



**International Investment
Agreements Negotiators
Handbook:
APEC/UNCTAD MODULES
(IIA Handbook)**

**APEC Committee on Trade and Investment
Investment Experts Group**

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NOTE

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ABBREVIATIONS

ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
CAFTA-DR	Central America - Dominican Republic Free Trade Agreement
CARIFORUM	Caribbean Forum
CECA	Comprehensive Economic Partnership Agreement
CEFTA	Central European Free Trade Agreement
CEPA	Closer Economic Partnership Agreement
COMESA	Common Market for Eastern and Southern Africa
CRS	Corporate and Social Responsibility
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
IIA	International Investment Agreement
ICSID	International Centre for Settlement of Investment Disputes
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Cooperation and Stability
PR	Performance Requirements
REIO	Regional Economic Integration Organization
TRIMs	Trade-Related Investment Measures

TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCITRAL	United Nation Commission on International Trade Law
WIR	World Investment Report
WTO	World Trade Organization

Introduction

Purpose

The Handbook aims to provide practical and user-friendly information to negotiators of International Investment Agreements (IIAs) in order to assist them in the decision-making process towards concluding IIAs compatible with national policy objectives. For experienced negotiators, the Handbook offers a quick and practical reminder of the main policy options, issues and implications at stake. For less experienced negotiators and other government officials, it helps to better understand IIAs. Written in plain language, it may also serve as an educational tool for capacity building.

The Handbook is divided into 26 sections (modules), each dedicated to a specific provision or issue commonly encountered in IIAs.¹ Each module identifies main approaches and policy options accompanied by sample treaty formulations from existing IIAs. Importantly, it also sets out main implications of each policy option in order to assist negotiators in making an informed choice.

The Handbook is not designed to meet specific needs, nor does it aim to present any sort of consensus or international benchmarking. It may not be seen as offering legal advice or a recommendation of any kind. Thanks to its “checklist” approach, it is simply a quick reference tool that should go some way in helping the user to understand the rationales for, and implications of, various policy options. The Handbook’s content and the various examples of existing IIA practice, provided here Handbook, are indicative and could be considered by the negotiators as a useful element.

While the Handbook features key variations of the elements commonly found in existing IIAs, it is not comprehensive, in that some treaties may cover matters not treated in the Handbook or – with respect to those elements that are included in the Handbook – may adopt approaches and formulations different from those mentioned here. At the same time, every effort was made to identify and analyze the principal and most wide-spread policy approaches.

In developing IIA clauses, negotiators would be well-advised to consult more detailed literature, arbitral practice² and other relevant sources of information in order to make considered and thought-out decisions. Such decisions are not necessarily limited to what is already “out there” and may require negotiators to creatively develop and formulate treaty rules according to their objectives. The Handbook is thus an input, among many others, that could be used in this process.³

¹ The expression “commonly encountered” should be taken with a grain of salt. In many aspects IIAs have reached a certain degree of uniformity, in others they have become increasingly diverse. Indeed, there is a substantial gap between a typical 6-page bilateral investment treaty of the 1990s and most recent IIAs that can take 40-50 pages or even more. To a large extent, this increase in length is due to the increasing level of detail found in the rules and standards (e.g. *Transfer of Funds* or *ISDS*), although in some instances new types of rules have emerged (e.g. *Denial of Benefits*, *Investor Responsibility*, *General Exceptions*).

² For information on relevant arbitration awards see UNCTAD database of treaty-based investor-State dispute settlement cases at <http://iadbcases.unctad.org/>

³ For further information, please also see UNCTAD’s Investment Policy Framework for Sustainable Development (IPFSD), which offers a comprehensive guide for national and international investment

It is hoped that the Handbook will serve as a convenient support tool for the conduct of effective and high-quality IIA negotiations, with a view to creating a network of IIAs that effectively fosters foreign direct investment.

How to use the Handbook

Each module follows the same basic structure and consists of the following elements:

- (1) Brief introduction explaining the general meaning and purpose of the relevant provision.
- (2) The structure of the provision, in the form of a checklist of elements commonly covered in the provision concerned. With respect to each element, one or more policy choice is indicated.
- (3) The explanation of specific policy options under each element, and the main implications of choosing a specific policy option.
- (4) One or more examples of treaty formulations illustrating each policy option.
- (5) A separate list of “other approaches” (if any), i.e. those that are less commonly encountered in IIAs but could still be considered.
- (6) An indicative list of other treaty provisions, if any, with which the provision concerned closely interacts.

