioners and legal commentators and remains unsettled in ISDS jurisprudence.[55]

In order to place the discussion in its appropriate perspective, it may be useful to point out that over the last decade, the issue of treaty claims versus contract claims has arisen in the context of numerous investment disputes. Very often these contracts have contained their own particular dispute settlement mechanisms under the domestic law of the host country. Thus, when investors have submitted contract claims to international arbitral tribunals, respondents have often objected the jurisdiction of arbitral tribunals constituted under the applicable IIA on the grounds that arbitrators only have jurisdiction to address claims related to breaches of the agreement.

Within that context, arbitral tribunals have been consistent in recognizing that a breach of a contract and a breach of the applicable IIA constitute separate causes of action.[56] However, recognizing the distinction between contract claims and treaty claims does not mean that an international arbitral tribunal never has jurisdiction to deal with claims arising under a contract. An orderly discussion of the subject has to recognize that there are different factual situations in which an arbitral tribunal may deal with a claim based on an alleged breach of a contract.

One factual situation is when there is a breach of a contract that also amounts to a breach of the IIA. It is uncontested in international investment jurisprudence that a violation of a contract can also entail a breach of a substantive obligation under an IIA. Thus, one can easily envisage a factual situation in which, by breaching a contract negotiated with an investor, the host State violates obligations typically included in most IIAs, such as the principle of fair and equitable treatment, or the commitment to refrain from discriminatory treatment of the investor or arbitrarily expropriating its property. For instance, in many cases, arbitral tribunals have held that measures undertaken by a State, which have the effect of nullifying rights under a contract may amount to an expropriation.[57]

The situation in which an investor's claim is based solely on the breach of contract in the context of an arbitration tribunal constituted under an IIA is the one which has generated much debate in ISDS jurisprudence over the period. The fact that numerous ISDS clauses in IIAs provide that arbitration procedures may apply with regard to "*any*" or "*all*" disputes which arise "*in connection with*" or "*arising out*" of an investment, has lead to the question whether such language provides arbitration tribunals with jurisdiction to hear a claim based solely on an alleged breach of a contract - and not on a violation of the treaty itself. The ISDS jurisprudence over the last decade on this matter has not been uniform.

Some arbitration tribunals have, provided that the dispute resolution clause is drafted in sufficiently broad language to extent to "*any*" or to "*all*" disputes, assumed jurisdiction over mere contractual claims, including when the dispute relates to the performance of a contract. For instance, in *Salini v. Morocco*, Article 8 of the applicable IIA provided that the ISDS mechanisms applied to "*all disputes or differences*" between a Contracting Party and a covered investor.[58] Within this context, the tribunal found that:

> "The terms of Article 8 are very general. The reference to expropriation and nationalisation measures, which are matters coming under the unilateral will of a State, **cannot be interpreted to exclude a claim based in contract from the scope of application of this Article**." (emphasis added)

Despite recognizing its jurisdiction to hear mere contract claims, the tribunal introduced, however, an important caveat. It read the ISDS clause as limiting the jurisdiction to all investment-related disputes between a covered investor and the *Contracting Party*, interpreting the latter part of the clause as limiting the jurisdiction of the tribunal to contracts in which the State itself, and not any other State entity, was a party.[59] The same approach was also adopted by the arbitral tribunal in *Impregilo v. Pakistan*. In that case, the tribunal concluded that the scope of the dispute resolution clause in the BIT between Italy and Pakistan (1997) did not extend to breaches of a contract to which an entity other than the State is a party.[60]

In contrast with the arbitral decisions referred to above, other arbitral tribunals have advocated the view that the broad wording of the ISDS provision in a IIA is not sufficient to establish jurisdiction with regard to purely contractual claims. One of the frequently-cited cases favouring this approach is *(SGS) Société Générale de Surveillance S.A. v. Pakistan,*[61] where the tribunal stated the following:

> "We recognize that disputes arising from claims grounded on alleged violations of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as "disputes with respect to investments", the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of *the factual subject matter of the disputes*, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9… Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract…We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT."[62]

On the basis of the reasoning cited above, the tribunal in *SGS v. Pakistan* found that it lacked jurisdiction with respect to claims based on alleged breaches of contract, which did not amount to breaches of the substantive obligations of the BIT. Another more recent occasion in which an arbitral tribunal emphasized the requirement that contract claims submitted to treaty-based arbitration should also constitute a breach of an obligation of the treaty was *Consorzio Groupement L.E.S.I. DIPENTA v. Algeria.* [63] In that dispute the claimant relied on the broad scope of the ISDS provision contained in Article 8(1) of the BIT between Algeria and Italy (1991). Nevertheless, the tribunal considered the following.

> "[The defendant state's consent to arbitration] …does not imply necessarily that it has a general scope and may therefore endow jurisdiction for any violation complained of by the Claimant…. the contracting parties' consent is not given, extensively, for all rights and claims that could be related to an investment. It is a requirement that the measures complained of amount to a violation of the bilateral Agreement, which means in particular that they be of an unjustified or discriminatory nature, in law or in fact…."[64]

The case law referred to above evidences that there is not a uniform trend in ISDS jurisprudence regarding the question as to whether a broadly drafted dispute settlement clause in an IIA may be sufficient to grant jurisdiction to arbitral tribunals to hear purely contractual-based claims. However, the discussion takes a different direction when the applicable IIA includes an "umbrella clause".

A third factual scenario in which a tribunal may deal with contract claims in the context of an investment dispute is when the applicable IIA includes an umbrella clause. This is a provision frequently included in BITs under which the Contracting Parties undertake to comply with any obligation they have assumed with respect to investments. For instance, Article 11 of the BIT between Switzerland and the Pakistan (1995) illustrates this kind of provision, and reads as follows:

> "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

In international legal doctrine it is widely accepted that by effect of an umbrella clause, a breach of a contract becomes a treaty violation.[65] However, ISDS jurisprudence has not been consistent regarding the effect of the umbrella clauses over the last decade. While some arbitral tribunals have agreed with most of the international legal doctrine, others have rejected the argument that umbrella clauses have the effect of elevating breaches of contract to a violation of the applicable agreement.

In this regard, five disputes are particularly relevant, *SGS v. Pakistan*[66], *Joy Mining v. Egypt*,[67] *SGS v. Philippines*,[68] *L.E.S.I-DIPENTA v. Algeria*[69]*, and Eureko B.V. v. Poland*[70]. While in the first two disputes arbitral tribunals, in their respective specific factual scenarios, rejected the view that umbrella clauses have the effect of transforming all contract disputes into treaty disputes under the applicable agreement, arbitrators have held the opposite view in the other cases.

4. Transparency

An overview of ISDS experience on the issue of transparency should differentiate between the evolution of the topic in the general context of ISDS arbitration and in the context of NAFTA's chapter 11 cases. It is in the NAFTA context that the pressure towards fostering transparency and greater participation of civil society in ISDS has been greatest; also, the most significant

developments in the evolution of investment rulemaking have taken place in connection with NAFTA.

In the context of general ISDS experience, there have been efforts over the last decade to increase the transparency of investor-State disputes. For instance, ICSID has produced a web-based list of its past and current cases[71], and a party to ICSID proceedings has always had the right to release awards and other decisions into the public domain unilaterally unless there was an agreement between the parties to the contrary. Further, the ICSID Secretariat has the authority to publish significant extracts of decisions where the parties do not agree to publish an award.[72]

Despite these efforts, it remains a fact that under ICSID, the degree of transparency of the ISDS process depends to a great extent on the agreement of the parties to the dispute. This situation leaves arbitral tribunals with very limited authority to foster greater transparency and participation of civil society in ISDS proceedings. An illustration is the recent case *Aguas del Tunari S.A. vs. Bolivia*[73].

This dispute, submitted to ICSID, involved a concession contract between the city of Cochabamba and Aguas del Tunari, a Bolivian company controlled by Dutch investors. The claimants alleged that Bolivia, though various acts and omissions leading up, and including, the rescission of the concession, breached various provisions of the BIT between Bolivia and the Netherlands (1992).

In the early stage of the proceedings, an environmental NGO filed a petition before the tribunal requesting permission to intervene in the arbitration. The President of the tribunal wrote a letter to the petitioners indicating that, after considering their requests and the views of the parties to the dispute, it observed the following:

> "[T]he Tribunal's unanimous opinion [is] that your core requests are beyond the power of the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public."[74]

The letter of the tribunal also acknowledges that there was no consent of the parties to the dispute to grant the requests, and that *"[a]lthough the Tribunal did not receive any indication that such consent may be forthcoming, the Tribunal remains open to any initiative from the parties in this regard."*[75]

Regarding the possibility of allowing the petitioners to participate as *amicus curiae*, the tribunal considered that there was no need at that moment to call witnesses or seek supplementary non-

party submissions, because it was still in the phase of examining its jurisdiction. . However, the tribunal left the door open for accepting *amicus curiae* participations in the later stages of the dispute.[76]

This last statement of the tribunal is important, as it confirms its authority to call witnesses or receive information from non-parties during the ISDS proceedings. Thus, despite the fact that the degree of the transparency of the ISDS process under ICSID depends, to a great extent, on the agreement of the parties to the dispute, the tribunal seems to suggest that non-parties to the dispute might still be admitted to the proceedings through the submission of *amicus curiae* briefs or, if applicable, being called as witnesses.

Thus, transparency and increased non-party participation through amicus curiae briefs is becoming more frequent in ISDS proceedings. Without any doubt, this trend has been initiated from ISDS practice under NAFTA's chapter 11.

The ISDS practice on transparency in the NAFTA context is illustrative in many ways. Not only has it been in connection with NAFTA that the ISDS jurisprudence on transparency has been more prolific, but the NAFTA experience is also an interesting example of how ISDS practice can have a significant impact on investment rulemaking regarding this particular issue.

Since the entry into force of NAFTA in 1994, the ISDS experience regarding transparency can be divided in two periods; the dividing line between them being July 31, 2001 - the date of enactment of the Notes of Interpretation of Certain Chapter 11 Provisions by the NAFTA Free Trade Commission. Among other important substantive clarifications, these Notes clarified certain provisions of the agreement affecting the transparency of ISDS proceedings.

Prior to the Free Trade Commission's Decision of 2001, arbitral tribunals had tended to interpret the applicable arbitration provisions in such a way as to increase transparency in ISDS proceedings. As neither Canada nor Mexico are Contracting States of the ICSID Convention, the ISDS jurisprudence under NAFTA on transparency has focused on the interpretation of the UNCITRAL rules or ICSID's Additional Facility Rules. Greater transparency has been sought through three different aspects: First, disclosure of documents; second, allowing non-party participation in the form of *amicus curiae* briefs; and third, opening the hearings in the disputes.

The issue of transparency has been discussed in several NAFTA ISDS proceedings. For instance, in *Metalclad v. Mexico*, the arbitration tribunal noted that neither the NAFTA nor the ICSID Additional Facility Rules contain any express limit on the parties' freedom to publicise information divulged during the arbitration. (para.13). Further, in *Lowen v. United States*, the tribunal stated that a general duty of confidentiality in arbitration involving a State party would be undesirable, as it would restrict public access to information relating to government and public matters (para.26). However, it has been in the context of two cases, namely *Methanex v. United States* and *UPS v. Canada*, that arbitral tribunals were called upon to decide on concrete transparency-related matters.

In *Methanex v. United States*, a dispute governed by the UNCITRAL arbitration rules, the arbitral tribunal was faced with the petition by several NGOs to be allowed to: First, file amicus briefs; second, to review the parties' written pleadings; third, to make written and oral submissions; and fourth, to participate in the oral hearings.

The *Methanex* tribunal noted that neither NAFTA's Chapter 11 nor the UNICTRAL Arbitration Rules include express powers allowing or prohibiting the acceptance of amicus briefs. The tribunal concluded that by virtue of Article 15(1) of the UNCITRAL Arbitration Rules, it had the power to accept amicus curiae submissions in writing, provided that they were copied simultaneously to the legal representatives of the disputing parties, Canada and Mexico. Further, the tribunal considered that it had no power to fulfil the NGO's requests of receiving materials generated within the arbitration or to attend oral hearings of the arbitration. As the parties did not agree to the disclosure of confidential information with the exception of the standard revelation of major pleadings, orders and awards of the tribunal, the information had to remain confidential.

Regarding the possibility of holding hearings open to the public, the tribunal determined in *Methanex v. United States* that Article 25(4) of the UNCITRAL Arbitration Rules - which provides for in-camera hearings - prevents it from allowing the presence of third parties in the oral hearings without party consent. However, both parties to the dispute decided to make the hearings public.

In *UPS v. Canada*, the arbitral tribunal relied on the *Methanex* case to a great extent. It also determined that it had the power to allow third party participation through the submission of *amicus briefs*. Drawing upon the *Methanex* reasoning and decision, the tribunal stated that Article 15(1) of the UNCITRAL Arbitration Rules granted it the power to conduct the arbitration in such a manner as it considered appropriate. Regarding the possibility to attend hearings or receive documents generated in the arbitration process, the tribunal relied on Article 25(4) to dismiss any prospect of third party attendance at the hearings, which, absent the consensus between the parties, would be held in camera. As in the *Methanex* case, both the hearings and written arguments were finally made public by agreement of the parties.

It follows from the above that the principle of transparency has been mostly promoted in the context of NAFTA's chapter 11.. It mandates public notification of new disputes, and its arbitration process has become increasingly open over the past several years. In line with the interpretative statement of NAFTA's Free Trade Commission,[77] the websites of the three NAFTA parties now provide routine access to notices of arbitration, claims and counterclaims, memorials, procedural decisions and substantive decisions and awards.

C. Interpretation of IIAs: Substantive Issues

This section focuses on the interpretation of the most salient substantive standards included in IIAs. Whether existing decisions have done this appropriately is a source of controversy between various interested parties. Certain trends of reasoning can be discerned on major issues. Accordingly, this part of the paper will identify such trends and consider their impact on the rights and obligations of investors and host countries in the light of development concerns.

1. Fair and Equitable Treatment

IIAs usually include one or several general principles that, together or individually, are intended to provide overall criteria by which to judge whether the treatment given to an investment is satisfactory.[78] Fair and equitable treatment is one of these general principles. It originated in customary international law on the protection of property of aliens, and provides a basic standard, detached from the host state's domestic law, against which the behaviour of the host State vis-à-vis foreign investments can be assessed.

Numerous investment instruments combine the fair and equitable treatment standard with other legal principles that may have their own specific content and historical origin, such as the principles of "full protection and security"[79] and "non-discrimination"[80]. While some agreements guarantee only fair and equitable treatment, other IIAs bundle the three standards --or sometimes only two of them -- in one single article.

Contrary to other treaty obligations, the fair and equitable treatment standard lacks a precise meaning. Consequently, it has raised important questions in international investment law, originally in the context of the application of NAFTA´s chapter 11, but more recently also in the context of several BIT-related investment disputes. The discussion has focused on the nature and content of the commitment. In this regard, two schools of thought have emerged in international legal doctrine.

According to some scholars, the obligation to grant "fair and equitable treatment" implies treating that investment in accordance with the international minimum standard which forms part of customary international law.[81] In view of other scholars, however, "fair and equitable treatment" means something different than the international minimum standard. They believe that the term "fair and equitable treatment" should be given its plain ordinary meaning. This results in applying a test based on equity on a case-by-case basis in order to determine whether the standard has been infringed.[82]

It has been argued that for a State to violate the international minimum standard of treatment of aliens, the conduct toward the investment must amount to gross misconduct, manifest injustice, or an outrage, bad faith or wilful neglect of duty.[83] The basis for this approach has been the *Neer case*, in which the Mexican General Claims Commission expressed the minimum standard of treatment of aliens in the following way: [84]

> "[T]he propriety of governmental acts should be put to the test of international standards, and … the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. .."[85]

According to this test, only arbitrary conduct would be seen to violate the international minimum standard of treatment. From the perspective of host States, this would mean that the obligation to

grant foreign investment fair and equitable treatment would not significantly impair the flexibility and discretion governments have to pursue their public policy objectives.

The outcome of applying the fair and equitable standard under the semantic approach would be very different. Under this view, "fair and equitable treatment" would be understood as a standard of equity or fairness based on the “plain meaning” of the term. Accordingly, the test whether a State has breached the obligation would be, to a great extent, subjective.

This semantic interpretation of the standard would entail establishing a lower threshold to breach the obligation. It would suffice that a host State acts in a way considered as “unfair” or “non-equitable” in the view of the investor and the arbitral tribunal. Further, interpreting the fair and equitable treatment standard according to its plain meaning has another significant implication. Given that the breach of any other obligation included in an IIA would mean that the host State has somehow mistreated the foreign investor, any such misconduct could also represent a violation of the fair and equitable treatment standard.[86]

Potential controversies as to the content of the standard can be minimized depending on the specific language used in the IIA. Some IIAs contain more precise texts than others; thus, the space allowing for different interpretations of the fair and equitable treatment standard may vary significantly among different agreements.

During the last decade, the determination of the scope and content of the fair and equitable treatment standard became a controversial issue in the context of NAFTA’s chapter 11 arbitrations, where arbitral tribunals were called in several cases to interpret NAFTA´s article 1105.(1)[87]. The debate was triggered by certain findings of the arbitration tribunals in three disputes, *Metalclad v Mexico*,[88] *S.D.Myers v. Canada* [89] and *Pope & Talbot v. Canada*[90].

In *Metalclad*, the tribunal determined that Mexico had not granted the investor with fair and equitable treatment in accordance with international law because it had acted inconsistently with the transparency obligations contained in NAFTA.[91] The award was finally set aside in part by the Supreme Court of British Columbia, which found that the tribunal had exceeded its jurisdiction by referring to conventional obligations included in treaties, which were beyond the scope of application of NAFTA’s chapter 11. According to the Court, the tribunal had not only interpreted Article 1105(1) of NAFTA in an extreme ample manner, but had also failed to demonstrate that the principle of transparency - being at stake in the case - has been incorporated into customary international law.[92] Thus, the Court clarified that the reference to “international law” in Article 1105 made reference to customary international law, and not to other conventional law.

In *S.D. Myers,* the tribunal found a violation of Article 1105(1) on the grounds that the national treatment obligation under Article 1102 had been violated. The tribunal considered that the violation of a norm of international law which had been designed to protect foreign investors would be tantamount to a violation of Article 1105.[93]

In *Pope & Talbot*, after a long interpretative analysis of the terms *"fair and equitable treatment"* and "*full protection and security"* and their relationship with the international minimum standard, the tribunal concluded that those concepts entailed a treatment beyond the required under international law. Although the tribunal acknowledged that the text of Article 1105 suggested that "fair and equitable treatment" and "full protection and security" were elements which were included in the requirements of international law, the tribunal opted to deviate from the plain reading of the text, and stated that there was another "possible interpretation" of that provision:

> "Another possible interpretation of the presence of fairness elements in Article 1105 is that they are additive to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, plus the fairness elements. It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included in international law…"[94]

The controversy generated by the three cases referred to above prompted the intervention of the NAFTA Free Trade Commission. On 31 July 2001, this Commission comprising the Trade Ministers of the three signatory countries issued a Note of Interpretation clarifying three basic points regarding NAFTA's Article 1105. First, it was stated that the provision prescribed the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. Second, the Commission spelled out that the concepts of "*fair and equitable treatment*" and *"full protection and security*" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Finally, the Commission concluded that the finding of a breach of another provision of the NAFTA, or of a separate international agreement, does not establish a violation of Article 1105(1).[95]

After this interpretation of the Free Trade Commission, several arbitral tribunals under NAFTA had to interpret Article 1105. Most tribunals have taken note of the Commission's guidance , and have recognized that they do not have unlimited discretion to decide when the standard has been breached, and that they rather have to base their assessment on the relevant sources of international law.[96] Nonetheless, ISDS jurisprudence regarding fair and equitable treatment in the NAFTA context has evolved on the basis of two important elements, which tribunals have consistently followed since 2002. First, it is recognized that the fair and equitable treatment standard has significantly evolved since the *Neer* case in the 1920s. Second, a breach of this "modern" fair and equitable treatment standard does not require that a State or agency of a State act in bad faith.

For example, in the *Mondev International Inc v. United States* case[97] - a dispute concerning property transactions in Boston between a Canadian developer and the city of Boston - the tribunal stated the following:

> *"Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular,

> both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. **To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.**... the terms "fair and equitable treatment" and "full protection and security" had their origin in bilateral treaties in the post-war period. In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.... In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate **current international law**, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments. "[98] (emphasis added)

Thus, recent NAFTA arbitral tribunals have found that the customary international law to be applied is the customary international law as it stood in 1994 - and not in the 1920s at the time of the *Neer* case. The same view was held by the tribunals in *ADF Group v. United States,*[99] and in *Lowen Group, Inc and Raymond Loewen v. United States*[100]. In the latter dispute, the arbitral tribunal emphasized that bad faith was not required in order to breach the standard: *"Neither State practice, the decisions of international tribunals nor the opinion or commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice."*[101]

Subsequent tribunals have provided greater guidance as to how to assess whether the standard has been violated in particular situations. These tribunals have required a certain degree of arbitrariness in order to violate the standard. For instance, in *Waste Management Inc. v. Mexico*[102], the tribunal reached the conclusion:

> "...that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.... Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[103]

Further, in *GAMI Investments Inc. v. Mexico*[104] - a dispute involving the implementation of the sugar regime in Mexico- the arbitral tribunal found that "*A claim of maladministration would likely violate Article 1105 if it amounted to an "outright and unjustified repudiation" of the relevant regulations."* In *Methanex Corp. v. United States,* the arbitral tribunal distinguished between the fair and equitable treatment standard as an absolute standard of protection and the relative standards of treatment included in NAFTA's chapter 11 – such as national treatment or MFN treatment. In this regard, the tribunal found that *"...the plain and natural meaning of the text of Article 1105 does not support the contention that the "minimum standard of treatment" precludes governmental differentiation as between nationals and aliens.*" [105]

2. National treatment

Over the last decade, most of the ISDS practice on national treatment has developed in the context of the interpretation of Article 1102 of NAFTA. In that context, most arbitral tribunals have followed a three-step analysis in order to determine whether in a particular case, a host State has breached its obligation to provide national treatment to the covered investor and its investments. The three steps of such analytical approach are the following. First, identification of the relevant subjects for comparison; second, consideration of the relative treatment each comparator receives, and third, if a different treatment is found, examination as to whether the subjects compared are in "like circumstances", or in other words, whether there are any factors that may justify such differential treatment. ISDS experience regarding each of these steps is examined below.

Regarding the first step of the analysis, from the outset, most arbitral tribunals have recognized that national treatment is a relative, non-contingent standard. Hence its interpretation necessarily calls for a comparison to be made between the investor invoking its right and someone else. One of the issues that have frequently arisen in the context of investment disputes is the determination of who should be the other subject whose treatment will be compared with that received by the foreign investor.

In *Pope & Talbot v. Canada*[106], the dispute involved the imposition by Canada of an export-fee regime on the export of softwood lumber from its territory to the United States. That regime was implemented by Canada in order to comply with an agreement negotiated with the United States in order to avoid the imposition of countervailing duties by the latter on lumber exported from Canada's four largest softwood-producing provinces. The regime was based on a complex formula based on historical export performance as a criterion for entitlement to export lumber "fee free". The regime was applied only to softwood lumber producers from the four targeted provinces. A U.S. investor, Pope & Talbot, claimed that among other things, such regime breached the national treatment standard.

In *Pope & Talbot*, the tribunal stated that the comparison required to start the analysis under the national treatment provision, should generally be made between the investor or its investment on the one hand, and on the other, any other domestic investors or investments operating in the same business or economic sector. The basis for such an approach was found on GATT jurisprudence

and international treaty sources, such as the 1993 OECD Declaration on National Treatment for Foreign-Controlled Enterprises, In this regard, the *Pope & Talbot* tribunal stated:

> "In evaluating the implications of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector."[107]

Many other arbitral tribunals also used this approach, identifying the appropriate comparator on the basis of the effects that the challenged measure had on other investors or investments in the same business or economic sector. For instance, in *S.D. Myers v. Canada,* where the dispute involved a ban on exports of PCB wastes to the United States which impeded S.D. Myers from undertaking its business of shipping PCB wastes from Canada to its Ohio facilities for treatment and destruction, the tribunal compared would-be competitors in the Canadian market for the destruction of PCB wastes.