The ultimate shape of an IIA is to a large extent determined by the interaction between selected policy options. For example, an agreement’s “protective strength” stems not only from the standards of protection, but also from the breadth and variety of categories of investors and investments it covers. Substantive treaty standards should be viewed together with flexibilities and exceptions (e.g. for national security and public policy objectives) and so on. In other words, each treaty element should be considered not only on its own but also in combination with other provisions and elements.

It should be kept in mind that a specific policy objective can be pursued by different treaty elements. For example, a country that wishes to preserve regulatory space for policies aimed at ensuring access to essential services can opt for (i) excluding investments in essential services from the scope of the treaty; (ii) excluding essential services policies from the scope of specific provisions (e.g. national treatment); (iii) scheduling reservations (for national treatment or the prohibition of performance requirements) for specific (existing and/or future) essential services policies; and/or (iv) including access to essential services as a legitimate policy objective in the IIA’s general exceptions. .

Role of the Most-Favoured-Nation (MFN) principle

Any new agreement concluded by a country may interact with earlier IIAs through operation of the Most-Favoured-Nation (MFN) obligation. The MFN obligation has in some cases been interpreted to allow investors covered by a given treaty to invoke more favorable provisions from treaties between the host State and a third country. A

polymaking. IPFSD consists of three elements: eleven core principles, which subsequently inform the specific guidelines for national investment policies, and policy options for IIAs, all of which aim at placing inclusive growth and sustainable development at the heart of efforts to attract and benefit from foreign investment. IPFSD is available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)

country wishing to avoid this outcome can seek to do so through careful formulation of MFN obligations, or in exceptions thereto.

Production team and acknowledgements

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1. Preamble

The preamble is an introductory statement made by the Contracting Parties which appears at the beginning of the treaty.

The purpose of the preamble is to express, in generic terms, the object and purpose of the treaty and its underlying philosophy, without establishing legally binding rights and obligations. The preamble is part of the treaty context under which the treaty will be interpreted pursuant to the Vienna Convention on the Law of Treaties.

Common elements

1. Content of the Preamble

- a. Intensifying economic cooperation
- b. Creating favourable conditions for investment
- c. Ensuring that broader economic and development goals are recognized
- d. Ensuring that other, non-economic values and principles are respected

This provision interacts with: *All provisions of the treaty*

1	The Contracting Parties determine which statements to include in the Preamble.
1.a	The Contracting Parties refer to the objective of intensifying economic cooperation between themselves. ➤ This statement expresses the intention that the treaty shall foster the economic relationship between the Contracting Parties. ➤ The role of the agreement as an instrument of economic diplomacy and cooperation is introduced. <i>Desiring to intensify economic cooperation to the mutual benefit of both States;</i> ➤ Austria-Iran BIT (2001) <i>Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;</i> ➤ United States Model BIT (2012)
1.b	States refer to the objective of creating and maintaining favourable conditions to promote cross-border investment. ➤ This objective is commonly found in investment treaties. ➤ Tribunals have relied on this recital to support investor-friendly interpretations of substantive treaty provisions. This can lead to one-sided outcomes particularly if the preamble does not contain a reference to other relevant objectives and principles (right to regulate,

	protection of public health and environment, etc.). <i>INTENDING to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;</i> ➤ Mexico-Trinidad and Tobago BIT (2006) <i>Intending to further create stable, equitable, favorable and transparent conditions for greater investment by investors of one Contracting Party in the Area of the other Contracting Party;</i> ➤ Colombia-Japan BIT (2011)
1.c	Contracting Parties refer to the objective of enhancing the flow of capital, thereby fostering prosperity, improving living standards and promoting sustainable development in the signatory economies. ➤ The statement explains that the agreement is meant to protect investments with the aim of enhancing prosperity and contributing to economic development. ➤ A reference to sustainable development can lead to more balanced interpretations and foster coherence between different policy objectives and bodies of law. <i>Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development;</i> ➤ Canada Model BIT (2004) <i>Recognizing the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties;</i> ➤ Malaysia-Turkey BIT (1998)
1.d	Contracting Parties clarify that the agreement is in line with certain principles and policy goals, such as the protection of sovereign regulatory powers, the maintenance of human rights, health, labour and/or environmental standards. ➤ The message is conveyed that the treaty is not concluded to the detriment of certain values or public policy goals, but that such values or principles are reinforced. ➤ When interpreting the treaty, tribunals would be expected to consider these objectives as part of the context of the treaty, along with the objective of investment protection. <i>Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;</i> ➤ US Model BIT (2012) <i>Willing to preserve their ability to safeguard the public welfare;</i> ➤ Colombia-EFTA FTA (2008)