In *Marvin Roy Feldman v. Mexico*, the dispute involved a trading company that imported, among other things, cigarettes from the United States to resale in Mexico. Feldman's company had qualified to receive tax rebates during certain periods of time, but not others. During these same periods, local competitors were still receiving rebates. Feldman's was also subjected to much rigorous audits than its competitors. In this case, the arbitrators based their national treatment analysis stating that the group of comparable investors and investments was comprised by those enterprises engaged in the purchase and resale of cigarettes.

However, to identify which are the particular domestic investors in the same business or economic sector as the foreign investor is not always an easy matter. One of the recent cases in which the question of the identification of the proper comparator was the key aspect of the dispute was *Methanex v. United States*.[108] The dispute involved a ban eliminating the use of MTBE, a gasoline additive, in California. Methanex, a Canadian company that produced methanol, a primary ingredient of MTBE, claimed that the California's ban breached, *inter alia*, the national treatment standard. The basis for such claim was that, in Methanex's view, the ban on MTBE had the effect of benefiting the U.S. producers of ethanol, a product which was a direct substitute of MTBE. The identification of which was the proper comparator in this case was particularly relevant, as there were many producers of methanol in the United States who were also affected in the same manner by the ban on MTBE as Methanex. In this dispute, the arbitral tribunal referred to *Pope & Talbot*, and stated the following:

> "In this respect, the NAFTA award in *Pope & Talbot v. Canada* is instructive. There, a US investor in Canada, which was obliged to pay export fees, alleged that it was in like circumstances with Canadian producers in other provinces that were not subject to export fees. The tribunal, however, rejected the claim for there were more than 500 Canadian producers in other provinces which were subject to the fees. That is, the tribunal selected the entities that were in the most "like circumstances" and not comparators that were in less "like circumstances". It would be a forced application of Article 1102 if a tribunal were to ignore the identical comparator and to try to

> lever in an, at best, approximate (and arguably inappropriate) comparator. The fact stands - Methanex did not receive less favourable treatment than the identical domestic comparators, producing methanol."

Thus, the decision in *Methanex v. United States* clarified further the criteria in order to identify the appropriate comparator in a national treatment analysis. In this regard the tribunal basically stated that the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership. Such conclusion is based on the reasoning that, given that the purpose of the national treatment standard is to address discrimination over an investment on the basis of nationality, it is necessary to compare the treatment of the foreign investor to the treatment accorded to a domestic investor that is most similarly situated to it. *"In ideal circumstances, the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership*". [109]

Following the trend established by most arbitral tribunals over the last decade, the second step in a national treatment analysis consists in observing whether there are differences in treatment between the foreign investor and its domestic counterpart. Regarding this specific aspect, the arbitral tribunal in S.D. Myers, one of the first established under NAFTA' chapter 11, made two important findings. First, the tribunal recognized that a breach of the national treatment standard could be both, *de jure* or *de facto*. Thus, the scope of the analysis is not limited to a *de jure* legal or administrative discrimination, but also comprises treatment that despite not being discriminatory on its face, nevertheless has a discriminatory impact over the foreign investors or their investments. In this regard, the tribunal explicitly stated the following:

> "The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:
>
> - whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;
> - whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.
>
> Each of these factors must be explored in the context of all the facts to determine whether
> there actually has been a denial of national treatment."[110]

The recognition that the national treatment standard can be breached by measures leading to *de facto* discrimination has been consistent in ISDS jurisprudence. The second important finding that from the outset was clearly recognized by arbitral tribunals constituted under NAFTA's chapter 11 is that in order to demonstrate a *de facto* discrimination it is not necessary, nor sufficient, to demonstrate any particular discriminatory intent on the part of the host State.[111]

Further, in *Feldman v. Mexico*, after stating that the national treatment standard is intended to protect against discrimination because of the foreign status of the investor, the tribunal also affirmed that there is no requirement to show that a breach of national treatment is expressly due

to the investor's nationality. Rather, a de facto difference in treatment could stand on its own, *"at least in the absence of any evidence to the contrary*".[112]

In several IIAs, the obligation to grant to foreign investors and their investments a treatment no less favourable than that granted to domestic investors and their investments is conditioned to the requirement that both investors or investments must be in *"like circumstances*" for the obligation to apply.

In ISDS practice, the inclusion of the "*like circumstances*" language in national treatment provisions has had a legal impact similar to an exception. That is, once the investor submitting the claim has demonstrated that it has received a treatment less favourable than that granted to domestic investors and their investments in the host State, it is up to the latter to demonstrate that the foreign investor is not in "like circumstances" than its domestic competitors. Thus, once a difference in treatment has been found, it is left to the tribunal to determine whether investors or investments are in "like circumstances". Such determination requires a factual analysis undertaken on a case-by-case basis.

It should be noted that the application of the national treatment standard in the context of IIAs entails different dynamics than the application of the same standard in the context of international trade in goods. For a long time a significant body of jurisprudence regarding the objective, nature and content of the national treatment standard has evolved in the context of GATT and the World Trade Organization (WTO) dispute settlement procedures. In numerous cases, that forum has considered allegations that a state has not treated foreign goods as favourably as *"like"* domestic goods. One of the main avenues to address that question has been to determine whether the products produced by the domestic industry and those produced by foreign suppliers are in fact substitutes in the market place.[113]

Contrary to the case of trade, where the production facilities are abroad, in the case of foreign investment, production facilities operate within the jurisdiction of the host country. Consequently, in the context of investment regulation, the nature of the investor's production and business processes are much more likely to be a matter of legitimate concern than in trade because of their direct domestic impact in the host country.

In several cases established in the context of NAFTA´s chapter 11, arbitral tribunals have adopted an approach that provides host States with significant scope for legitimate regulatory initiatives even if they treat domestic and foreign investors differently in effect. In this regard, determining whether foreign and domestic investors who were treated differently were in like circumstances, arbitral tribunals have asked whether the difference in treatment has been justified by a rational policy objective that is not based on a preference in favour of domestic investors over foreign and does not unduly undermine the investment liberalizing objectives of NAFTA. If the difference in treatment can be justified on this basis, arbitral tribunals have found that the foreign and domestic investors are not in like circumstances. For instance, in Pope & Talbot, the arbitral tribunal stated the following:

> "… Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de fact, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[114]

In conclusion the standard for the national treatment obligation in its interpretation by arbitral tribunals remains open to further refinement. The cases reviewed have accepted a standard of both *de jure* and *de facto* discrimination based on a case-by-case analysis of the impact a measure has on a foreign investor. This allows for an examination not only of measures that clearly show difference of treatment between foreign and domestic investors that is favourable to the latter, but also of measures that are, on their face, non-discriminatory but have the effect of according less favourable treatment to foreign as compared to domestic investors in like circumstances. The *Methanex* tribunal has recently looked into the precise scope of the term *"like circumstances*".[2]It took a narrow approach to the requirement "*in like circumstances*" by asking whether the activities of the foreign investor were comparable to economic activities in the domestic sphere, rather than the relatively broader approach used in *S.D. Myers* and drawing upon the precedents in the area of international trade. Thus, there is currently no uniform interpretation of the requirement of "in like circumstances".

3. Most-favoured-nation treatment (MFN)

One of the most important lessons evidenced by ISDS practice over the last decade is that the particular way MFN provisions are drafted in the various IIAs does matter, and depending on the wording of the applicable clause, a dispute can lead to different outcomes. The scope and approach used to draft MFN clauses in IIAs tend to differ substantially among different agreements. Some IIAs provide that MFN applies to all matters covered by the treaty, others provide that MFN applies all investments of investors, while others provide that MFN operates with respect to the management, maintenance, use, enjoyment and disposal of the investments. Other IIAs even merge in one single provision the MFN and the fair and equitable treatment standard. (UNCTAD, 1999c) The variety of approaches used in IIAs to regulate the MFN obligation explains, to a great extent, why investment jurisprudence over the last decade has not been uniform on this particular subject.

Among the potential effects of the MFN standard is to broaden the scope of an investor's procedural and substantive rights beyond those in the original agreement under which it claims protection. This result has recently led to some controversy among certain government officials and legal commentators, who have feared the possibility of investors using the MFN to practice "treaty shopping", and having the option to pick and choose provisions from the various IIAs signed by the host State. On the other hand, it could be argued that such an effect is precisely what MFN is all about, and that many public policy considerations could justify that result.

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[2] *Methanex v. United States*, UNCITRAL, Decision on Amici Curiae, 15 January 2001, and 1st Partial Award, 7 August 2002 (NAFTA). Final Award, 3 August 2005.

The analysis of the MFN standard by international jurisprudence is not a recent development.[115] However, until recently, most of the ISDS practice tended to address the application of the MFN standard regarding substantive rights. Nevertheless, despite some concrete disputes dealing with substantive standards of protection, over the last decade, investment case law has tended to focus on the question of whether, in addition to the substantive rights granted to the investor, the MFN standard should also apply to dispute settlement procedures.

Although it was not the first time that the issue arose in the context of an investment dispute[116], one of the most controversial cases of the decade that addressed the question of the applicability of MFN to dispute settlement procedures has been *Maffezini v Spain.*[117] The *Maffezini* case concerned a dispute arising from the alleged treatment Spanish authorities provided to Emilio Agustin Maffezini, an Argentinean national who invested in an enterprise for the production and distribution of chemical products in Galicia, Spain. Mr. Maffezini invoked the BIT between Spain and Argentina and initiated an international arbitral procedure before ICSID. According to article 10 of the BIT between Argentina and Spain, the possibility to settle the dispute through international arbitration existed only once domestic tribunals had failed to resolve the dispute on the merits after an 18 month-period had elapsed. To overcome this hurdle, Mr. Maffezini argued that the MFN clause included in article 4 of the BIT between Argentina and Spain allowed him to invoke the dispute settlement provisions included in the BIT between Chile and Spain, which enabled the investor to submit the dispute to ICSID arbitration without having to submit it first to domestic courts.

Given that the scope of the MFN clause in the BIT between Argentina and Spain explicitly referred to *"all matters subject to this Agreement"*, after an elaborated reasoning, the tribunal found that in this particular case Mr. Maffezini was able to import the dispute settlement provisions of the BIT between Chile and Spain and avoid the requirement to submit his dispute to Spanish courts prior initiating a case under ICSID.

Fearing the potential effects of this expansive interpretation of the MFN provision, in *Maffezini* the arbitral tribunal introduced several caveats for the application of the MFN standard. First it noted that the scope of the MFN treatment has to be based on the text of the applicable agreement. Second, the tribunal referred to the *ejusdem generis* principle, which is a rule according to which a MFN clause can only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates. For instance, an advantage granted between two contracting parties in the context of a financial agreement cannot automatically be imported to the context of an IIA by a contracting party invoking the MFN clause. Third, the tribunal also introduced the limitation that the MFN standard should not be used to override public policy considerations envisaged by the contracting parties as key to condition their acceptance of the agreement concerned.[118]

One of the implications of the *Maffezini* case was to make it evident for governments negotiating IIAs of the importance of clearly delimiting the scope of application of the MFN clause in the text of these agreements. *Maffezini* made it clear to contracting parties that, if they did not intend to extend MFN treatment to dispute settlement matters, it would be better for the text of the IIA

to explicitly say so. The interpretation of the broad MFN provision in *Maffezini*, influenced some successive arbitral tribunals, such as the one adjudicating in *Siemens v. Argentina.*[119]

The discussion in the *Siemens* case was quite similar to that in *Maffezini.* In *Siemens,* the claimant sought to make a substantive claim against Argentina under the BIT negotiated between the later and Germany (1991). That IIA, like the BIT between Spain and Argentina applicable in the *Maffezini* dispute, provided for an eighteen-month period in which local Argentinean courts were given the opportunity to resolve the dispute. The claimant sought to avoid this pre-condition by invoking the MFN principle and apply the BIT between Chile and Argentina (1991), which did not require a prior submission to local courts prior to arbitration. The MFN clause in the Argentina-Germany BIT states that none of the contracting parties shall accord in its territory to nationals or companies or their investments of the other contracting party "*a less favorable treatment*" than the treatment granted to nationals or companies or their investments of its own nationals or companies or to the investments of nationals or companies of third States. In *Siemens*, the tribunal concurred with the decision in Maffezini, and stated the "*access to these [dispute settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause... This conclusion concurs with the findings of the arbitral tribunal in Maffezini...*"[120]

The arbitral decisions in both *Maffezini* and *Siemens* generated some controversy among certain governments, who did not consider MFN should apply to dispute settlement procedures.[121] Further, the trend in the interpretation of the MFN standard varied significantly in two successive investment disputes, in which arbitral tribunals held a more restrictive approach.

The first of those cases was *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan,*[122] a dispute which entailed a claim by Italian investors under the BIT between Italy and Jordan (2001) based on the performance of a contract. The BIT referred explicitly made it clear that disputes arising from contracts had to be referred to the dispute settlement mechanisms provided for in the contracts. However, after finding that the dispute settlement provisions included in the BITs between Jordan and the United Kingdom (1979) and Jordan and the United States (1997) allowed investors to refer a contract-based claim to ICSID, the investors invoked the MFN clause of the BIT between Italy and Jordan in order to justify the submission of their claim before ICSID. Thus, in this case, the arbitral tribunal also considered whether the MFN clause can be invoked for dispute settlement purposes.

The tribunal in *Salini v. Jordan*, shared the concerns expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case, and explicitly manifested its fear that, despite the caveats devised by the tribunal in that dispute, in practice such a broad interpretation of the MFN standard add "*more uncertainties to the risk of* "*treaty shopping*." Thus, in *Salini v. Jordan*, the tribunal followed a more restrictive approach, and refrained from applying MFN to dispute settlement on the basis that the circumstances of that particular dispute were different. In this regard, the tribunal stated the following:

> "The Tribunal observes that the circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage "all rights or all matters covered by the agreement." Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and *an* entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims."[123]

In 2005, the issue of the applicability of the MFN standard to dispute settlement procedures arose again in *Plama Consortium Limited v. Bulgaria.* [124] This case concerned a dispute submitted under the BIT between Cyprus and Bulgaria (1987), which limited the application of ISDS procedures only to disputes related to expropriation and did not envisage the possibility to submitting the dispute to ICSID. The MFN clause included in the BIT, stated that each contracting party "*... shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states."* Thus, on the basis of the MFN provision, the claimant pretended to invoke the BIT between Bulgaria and Finland (1997) which included ISDS provisions applicable to all disputes related to investments. In this particular case, the arbitral tribunal addressed two main issues related to the MFN standard. First, whether the MFN provision in the Bulgaria-Cyprus BIT applied to all aspects of "treatment;" and whether "treatment" covered settlement of disputes provisions in other BITs to which Bulgaria was a Contracting Party.

In this case, the tribunal concluded that MFN provision could not be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration. Criticizing the approach used by the arbitral tribunal in Maffezini, in Salini v. Jordan, the tribunal based its reasoning on two fundamental premises. First, the arbitrators stressed that the basic prerequisite for arbitration is an agreement of the parties to arbitrate. Consequently, it stated that:

> " ... It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires... Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference...."

The second basis for the tribunal's decision was the difficulty it found for applying an objective test to determine which dispute settlement procedure is more favorable. In this regard, the arbitrators stated:

> " The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms, and to have the entire dispute resolved by arbitration as provided in the Bulgaria-Finland BIT, than to be confined to *ad hoc* arbitration limited to the quantum of compensation for expropriation. The Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?"

On the basis of these two premises, the tribunal in *Salini v. Jordan* concluded that through an MFN provision is not possible to incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, *"...unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them."*

4. Expropriation

Expropriation has traditionally ranked at the top of the controversial issues in the development of international law on investment. The international debate on expropriation for most of the XX century, focused on which were the conditions under which an expropriation could be considered lawful. Over the last decade the debate has tended to shift, and has focused on the question of what amounts to an indirect expropriation of an investment. Most IIAs contain expropriation clauses which, despite protecting investment against unlawful *"expropriation"* or *"nationalization" or "measures having an equivalent effect"* do not define these terms nor establish any factual criteria to determine whether a particular situation constitutes an expropriation. Thus, one of the aspects that has generated more controversy in ISDS practice has been the lack of clarity of some IIAs regarding the degree of interference with the rights of ownership that is required for an act or series of acts to constitute an indirect expropriation, and thus, subject to compensation.

International legal doctrine has traditionally distinguished between two broad categories of expropriation. First, there is the direct expropriation, which as its name suggests, entails the actual taking of property by direct means, including the loss of all, or almost all, useful control of property. Second, there is the indirect taking, where the measure that does not take property has the same impact by depriving the owner of the substantial benefits of the property. One kind of indirect taking is that denominated regulatory expropriation, where a measure is taken for regulatory purposes but has an impact on the economic value of the asset owned by the investor sufficient to be considered an expropriation. (UNCTAD 2000)

The potential for investment disputes related to alleged regulatory expropriation has significantly increased in recent years. In order to achieve its goals, the modern State needs regulation in a wide fan of public policy areas. As the level of interaction between the State and the property rights of citizens increases, the main challenge that arises is how to distinguish between a legitimate exercise of governmental authority that interferes with the enjoyment of foreign-owned property and a regulatory taking that requires compensation.(UNCTAD 2003c, p. 111).

Numerous arbitral tribunals have addressed the issue of indirect expropriation over the last decade. However, the critical question as to which elements establish a taking under international law remains evergreen. The complexity of the issue explains the failure of a unified methodology yet to emerge from ISDS case law. Most arbitral tribunals which have addressed the question coincide that the determination as to whether a regulatory taking has in fact occurred has to be undertaken on a case-by-case basis.

Despite the analytical difficulties referred to above, by observing ISDS practice over the last decade, it is possible to identify various key elements repeatedly referred to by arbitral tribunals in order to determine whether the State is liable to compensate an investor due to an indirect taking. Among these elements are: the permanence of the interference with the property, the substantiality of such interference, the existence of investment-backed expectations and more recently, the proportionality between the public policy objective and the burden over the property of the investor.

Regarding the first element, ISDS practice has traditionally conceived that for an indirect expropriation to exist, the interference with the property of the investor must have permanence. That is, interference should not be temporary. Thus, for a taking to exist, tribunals have required a deprivation of ownership rights that is lasting. For instance, in *S.D. Myers*, when examining the export ban to PCB waste challenged by the claimant, the tribunal did not find an indirect expropriation because the export ban was temporary, and ended after a sixteen-month period. In that dispute, the tribunal stated the following:

> "In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. Canada realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed. The Tribunal concludes that this is not an "expropriation" case."[125]

A second element consistently referred to by ISDS practice to identify the existence of a regulatory taking is the substantiality of the interference with the property rights. In this regard, arbitral tribunals have reiterated that not all government impediments to business operations amount to a taking and thus, require compensation. For instance, in
Feldman v. Mexico, the arbitral tribunal stated:.

> "...governments must be free to act in the broader public interest through the protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[126]

On the other hand, it has also been pointed out that, compensation does not depend upon demonstrating a total loss of the property concerned. Despite the lack of any precise method of

quantification, it seems that the international law threshold for compensation is somewhere between total deprivation of property rights and mere interference with the latter. However, arbitral tribunals have tended to require a stringent degree of interference, and have stated that it has to be "substantial". In this regard, the arbitral tribunal in *Pope & Talbot* referred to a test which has subsequently been used by other arbitrators. On this point, the arbitrators in that case stated:

> "... While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether the property has been "taken" from the owner. Thus, the Harvard Draft defines the standard as requiring interference that would "justify an inference that the owner... will not be able to use, enjoy or dispose of the property...". The Restatement, in addressing the question whether regulation may be considered expropriation, speaks of "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of alien's property." Indeed, at the hearing, the Investor's Counsel conceded, correctly, that under international law, expropriation requires "substantial deprivation"..."[127]

A related question is how do arbitral tribunals come to the conclusion that in a particular case there has been a substantial deprivation. In this regard, ISDS practice has tended to follow an analysis comparing the investment's original situation with its state after the challenged measures were taken. That comparison enables arbitral tribunals to examine the extent to which the bundle of ownership rights of the investor has been impaired. For instance, in the *Methanex* case the basis for the tribunal to find that there was not any regulatory expropriation, was the fact that the claimant had retained control over its assets, including subsidiaries and manufacturing capabilities. Further, although the claimant argued that it had lost customer base, goodwill and market share, the tribunal considered that those variables standing alone could not amount to an expropriation. Referring to a similar finding of the arbitral tribunal in *Feldman v. Mexico*[128], in *Methanex* the arbitrators stated:

> " Methanex [has not] established that the California ban manifested any of the features associated with expropriation. In *Feldman v. Mexico*, the tribunal held that: "*... the regulatory action has not deprived the Claimant of control of his company, . . . interfered directly in the internal operations . . . or displaced the Claimant as the controlling shareholder. The claimant is free to pursue other continuing lines of business activity . . . . Of course, he was effectively precluded from exporting cigarettes . . . . However, this does not amount to Claimant's deprivation of control of his company14.*" Methanex claims that it lost customer base, goodwill and market share.... In the view of the Tribunal, items such as goodwill and market share may... "constitute [] an element of the value of an enterprise and as such may have been covered by some of the compensation payments". Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal."[129]

A third element often considered by arbitral tribunals to determine whether a regulatory taking has taken place is whether a particular measure implemented by the host State has negatively affected the investor's reasonable "investment-backed expectations". ISDS practice has frequently recognized that foreign investors and host States are entitled to have the governmental interference with the investor's enterprise considered in light of the business model selected by the investor, the nature of its enterprise and related expectations.[130] Within this logic, investment-backed expectations of the investor constitute another factor to consider whether the degree of interference with the rights of ownership is substantial enough as to amount to an indirect expropriation.

For instance in *Metalclad v. Mexico*, the dispute involved measures to prevent the claimant from using land as an underground landfill, and a subsequent decree to establish that land as a state wildlife protected area. These measures were implemented despite the previous authorization granted to the investor by the federal authorities to build the landfill. In *Metalclad*, the arbitral tribunal stated that *"expropriation ...includes... interference with property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of the property..."*[131]

Metalclad illustrates another important trend in the analysis of arbitration tribunals when analyzing regulatory expropriations. That is, the focus of the enquiry is whether the challenged measure has had the effect of depriving the investor of its ownership rights. In this regard, the motivation behind the measure -- as in the *Metalclad* case, the protection of the environment-- is not particularly relevant. In this regard, arbitral tribunals, like in *Compañía de Desarrollo de Santa Elena S.A. v. Costa Rica*, have stated that:

> "Expropriatory environmental measures –no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation top pay compensation remains."[132]

In the same direction, in *TECMED v. Mexico,* the Tribunal stated its view that regulatory measures were covered by the same rules on expropriation as other types of government measures. As in most of the other recent cases, the effect on the investor was considered to be the primary test to apply. This included the economic impact and a test that considered the loss of rights of the investor.[133] However, the tribunal, in this case, seems to have set a particularly high bar of the degree of impact, looking to see whether the *"negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."*[134]

Although not very frequent, another element present in some recent regulatory takings analysis in ISDS practice, is an examination of the proportionality between the public policy objective pursued by the challenged measure and the burden that such measure entails over the property of

the investor. An analysis of proportionality consists in determining the correspondence between means, ends and the distribution of burdens between the investor owning the property and the host State.[135] When the individual owner of the property has to bear a burden which is too significant in light of the aim to be achieved, the measure is deemed to be disproportionate and thus, more likely to lead to a finding that there was a taking of property subject to compensation. This approach has been frequent in jurisprudence under the European Court of Human Rights, and it is not until recently, that some ISDS arbitral tribunals have started to include it in their decisions.

In conclusion, through the use of the various tests previously referred, ISDS practice is gradually developing a body of jurisprudence to deal with the issue of regulatory takings. Through those tests, most arbitral tribunals have tried to set a threshold requirement for a compensable expropriation that in fact, has screened out the majority of the complaints on indirect expropriation and the economic regulation by the State. However, despite the evolving jurisprudence and guidance in this regard, tribunals have not yet developed a clear analytical framework that governments may use to discern whether an envisage measure will be found to be acceptable regulation or will be considered an regulatory taking entailing compensation. Although it is clear that more and more tribunals require a substantial deprivation of property rights to consider whether compensation proceeds, the measure of what is "substantial" and the definition of what is property remains unclear.

IV. Effect of the ISDS jurisprudence over investment rule-making

ISDS practice has led numerous countries of the Americas, in particular the United States, Canada and other Latin American countries, to realize that the specific wording of IIA provisions does matter, and that it can make a significant difference on the outcome of an investment dispute. Thus, it is no coincidence that over the last couple of years, a new generation of IIAs has been gradually emerging. This "new generation" of IIAs falls mainly into two groups: The first group consists of economic integration agreements (EIAs) containing a chapter on investment. Originally influenced by NAFTA, such treaties have been concluded relatively frequently in the Americas involving countries such as Canada, Chile, Costa Rica, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Peru, and the United States. A second group of IIAs comprises BITs incorporating important innovations, and which are exemplified by the new model BITs of the United States and Canada. The normative evolution in these IIAs has five main features:

First, some recent IIAs have deviated from the traditional open-ended, asset-based definition of investment. Instead, they have attempted to strike a balance between maintaining a comprehensive definition of investment and yet not to cover assets that are not intended by the Parties to be covered investments.

Second, the wording of various substantive treaty obligations has been revised. Learning from the technical intricacies faced in the implementation of NAFTA's chapter 11 and other agreements, new IIAs clarify the meaning of provisions dealing with absolute standards of

protection, in particular, the international minimum standard of treatment in accordance with international law and indirect expropriation.

Third, these IIAs address a broader scope of issues - not only specific economic aspects like investment in financial services, but also other kind of issues where more room for host country regulation is sought. The protection of health, safety, the environment, and the promotion of internationally recognized labour rights are areas where new IIAs include specific language aimed at clarifying that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of these other key public policy goals.

Fourth, recent IIAs include transparency provisions, which represent an important qualitative innovation compared to previous IIAs. From a trend of conceiving transparency as an obligation to exchange information between States, these IIAs tend to establish transparency also as an obligation with respect to the investor. Further, transparency obligations are no longer exclusively geared towards fostering exchange of information, but also as transparency in the domestic process of rulemaking, aiming to enable interested investors to participate in it.

Fifth, new IIAs contain significant innovations regarding investor-State dispute settlement (ISDS) procedures. Greater transparency in arbitral proceedings, including open hearings, publication of related legal documents, and the possibility for representatives of civil society to submit "amicus curiae" briefs to arbitral tribunals is foreseen. In addition, other very detailed provisions on investor-state dispute settlement are included in order to provide for a more legal-oriented, predictable and orderly conduct at the different stages of the ISDS process.

A. Greater precision in the definition of investment

Over the last decade, one aspect that generated concern in some countries has been the interpretation by some arbitral tribunals of the concept of "investment" under the applicable IIA. It has been considered that some of these interpretations were too broad, and went beyond what the contracting parties conceived as "investment" when negotiating the IIA. For instance, in the case of *Pope & Talbot v. Canada*[136], the tribunal found that a market share through trade could be regarded as part of the assets of an investment; and in *S.D.Myers v. Canada*[137], the arbitral tribunal held that the establishment of a sales office and commitment or marketing time formed a sufficient investment.

One approach of avoiding an over-reaching definition of investment is called a "closed-list" definition. This approach differs from the broader asset-based definition in that it does not contain a conceptual chapeau to define the term "investment"; it rather consists in an ample, but finite list of tangible and intangible assets. Originally envisaged as an "enterprise-based" definition used in the context of the U.S.-Canada Free Trade Agreement, this approach evolved towards the definition used in article 1139 of NAFTA. Subsequently, the "closed-list" approach has been frequently used by several APEC member countries in the definition of "investment" included in their IIAs. For instance, Article 96 of the Free Trade Agreement (FTA) between Japan and Mexico illustrates this approach, and defines "investment" in the following manner:

“(i) the term “investment” means:
(AA) an enterprise;
(BB) an equity security of an enterprise;
(CC) a debt security of an enterprise:
(aa) where the enterprise is an affiliate of the investor, or
(bb) where the original maturity of the debt security is at least 3 years, but does not include a debt security, regardless of original maturity, of a Party or a state enterprise;
(DD) a loan to an enterprise:
(aa) where the enterprise is an affiliate of the investor, or
(bb) where the original maturity of the loan is at least 3 years, but does not include a loan, regardless of original maturity, to a Party or a state enterprise;
(EE) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(FF) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (CC) or (DD) above;
(GG) real estate or other property, tangible or intangible, and any related property rights such as lease, liens and pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(HH) interests arising from the commitment of capital or other resources in the Area of a Party to economic activity in such Area, such as under:
(aa) contracts involving the presence of an investor’s property in the Area of the Party, including turnkey or construction contracts, or concessions, or
(bb) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean,
(II) claims to money that arise solely from:
(aa) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Party to an enterprise in the Area of the other Party, or
(bb) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (DD) above; or
(JJ) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (AA) through (HH) above;”

During the last decade, the “closed-list” definition of "investment" has also begun to be used in the context of BIT negotiations. In 2004, Canada abandoned the asset-based definition of "investment" in its FIPAs and opted to incorporate in its new Canadian BIT model a relatively detailed "closed-list” definition of “investment.”[138] In addition to being finite, the list contains a series of specific clarifications to avoid applying the agreement to certain kinds of assets that otherwise would fall under the investment definition.

Another approach used to make the definition of "investment" more accurate has been to qualify an otherwise very broad definition. Accordingly, numerous IIAs, such as the investment chapters of several free trade agreements signed between the United States and Latin American countries incorporate a definition of “investment” in economic terms, that is, they cover, in principle,

every asset that an investor owns and controls, but add the qualification that such assets must have the “characteristics of an investment”. For this purpose, they refer to criteria developed in ICSID practice, such as “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”. This approach is complemented by explicit exclusions of several kinds of assets, which are not to fall within the category of covered investments under the agreement.

The approach referred to above clearly indicates that for an asset to be considered as a covered investment, three requisites must concur as a minimum. First, the asset must be owned or controlled by an investor as defined by the agreement; second, the asset must have the characteristics of an investment; and third, the asset must not fall within any of the excluded categories.

The definition does not list all the characteristics that an asset must have in order to be considered an investment. However, the definition does include some minimum parameters, namely the commitment of capital, the expectation of gain or profit, or the assumption of risk. The inclusion of these criteria within the definition of investment has the effect of excluding *ab initio* certain assets – arguably this would be the case for real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes. However, the wording of the definition means that in the case of other kind of assets, the determination as to whether they fall within the scope of a covered investment has to be undertaken on a case-by-case basis.

B. Clarification of several key substantive obligations

A second trend in investment rulemaking derived from the ISDS experience over the last decade relates to the revision of the wording of various substantive IIA obligations. New IIAs have tended to clarify the meaning of several substantive provisions, in particular those dealing with absolute standards of protection, such as the international minimum standard of treatment and expropriation.

In the case of the international minimum standard of treatment, new IIAs include a provision, which explicitly clarifies that the obligation undertaken by the Contracting Parties is to accord covered investments treatment *in accordance with customary international law*. According to these IIAs, the latter includes the notions of fair and equitable treatment and full protection and security. The IIAs also define each of these standards. It is evident that the negotiators of these agreements have taken into account the issues discussed in recent NAFTA chapter 11 arbitrations. An example of this trend is the relevant article included in the investment chapter of the Free Trade Agreements negotiated between the United States and Chile, Central America, Colombia and Peru, that reads as follows:

“**ARTICLE 11..: MINIMUM STANDARD OF TREATMENT** 11-1

> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
>
> ---
>
> 11-1 Article 11.5 shall be interpreted in accordance with Annex 11-A."

The provision cited above is complemented by an Annex, which clarifies the understanding of the IIA parties regarding the concept "customary international law".

> **"Annex A**
> **Customary International Law**
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 11.5 and Annex 11.B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

The language of the clause cited above is self-explanatory. This seems to be exactly the intention of the Contracting Parties, partly as a result of the experience with article 1105 of NAFTA. The debate regarding the fair and equitable treatment clause in chapter 11 of NAFTA, and more recently in some BIT disputes, has evidenced the risks of including unqualified language in IIAs. The wording of those clauses could be broad enough to apply to virtually any adverse circumstance involving an investment, making the fair and equitable treatment provision among those most likely to be relied upon by an investor in order to bring a claim under the investor-State dispute settlement proceedings. The inclusion of language clarifying the content and scope of the minimum standard of treatment in new IIAs may be particularly relevant to counterbalance two recent trends in ISDS practice.

Expropriation is the other area where recent IIAs have introduced clarifying language. As was explained before, the lack of clarity concerning the degree of interference with the rights of ownership that is required for an act or series of acts to constitute an indirect expropriation, has been one of the most controversial issue during the last decade (UNCTAD, 2000).

The number of ISDS cases acknowledging that an indirect expropriation has occurred have been scant. Nonetheless, parts of civil society in some countries have expressed fears that the prospect of investor-State arbitration arising out of alleged regulatory takings could result in a "regulatory chill" on the grounds that concern over liability exposure might lead host countries to abstain from necessary regulation.

Within this context, recent IIAs contain provisions clarifying two specific aspects. First, text has been included in order to make it explicit that the obligations regarding expropriation are intended to reflect the level of protection granted by customary international law. Second, such clarification has been complemented by guidelines and criteria in order to determine whether, in a particular situation, an indirect expropriation has in fact taken place.

In this regard, it is clarified that an adverse effect on the economic value of an investment, as such, does not establish that an indirect expropriation has occurred. It is further stated that, except in rare circumstances, non-discriminatory regulatory actions by a Party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. Annex 10-D of the Free Trade Agreement between Chile and the United States illustrates this trend:

"Annex 10-D
Expropriation

> The Parties confirm their shared understanding that:
> 1. Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
> 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
> 3. Article 10.9(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
> 4. The second situation addressed by Article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
> (iii) the character of the government action.

> (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

What are the motivations behind the inclusion of these clarification clauses in some IIAs? Do these clauses reflect the intention of the contracting parties to "correct" any particular trend in the jurisprudential interpretation of expropriation clauses? It could be argued that provisions like the one cited above provide some important guidance for future cases. Another significant role of such clarifying provisions may be that they serve as a signal for civil society. By including such language, governments may acknowledge the concerns of certain sectors of civil society regarding to what they perceive as a "regulatory chill effect" of ISDS proceedings. To respond to these concerns, a provision like the one cited above indicates that IIAs are not intended to put in question the regulatory power of host States.

C. Balance between investment protection and other public policy objectives

In addition to the features already mentioned, some new IIAs address a broader scope of issues. The protection of health, safety, cultural identity, the environment, and the promotion of internationally recognized labour rights are some of the areas where these IIAs include specific language aimed at clarifying that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of these other key public policy objectives. Different techniques have been used for that purpose. While some IIAs have included general treaty exceptions, other treaties have opted for positive language in order to reinforce commitments of the contracting parties to safeguard certain values; some IIAs have combined the both.

Examples of IIAs including exceptions to safeguard flexibility for regulation are the new U.S and Canadian model BITs. The latter includes a series of exceptions to preserve a wide fan of public policy objectives, such as the protection of human, animal or plant life and health, the integrity and stability of the financial system, cultural industries and essential security interests.

Countries have not only opted to use exceptions, but have also included positive language into the IIAs to protect other public policy objectives, notably the protection of the environment and the respect for core labour rights. Once more, the legal techniques used for such purpose vary among the different IIAs. One approach has been to make reference to these values in the preamble of the agreement. Other IIAs have included "side agreements" to protect labour and environmental standards. Among other aspects, it is made clear that investment promotion and liberalization will not impair the capacity of the contracting parties to protect the environment or labour rights in their respective territories. The same technique can be observed in the NAFTA and in the Free Trade Agreement between Canada and Chile. Other IIAs have incorporated specific provisions in the investment chapter as well as in additional sections on labour and environment.

D. Promotion of greater transparency in the process of domestic rule-making

A fourth feature of some recent IIAs is the qualitative evolution in the conception of the transparency obligations for purposes of the agreement. In addition to the obligation of the Contracting Parties to publish their laws[139], new approaches include the investors in transparency regulations, providing them not only with rights, but also with obligations vis-à-vis the host State.[140] Second, this new method conceives transparency beyond the traditional notion of publication of laws and regulations. Rather, it also focuses on the process of rulemaking, attempting to use it as an instrument to promote the principle of due process. Thus, in addition to enabling investors to know and understand the applicable rules and disciplines affecting their investments, this new approach attempts to use transparency as a tool to enable interested persons to participate in the process of investment-related rulemaking. An example of this approach is article 19 of the 2004 Canadian Model BIT:

> **"Article 19**
> **Transparency**
> 1. Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
> 2. To the extent possible, each Party shall:
> (a) publish in advance any such measure that it proposes to adopt; and
> (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.
> 3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments."

The approach illustrated above applies transparency not only to existing legislation, but also to draft bills and regulations. In this respect, article 19.2 above provides that to the extent possible, the Contracting Parties shall publish in advance any proposed measure of general application that affects investments and also *"... provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures."* This approach, which is also used in the new U.S. model BIT, represents a qualitative leap in the content and rationale of transparency provisions in IIAs. Several reasons justify this assertion.

First, under this approach, transparency no longer means just information, but also participation in investment rulemaking. Second, the obligation does not provide an exclusive right to a foreign investor vis-à-vis the host country. Rather, the obligation is to provide a reasonable opportunity to all interested persons to comment on proposed investment-related measures. Thus, the obligation is not only applicable to the contracting parties with respect to the investors of the other contracting party, but also between each contracting party and its own citizens.

It is true that for some countries, to develop the mechanisms to effectively comply with principles of due process may entail legal reforms and financial costs. On the other hand, if those adjustments are necessary it is because the developing countries concerned lack a modern body of administrative law and implementation procedures, a sine-qua-non requisite not only for the modernization of the administration of justice, but for strengthening democratic institutions in general. Within this context, transparency provisions in IIAs may be significant not only for the generation of a more predictable business climate in favour of foreign investors, but - more important from a development perspective - to foster a more legalistic and rule-oriented administrative practice, which is in the general interest of the population of the host country.

The emphasis of some IIAs on using transparency provisions to strengthen the principle of due process of law is also evidenced by some additional obligations. An example is the BIT between the United States and Uruguay (2005), which includes within the transparency provision additional explicit obligations on administrative procedures and the right of an impartial review and appeal of administrative decisions on investment-related matters. Once more, these kinds of obligations matter not only because of the more predictable investment climate they tend to generate, but also because of the institutional strengthening that their full compliance may entail for the entire citizenry of the countries concerned.

E. Innovations in ISDS procedures

Some recent IIAs regulate in more detail ISDS procedures, providing greater guidance, both to the disputing parties and tribunals, with respect to the conduct of the arbitration proceedings. During the first part of the last decade, chapter 11 of NAFTA influenced significantly the features of the investor-State dispute settlement provisions in many other IIAs. More recently, it is the experience with the increasing number of investment disputes that has triggered innovations included in new IIAs.

Traditionally, most IIAs have had very few general provisions on ISDS procedures. This trend changed with NAFTA, which for the first time regulated a series of aspects of arbitration proceedings. NAFTA's chapter 11 devotes a whole section to ISDS procedures. Recent IIAs negotiated among various Latin American countries have continued with this trend, and have even taken the evolution in rulemaking one step further ISDS procedures are one of the areas where significant developments in IIAs have taken place over the last decade.

Recent IIAs have incorporated various innovative provisions directed to foster four general objectives: First, they have purported to provide greater control by the contracting parties over arbitration procedures; second, they promote the principle of judicial economy in investment-related disputes; third, they seek to ensure consistency among arbitral awards; and fourth, they promote greater legitimacy of ISDS within civil society. These objectives are derived from the experience on investment disputes that several countries of the region have gathered over the last decade.

V. Conclusions

Over the last decade ISDS practice has touched upon numerous procedural and substantive aspects of arbitration and investment law. Despite the significant case load, it should be noted that jurisprudence is still in its early stages, and the majority of the cases submitted to arbitration during the last couple of years are still in process. Within this context, it should not surprise that most of the emerging patterns in jurisprudence are related to matters of jurisdiction and ISDS procedural aspects, although some key points of substantive law have also been addressed.

With respect to procedural matters, ISDS jurisprudence has tended to focus on questions of jurisdiction, and has clarified a series of issues until recently remained limited to theoretical discussions. The jurisdictional objections have raised novel issues concerning, for example, the overlap of contractual and IIA disputes, the *jus standi* of minority and non-controlling shareholders, criteria to attribute to the host State measures adopted by State enterprises and the "fork-in-the-road" clauses. However, besides jurisdictional questions, ISDS jurisprudence on matters of procedure has also addressed other key issues, such as transparency and non-party participation in ISDS proceedings.

Regarding substantive aspects, although less voluminous, ISDS experience has also dealt with key standards of treatment and protection to foreign investment. The scope and content of the minimum standard of treatment and its related standards on fair and equitable treatment and full protection and security, the scope of MFN, the methodology to determine whether there has been a breach of the national treatment standard and the criteria to determine whether an indirect expropriation has in fact occurred appear as salient issues addressed by ISDS jurisprudence during this initial period.

Commenting on the evolving ISDS jurisprudence, it has been said that consistency is precisely one of its strengths. Frequently, international doctrine points to the *Lauder* and *CME* cases and the two *SGS* cases against Pakistan and Philippines as evidence of almost identical disputes leading to conflicting results. However, placing ISDS experience into perspective, and considering that it is evolving based on the interpretation of more than 2500 different IIAs negotiated by different countries and containing provisions the wording of which is also different, the degree of consistency in the evolving investment jurisprudence is quite remarkable.[141]

When inferring trends on ISDS jurisprudence, it is paramount to act with extreme caution. It is quite difficult to extract the essence of the case law when the latter is based on the interpretation of texts of IIAs which, although are similar on their face, in fact have provisions with different wording, and thus, entail very distinct legal effects. Further, arbitral decisions are delivered on a given particular factual context, often unique to the dispute under consideration. Thus, it is not advisable to make general statements regarding the jurisprudential interpretation of a particular standard of treatment or protection. Any trend in this regard should always be placed in its appropriate context.

From a different perspective, however, it is possible to identify two important lessons derived from the ISDS practice over the last decade. One is that the increase in investment disputes has tested the wisdom to negotiate IIAs with extremely broad and imprecise provisions. The broader and more imprecise a particular text is, the more likely that it will lead to different, and event conflictive, interpretations. This will not only make it more likely that a dispute between the investor and the host State arises, but it will also improve the possibility of delegating to the arbitral tribunal the task of identifying the meaning that the provision under dispute should have. Clearly, one of the objectives of IIAs is to foster predictability and certainty for investors, but also for host States, and in this regard, having investment provisions drafted broadly and imprecisely do not serve the interests of neither of these parties.

A second important lesson derived from ISDS practice is that, when negotiating IIAs, countries not only should pay attention to the particular wording of the text of the agreement. Equally important, parties should bear in mind the future interaction between the IIA and the arbitration convention(s) referred to by the latter, and in particular, ICSID. As explained in Section III of this document, for a dispute to fall within the jurisdiction of ICSID, it is necessary to comply with the objective requirements of jurisdiction included in Article 25 of the ICSID Convention. Thus, not everything that the parties agree to be subject to arbitration under an IIA may in fact fall within the jurisdiction of ICSID.

The development of a new generation of IIAs, most of which have been negotiated by Latin American countries in the context of Free Trade Agreements with the United States, shows that several governments have been attentive to the developments in ISDS practice. Observing how previous IIAs are interpreted and applied by arbitral tribunals, some governments have come up with new provisions and new language which addresses most of the problems evidenced in the context of investment disputes. In this sense, it could be said that new generation IIAs represent the response on the part of those governments to the various procedural and substantive issues raised in the context of ISDS practice over the period.

New generation IIAs have made the definition of investment more precise, have redrafted and clarified several provisions dealing with standards of protection, have improved and redefined the concept of transparency in the context of investment agreements, have clarified that investment protection and liberalization must not be pursued at the expense of other key public policy objectives, and have updated and modernized ISDS procedures, *inter alia*, fostering increased information and participation of civil society in those proceedings. Regardless of the particular merits that each of the mentioned improvements may have, the surge of new generation IIAs demonstrates a trend which is even more important from a systemic perspective, that is, that governments are being responsive to the challenges posed by new realities.

The increase in the number of investment disputes is often associated with numerous challenges for developing countries. As will be explained below, it is true that developing countries are confronted with important challenges as a result of the increase in investment-related litigious activity. However, the existence of such challenges should not obscure the fact that the

intensification of ISDS is symptomatic of two extremely positive trends for developing countries.

One of them is the legalization of investment dispute resolution. Indeed, the fact that until the last decade there was a limited number of ISDS cases does not mean that until that turning point in history there were not investment-related disputes. Historically, international investment-related disputes have existed since very long ago. Thus, it is nothing new that disputes arise. What is certainly an innovation is the fact that investors and their countries of origin, instead than relying on other means to solve their grievances, are increasingly relying on international law to solve them. In perspective, this is a remarkable development in the path towards a more stable, fair and balanced international order. Indeed, nowadays, the use of "gun boat diplomacy" to deal with investment-related disputes seems barbarian, however, civil society tends to forget that just a century away that was the means through which investment-related disputes were often solved.

The legalization of the international investment system obviously serves the interests of all the involved parties, investors, developed and developing countries. However, given that developing countries lack the economic, political or military might of industrial nations, they should be the most interested ones in pursuing the legalization of the international investment system, as the only means at their disposal to defend their interests in an world prone to conflict, lies in the strengthening of the rule of law at the international level.

A second positive aspect which is evidenced by the increase in ISDS activity is that such trend is gradually motivating developing host countries to improve domestic administrative practices in order to avoid future cases. Indeed, the ISDS experience shows that in addition to fostering the rule of law at the international level, that result is fostered in the domestic front as well. Fostering greater rigour, discipline and due process in the application of legislation is a goal which should be pursued in every country -- developing as well as developed. ISDS procedures are instrumental in fostering this objective. Of course, to make that happen, important capacity building initiatives must be undertaken. In this regard, further work is required in four different fronts.

First, Latin American countries must learn how to use the international investment adjudication system. International investment law is a complex and specialized subject, with multiple sources and in constant evolution. Thus, to develop the domestic capacities of governments and private sector of developing countries is paramount. The current level of dependence on foreign assistance for these countries to be able to adequately defend their interests in international arbitration cases is not fair or advisable for the health of the international investment system as a whole.

Further, having more capable and informed government officials in developing countries, who fully understood the content and implications of IIAs, not only is the interest of developing countries, but in the best interest of foreign investors and developed countries as well. Better prepared officials would likely increase the possibility of a better administration of domestic law and diminish the need of foreign investors to invoke ISDS procedures to defend their interests.

Further, in case disputes could not be avoided, by being able to directly participate in the proceedings and defend the host countries from the claims of investors, the legitimacy of the ISDS system as a whole would certainly be improved vis-à-vis civil society and certain international academic and domestic circles.

Second, small and medium enterprises --both from developed and developing countries-- should be able to participate in the ISDS system. Currently, the high cost of international arbitration proceedings -- which may cost various U.S.$ million-- is *de facto* limiting the access to international justice only to those investors with claims entailing sums large enough to justify the use of the ISDS mechanism. The majority of the enterprises in Latin America are small and medium enterprises (SMEs) which, if they became foreign investors, they would start with relatively small operations and most probably, in adjacent countries. Because of their size and lesser international exposure, SMEs tend to be more vulnerable to arbitrary practices of host States than the bigger multinational enterprises, and yet, the former are the less protected by IIAs. This is so because, despite the fact that SMEs could theoretically benefit equally from the standards of protection and treatment included in IIAs, if they do not have access to ISDS procedures, they lack any effective enforcement mechanism to ensure the benefit from those guarantees.

Within this context, one of the remaining systemic challenges for Latin America, and for other latitudes as well, is then to device low-cost ISDS mechanisms to effectively enable SMEs to have access to international adjudication and effectively enforce the guarantees granted in IIAs. This is an issue, however, that has not yet attracted much international attention, and that UNCTAD is purporting to address in the near future.

A third front of action relates to one of the less acknowledged but more important benefits IIAs can entail for developing countries. IIAs are important not only because their potential international impact in terms of attracting FDI or sending positive signals to foreign investors. Equally important, there is the domestic impact these IIAs can have in developing countries. IIAs can become instrumental to foster key domestic reforms in developing economies -- which are often postponed-- in order to promote the modernization of their institutions and in this way, incentive fair and sustainable economic development. Although in the short term, investment disputes may entail a significant financial burden for developing countries, it is important not to oversee the potential effect ISDS can have in fostering domestic reform.

To a great extent, promotion of transparency, due process and a strict application of the rule of law is the best way to avoid investment disputes. Indeed, for a developing country, the best way to win an investment dispute is not to have it in the first place. Further, the role of the rule of law in fostering economic development has been widely acknowledged in international economic literature. Through appropriate capacity building, the countries of Latin America could improve their discipline in the administration of investment-related laws and regulations and in this way, not only avoid the possibility of being subject to investment disputes, but also, improve the general investment climate.

A fourth front of action is clearly civil society. It is likely that the interaction between national investment policies and IIAs will undergo a broader political debate. This would be a positive development in the sense that that more awareness and information about the importance and role of IIAs in general and ISDS in particular could yield a stronger and more coherent policies in the long run.

Furthermore, interaction between foreign investors and host States will likely continue to increase in the future. Within this context, rather than resisting the development of international regimes, there is need for making civil society understand the importance of those regimes in promoting a more rule-oriented and predictable international order, and as a result a more stable, fair and peaceful world to live. To reach those objectives, international law and capacity building are necessary.

* * *

Notes

[1] The IIAs examined in this study fall into two groups. The first group consists of bilateral investment treaties (BITs). The submission of a growing number of investment disputes to arbitration under ISDS procedures has prompted some revaluation of the content of traditional investment provisions. As a result, the new generation of IIAs has witnessed some innovations in BIT practice and thus there is greater variability among these agreements that in the past. The second group of IIAs considered in this study consists of economic integration agreements (EIAs) with investment provisions, which are basically trade agreements that include investment provisions. During the last decade, a number of countries have concluded a new generation of EIAs comprising highly complex free trade agreements that liberalize trade in goods and services, while also containing investment protection provisions similar to those that traditionally have appeared in BITs. This new generation of EIAs, like the new generation BITs, has generated innovations in IIA practice.
[2] Source: UNCTAD.
[3] *Ibid.*
[4] Source: UNCTAD
[5] Source: UNCTAD
[6] The figures referred to in the section are, with minor exceptions, mainly based on published NAFTA and ICSID cases, and consider only those arbitral decisions --both preliminary and final awards - that are publicly available.
[7] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka***,** ICSID Case No. ARB/87/3, 27 June 1990 (United Kingdom of Great Britain and Northern Ireland/Sri Lanka BIT). Note: unless otherwise indicated, all cases can be found on the ICSID webpage at www.worldbank.org/icsid/cases/cases.htm, or at http://ita.law.uvic.ca/chronological_list.htm.
[8] The sole known exception is a 2003 State-to-State dispute between Chile and Peru that was lodged in response to an investor-State claim filed by a Chilean firm, Lucchetti (*Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4). The State-State procedure was discontinued, and the investor-State case was only recently decided. In other instances, States have set up claims commissions to deal with investor-to-State cases, such as the Iran-United States Claims Tribunal.
[9] The worldwide inward FDI stock has tripled between 1995 and 2004 (from $2.8 trillion at the end of 1995 to $8.9 trillion at the end of 2004; see www.unctad.org/wir.
[10] These figures do not add up because of overlaps in counting.

[11] There are important exceptions to this trend, however. As will be explained in section IV below, Investor-State dispute settlement is one of the key areas where significant developments in treaty making have taken place over the last decade. During this period, there has been an emerging group of IIAs, which have attempted to regulate in more detail investor-State dispute settlement mechanisms, providing greater guidance to the disputing parties with respect to the conduct of the arbitration procedures and strengthening the rule-orientation of these adjudication mechanisms. Within this latter category of IIAs, it could be said that, in many ways, NAFTA Chapter 11 has played a significant role influencing the features of the investor-State dispute settlement provisions. During the first part of the last decade, several countries have attempted to incorporate into their IIAs some of the main features of NAFTA's Chapter 11 dispute settlement provisions. More recently, it is the experience gathered as a result of the application of NAFTA's Chapter 11 what has influenced the innovations included in some of the new generation of IIAs.

[12] Decision on Jurisdiction, 21 October 2003, ICISD case No. ARB/02/9.

[13] However, the tribunal also did not rule out that situations might arise where the exclusion of dual nationals could lead to a result, which was manifestly absurd or unreasonable (Vienna Convention, Article (32)(b)). *"One could envisage a situation where a country continues to apply the jus sanguinis over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state."*

[14] Award, 21 October 2003, ICSID Case No. ARB/02/7.

[15] *Ibid,* para.55.

[16] For instance, the BIT between the United States and Uruguay (2005) provides that*" "an investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided however, that a natural person who is dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship."*

[17] An example is the BIT between Argentina and Canada, which states the following:

> "The term "investor" includes any natural person who makes the investment possessing the citizenship or or **permanently residing** in a Contracting Party in accordance with its laws". (emphasis added)

[18] For a detailed discussion of this particular trend, see (Schreuer, 2001).

[19] Decision on Jurisdiction, 27 November 1985, ICISD Case No. ARB/84/3

[20] Decision on Jurisdiction, 6 July 1975, ICSID Case No. ARB/74/3.

[21] Decision on Jurisdiction, 29 April 2004, ICSID Case No. ARB/02/18

[22] Decision on Jurisdiction, 27 September 2001, ICSID Case No.ARB/00/5

[23] Legal doctrine has recognized that definitions of corporate nationality in IIAs providing for ICSID's jurisdiction will apply for determining of whether the nationality requirements of Article 25(2)(b) have been met, as they are part of the legal framework for the host State's submission to the Centre. In this regard, *"…any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal."* (Schreuer, 2001).

[24] For instance, the BIT between Mexico and the Netherlands explicitly provides for this possibility in its definition of "investor". Article 1 paragraph 3 of the Agreements provides the following:

> "(3) the term "nationals" shall comprise with regard to either Contracting Party:
>
> (a) natural persons having the nationality of that Contracting Party;
>
> (b) legal persons constituted under the law of that Contracting Party;
>
> (c) legal persons constituted under the law of the other Contracting Party but controlled, directly or indirectly, by natural persons as defined in (a) or by legal persons as defined in (b) above."

[25] An example of this approach is NAFTA Article 1117 which in its relevant part reads as follows:

> **"Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A …."

[26]Award, 31 March 1986, ICSID Case No. ARB/83/2
[27] Award, 21 October 1983, ICSID Case No. ARB/81/2
[28] Award, 20 November 1984, ICSID Case No.ARB/81/1
[29] Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 394, cited in (Schreuer, 2001), *supra* note 18, para 513.
[30] It should be noted, however, that in other contexts different from ICSID, arbitral tribunals have also considered variables other than share ownership in order to determine whether an investor controls a legal entity. In the case *S.D.Myers Inc v. Canada*, an UNCITRAL procedure brought under NAFTA chapter 11, the claim of the investor was challenged on the basis that the investor did not own shares in the investment in question and consequently, was not a covered investor under NAFTA. The Tribunal nevertheless found that S.D. Myers Inc, the U.S. investor, controlled Myers Canada not through legal ownership of shares, but on the basis that Mr. Dana Myers, who was President of S.D.Myers Inc. in fact controlled every decision, investment and transaction made by Myers Canada. See *S.D.Myers Inc v. Canada*, Partial Award, 13 November 2000, available at: http://www.investmentclaims.com/decisions/SDMyers-Canada-1stPartialAward-13Nov2000.pdf
[31] Award. 21 October 1983, 2 ICSID Reports 16
[32] Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349.
[33] Award, 16 February 1994, ICSID Case No.ARB/92/1.
[34] *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) February 5, 1970, (1970) I.C.J.3 at 35-36, 9 I.L.M. 227.
[35] Decision on Jurisdiction, 30 April 2004, ICSID Case No. ARB/02/1
[36] Decision on Jurisdiction 17 July 2003, ICSID Case No.ARB/01/8
[37] Decision on Jurisdiction, 3 August 2004, ICSID Case No.ARB/02/8
[38] Decision on Jurisdiction 17 July 2003, ICSID Case No.ARB/01/8, para. 45.
[39] *Ibid*, para.48.
[40] *Ibid*. para 51.
[41] Decision on Jurisdiction, 8 December 1998, ICSID Case No.ARB/97/6.
[42] For instance, in *GAMI Investments Inc. v. Mexico*, the investor only held a 14.8 percent equity interest in the investment. See, Final Award, 15 November 2004, UNCITRAL Case, available at the website of the Ministry of Economy of Mexico. http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Gami
[43] In this regard, it has been noted that: *"In agreeing to ICSID arbitration, the parties would be left to determine the kinds of activity which could give rise to a dispute contemplated in Article 25(1). In other words, consent of the parties in a particular case implied their recognition that the investment criteria had been met.*" (Hamida, 2005).
[44] In some NAFTA cases, arbitral tribunals – established under UNCITRAL-- have considered as covered investments assets, which have generated some controversy because of their immaterial nature. That is the case of *Pope & Talbot v. Canada*, where the tribunal found that market shares through trade could be regarded as part of the assets of an investment, or in *S.D.Myers v. Canada*, where the tribunal held that the establishment of a sales office and commitment or marketing time formed a sufficient investment. See, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Interim Award on the Merits, 26 June 2000 (NAFTA), and *S.D.Myers Inc. v Canada*, UNCITRAL, First Partial Award ,13 November 2000 (NAFTA).

[45] Decision on Jurisdiction, 11 July 1997, ICSID Case No. ARB/96/3(1).
[46] Decision on Jurisdiction, 11 July 1997, ICSID Case No. ARB/96/3(1).para.37
[47] *Ibid*, para.43.
[48] Decision on Jurisdiction, 23 July 2001, ICISID Case No. ARB/00/4.
[49] *Ibid,* para. 52.
[50] Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11.
[51] *Ibid*, para 45.
[52] Ibid, para 47.
[53] *Ibid*, para 50.
[54] *Ibid*, para. 53

[55] In this regard, see (Gaillard, 2005, p.3)

[56] For instance, in *Compañía del Aguas del Aconquija, S.A.& Compagnie Générale des Eaux v. Argentina (the Vivendi I Case)*, both the arbitral tribunal as well as the ad-hoc Committee, which had to decide on the request for annulment of the award distinguished between claims based on the applicable IIA -- the BIT between France and Argentina-- and claims based on the concession contract. In this regard, the ad-hoc Committee found it *"...evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract..."*, However, the Committee also pointed out that a breach of a contract and a breach of the treaty entailed independent standards, and thus affirmed that *"A State may breach a treaty without breaching a contract, and vice versa."* Consequently, the Committee stated that *"... whether there has been a breach of the BIT and whether there has been a breach of the contract are different questions."*
The distinction between treaty-based claims and contract-based claims has also been upheld in numerous other cases, such as in *LANCO v. Argentina*; *Azurix Corporation v. Argentina*, and *CMS v. Argentina*, among others.
[57] For instance, see *Azinian v. Mexico*, Award, 1 November 1999; *Mondev v.United States*, Award 11 October 2002; *Waste Management v. Mexico*, Award, 30 April 2004; *Amco v. Indonesia*, Award 20 November 1984, *LETCO v. Liberia*, Award 31 March 1986.
[58] Article 8 of the Italy-Morocco BIT read as follows:

> "All disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party…"

[59] In this regard, the *Salini v. Morocco* tribunal held:

> "… the Tribunal considers that its scope of application regarding the nature of the disputes is limited as to the persons concerned. In the case where the State has organised a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted a priori that the jurisdiction offer contained in Article 8 should bind it with respect to contractual breaches committed by this entity…. In other words, Article 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party."

Decision on Jurisdiction, 23 July, 2001, ICSID Case No.ARB/00/4, paras.60& &61
[60] As the contract involved an Italian investor and a Pakistani public - but autonomous corporate - body, legally and financially distinct from Pakistan, the tribunal decided that it lacked jurisdiction under the BIT between Italy and Pakistan to entertain Impregilo's claims based on alleged breaches of the contracts.
See*, Impregilo S.p.A v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/02/2, paras.198-211.
[61] Decision on Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13.
[62] *Ibid*, para.161.
[63] Award, 10 January 2005, ICSID Case No. ARB/03/08
[64] *Ibid*, para.25 Translation from the award in French, cited in (Gaillard, 2005, p.3)
[65] In this regard, see (Schreuer, 2005, p.299)
[66] Decision on Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13
[67] Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11
[68] Decision on Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/06
[69] Award, 10 January 2005, ICSID Case No. ARB/03/08
[70] Partial Award, 19 August 2005, Ad-hoc arbitration procedure, available at http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf
[71] See http://www.worldbank.org/icsid/cases/cases.htm.
[72] Amendment to Arbitration Rule 48, ICSID 2005
[73] Decision on Jurisdiction, 21 October 2005, ICSID Case No.ARB/02/03.
[74] *Ibid*, para.17
[75] *Ibid.*
[76] *Ibid.*

[77] See http://www.worldbank.org/icsid/cases/cases.htm. Statement of the NAFTA Free Trade Commission of 31 July 2001 (http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp).
[78] See (UNCTAD, 1998 p.53)
[79] Many BITs, after providing for fair and equitable treatment, add explicitly that investment from the other contracting party should be provided with "full protection and security" or "most constant protection and security". Contrary to the fair and equitable treatment standard, the content of the principle of full protection and security has been defined with more precision. As pointed out by (UNCTAD, 1998, p.55) not only is this an old standard commonly used in Friendship, Commerce and Navigation (FCN) treaties, but it was also included in early BITs before the concept of fair and equitable treatment had been introduced. In this regard, it has been said:

> " The provision does not impose strict liability on the host country to protect foreign investment. In effect, the standard does not represent a deviation from the due diligence rule. Thus, the term "full protection and security" connotes the assurance of full protection and security for foreign investors as contemplated or required by customary international law. At the same time, the clause on full protection and security is unusual in that it contemplates protecting investment against private as well as public action, that is, the clause requires that the host country should exercise reasonable care to protect investment against injury by private parties."

[80] "Non-discrimination, in its general sense, means that the host country must abstain from discriminatory action towards foreign investors in general or towards specific groups of foreign investors. … Although arguably, the standard of fair and equitable treatment implicitly excludes arbitrary or discriminatory treatment, some BITs explicitly prohibit such treatment." *Ibid.*
[81] For a detailed explanation of this position, see, (UNCTAD, 1999d, pp.37-41)
[82] As has been clearly explained, according to this view:

> "… the strength and usefulness of the fair and equitable treatment standard lie in its relative lack of abstract content which appears to be aimed at ensuring the prudent and just application of legal rules…According to this view, the inclusion of this standard in BITs serves several purposes; not only does it provide a basic standard, it also provides a basic auxiliary element for interpretation of the other provisions in the agreement and for filling gaps in the treaty."
> *Ibid*, p.54

[83] In this regard, see, (Brownlie, 2003)
[84] The Commission was established in 1924 as a result of the agreement between Mexico and United States to set up a facility to address claims from nationals for injuries suffered during and in the aftermath of the Mexican revolution of 1910.
[85] U.S.A.(L.F. Neer) v. United Mexican States, (1926), RIIA iv.60. at 61-62. Cited in J.C.Thomas, "Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators", in *ICSID Review, Foreign Investment Law Journal*, Vol.17, No.1, Spring 2002, p.31.
[86] As will be explained below, this was one of the conclusions of the arbitral panel in the *Metalclad* dispute brought against Mexico in the context of the application of NAFTA´s article 1105.
[87] Article 1105(1) of NAFTA reads as follows:

> "1. Each Party shall accord to investment of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[88] Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1.
[89] First Partial Award, 13 November 2000, UNCITRAL (NAFTA).
[90] Award on the Merits, 10 April 2001, UNCITRAL (NAFTA)
[91] In this regard, the *Metalclad* tribunal concluded that:

> "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA."

Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, para.99.
[92] Review by British Columbia Supreme Court (2001 BCSC 664), 2 May 2001.
[93] *Ibid*, para 266.

[94] Award on the Merits, 10 April 2001, UNCITRAL, para.110.

[95] The relevant part of the Note of Interpretation issued by the Free Trade Commission states the following:

> " Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:….
> B. Minimum Standard of Treatment in Accordance with International Law
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

Note of Interpretation of the NAFTA Free Trade Commission, 31 July, 2001.

[96] Mondev International Inc v. United States of America, paragraph 119. In ADF Group v. United States of America, which concerned a statute on local procurement requirements, the tribunal reiterated the approach taken in the Mondev case, i.e. that a tribunal did not have carte blanche to arrive at its own idiosyncratic assessment, but must ground its determination on relevant sources of international law. ADF Group v. United States of America, paragraphs 184-185

[97] Award, 11 October 2002, ICSID Case No.ARB(AF)/99/2 (NAFTA)

[98] *Ibid*, paras.116,123,125.

[99] Final Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1 (NAFTA) para.179.

[100] Award on the Merits, 26 June 2003, ICSID Case No. ARB(AF)/98/3 (NAFTA)

[101] *Ibid*, para.132.

[102] Final Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3 (NAFTA)

[103] *Ibid*, paras.98-99.

[104] Final Award, 15 November 2004, UNCITRAL (NAFTA) para.103.

[105] Final Award, 3 August 2005, UNCITRAL (NAFTA) Part IV.Chpt.C.para 14.

[106] Award on the Merits, 10 April 2001, UNCITRAL (NAFTA)

[107] *Ibid*, para.78.

[108] Final Award, 3 August 2005, UNCITRAL, (NAFTA) Part IV.Chapt. B. para.19

[109] *Ibid*, para.14.

[110] *S.D. Myers v. Canada*, First Partial Award, 13 November 2000, UNCITRAL (NAFTA), para.252.

[111] *Ibid*, para.254

[112] *Marvin Roy Feldman v. Mexico*, Award on the Merits, 16 December 2002, ICSID Case No. ARB(AF)/99/1, para 181.

[113] Within this path of reasoning, the processes and production methods used to create a product, including their impact on the environment, have often been considered irrelevant to a determination of whether the products subject to comparison are in fact "like products". One of the most commented cases hat followed this approach was the 1991"Tuna Case" , *United States-Restrictions on Imports of Tuna*, DS21/R, (unadopted) dated 3 September 1991. Cited in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th edition, (1995) p.138

[114] *Pope & Talbot v. Canada,* Award on the Merits, 10 April 2001, UNCITRAL (NAFTA), para.78.

[115] See, for example: *Asian Agricultural Products Limited v. Republic of Sri Lanka,* ICSID case No. ARB/87/3. 1990, ICSID Reports 246; *Anglo-Iranian Oil Company Case,* International Court of Justice, Reports, 1952, p.93; *Case concerning the rights of nationals of the United States of America in Morocco,* International Court of Justice, Reports, 1952, p.176 and *Ambatielos Case,* International Court of Justice, Reports, 1953, p.10.

[116] The first published case to address this is Asian *Agricultural Products Ltd. v. Republic of Sri Lanka,* op. cit

[117] *Emilio Agustin Maffezini v. The Kingdom of Spain,* Decision on Jurisdiction, 25 January 2000; ICSID Case No. ARB/97/7

[118] The Arbitral Tribunal elaborated in greater detail this point and stated:

“63. Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”

Ibid, paras. 62 and .63.

[119] *Siemens v. Argentina* Decision on Jurisdiction, 3 August 2004 ICSID Case No. ARB/02/8

[120] *Ibid,* paras. 102 and 103.

[121] The reaction against expanding MFN treatment to dispute settlement procedures is illustrated by the proposal made by several countries participating in the then active negotiations of the Free Trade of the Americas (FTAA). In the draft of 21 November 2003, a footnote 13 was included stating the following:

> “Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement:
>
> *“The Parties note the recent decision of the arbitral tribunal in the Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2002). By contrast, the Most-Favored- Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case*.”

[122] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan,* Decision on Jurisdiction, 9 November 2004, ICSID Case No. ARB/02/13.

[123] *Ibid*, para 118

[124] *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, 8 February 2005 ICSID Case No. ARB/03/24.(Energy Charter)

[125] *S.D. Myers, Inc. v. Canada*, First Partial Award, 13 November 2000, UNCITRAL (NAFTA), para.287-288

[126] *Marvin Roy Feldman v. The United Mexican States*, Award on the Merits. 16 December 2002, ICSID Case No. ARB(AF)/99/1, para.103.
[127] *Pope & Talbot, Inc.v Canada*, Interim Award on the Merits, 26 June 2000, UNCITRAL (NAFTA), para.102.
[128] Award on the Merits, 16 December 2002, ICSID Case No. ARB(AF)/99/1
[129] *Methanex v. United States*, Final Award, 3 August 2005, UNCITRAL (NAFTA) paras. 16-18
[130] In this regard, see, J.Coe & N. Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contribution*, in T.Weiler, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, London, (2005) p.624.
[131] *Metalclad Corporation v. Mexico*, Award on the Merits, 16 December 2002, ICSID Case No. ARB(AF)/97/1, (NAFTA)
[132] *Compañía de Desarrollo de Santa Elena S.A. v. Costa Rica,* Award on the Merits, 17 February 2000, ICSID Case No.ARB/96/1, para.72.
[133] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award, 29 May 2003, ICSID Case No. ARB(AF)/00/2, paras 121 et seq.
[134] *Ibid*., paras.116.
[135] , J.Coe & N. Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contribution*, in T.Weiler, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, London, (2005) p.625.
[136] *Pope & Talbot, Inc. v. The Government of Canada,* UNCITRAL*,* Interim Award on Merits, 26 June 2000; Award on Merits*,* 10 April 2001; Award on Damages, 31 May 2002; Award on Costs, 26 November 2002.
[137] *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000.
[138] Since this definition is more than one page long, it is included in Annex 1 to this document.
[139] For instance, Article10 of the BIT between Uruguay and the United States (2005) provides the following:

> **"Article 10: Publication of Laws and Decisions Respecting Investment**
> 1. Each Party shall ensure that its:
> (a) laws, regulations, procedures, and administrative rulings of general application; and
> (b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.
> 2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:
> (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or
> (b) a ruling that adjudicates with respect to a particular act or practice."

[140] Thus, for example Article 15.2 of the BIT between Uruguay and the United States obliges the investor to provide information on its investment to the host government in certain circumstances.

> **"Article 15: Special Formalities and Information Requirements**
> ….
> 2. Notwithstanding Articles 3 and 4, a Party may require an investor of the other Party, or its covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law."

[141] Some legal scholars have recognized that level of coherence on recent ISDS jurisprudence, and have drawn attention to the Argentinean experience, context in which the level of consistency among different arbitration tribunals has been evident. For instance, it has been said that *« ... l'exemple des onze décisions sur la compétence rendues dans les affaires argentines illustre parfaitement le mouvement de création d´une jurisprudence arbitrale beaucoup plus cohérente que son mode d´élaboration aurait pu le faire craindre. »* (Gaillard, 2006).

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