	<i>Reaffirming their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives;</i> ➤ India-Singapore CECA (2005)
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Other approaches

Asymmetric development	The Contracting Parties acknowledge differences in their respective levels of development. ➤ It recognizes that the Contracting Parties may require different treatment. However, to achieve an effective result this would need to be reflected in substantive treaty provisions.
	<i>RECOGNISING the different levels of development [...] which require some flexibility including special and differential treatment [...];</i> ➤ ASEAN Comprehensive Investment Agreement (2009)

No Preamble

Implications	➤ For the purposes of interpretation, reference can be made to other elements of the treaty, preparatory works, etc., consistent with customary rules of treaty interpretation, i.e., where the language of the treaty is ambiguous ➤ The Contracting Parties lose an opportunity to communicate policy messages related to the object and purpose of the treaty.
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2. Treaty Scope

2.1. Definition of Investment⁴

The definition of investment sets out the kinds of assets that qualify as investment for the purposes of the treaty. It may also include specific exceptions.

The objective of this provision is to determine the range of economic interests covered by the treaty (scope *ratione materiae*).

Common elements

1. **Open-ended or closed definition**
 - a. Open-ended (illustrative)
 - b. Closed (exhaustive)
2. **Asset-based or enterprise-based definition**
 - a. Asset-based
 - b. Enterprise-based
3. **Listing characteristics of an investment**
4. **Excluding specific types of assets**
 - a. Portfolio investment
 - b. Sovereign debt
 - c. Commercial transactions
 - d. Loans and debt securities of short maturity
 - e. Court judgments or administrative decisions
5. **Compliance with domestic entry requirements**
6. **Link between investors and investments**
7. **Temporal dimension**
 - a. Coverage of both existing and future investments
 - b. Coverage of future investments only

This provision interacts with: *All substantive investor protection provisions*
Definition of Investor of a Party
Transparency
Exclusions from Treaty Scope
National Security Exceptions
General Exceptions
Investor-State Dispute Settlement

1	States decide whether to use an open-ended definition or a closed one.
1.a.	The open-ended approach refers to every kind of asset and usually includes an illustrative list of main categories of investment. ➤ It offers treaty protection to a maximum range of economic interests and can apply to anything that has economic value. ➤ It is not limited to the types of asset expressly listed in the treaty.

⁴ For a literature and case law review see *Scope and Definition*, UNCTAD/DIAE/IA/2010/2, 163 pages, Sales No: E.11.II.D.9 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=354>

	➤ It provides the greatest reassurance to investors that all of their interests will be eligible for protection regardless of their form and nature. ➤ It extends to new forms of investments that may have not existed at the time of the treaty's conclusion. ➤ Qualifying language can be included to limit or provide guidance on the scope of economic interests covered (e.g., "characteristics of an investment – see below). <u>The term "Investment" means every kind of asset [...] including, in particular, though not exclusively...</u> ➤ Azerbaijan-Finland BIT (2003) <u>The term "investment" comprises all assets and in particular, though not exclusively...</u> ➤ Austria-Philippines BIT (2002)
1.b	The closed-list approach implies a finite list of assets that qualify for treaty protection; whatever is not included shall not be deemed a covered investment. ➤ It sets out an exhaustive list of covered assets and thus delineates the treaty's scope of application in a precise and certain manner. ➤ It allows the Contracting Parties to target particular types of investments – those that they want to attract. ➤ The Contracting Parties may construct a list that is comprehensive or narrow. ➤ For additional types of assets to be included later, an amendment to the treaty will be required. ➤ The nature of some terms included in a closed list (e.g., "interests arising from a commitment of capital") can in fact render the scope of application indeterminate. <u>"Investment" means the following assets owned or controlled by investors of one Contracting Party and established or acquired in accordance with the national legislation of the other Contracting Party in whose territory the investment is made...</u> ➤ Belarus-Mexico BIT (2008)
2	States decide whether to use an asset-based or an enterprise-based definition of investment, either in a closed or illustrative list.
2.a	The asset-based approach lists different categories of assets, which typically include: • Movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; • Equity interest in companies, debt securities; • Claims to money or to any performance having an economic value; • Intellectual property rights (with or without a list of covered intellectual property rights); and • Business concessions, including concessions to search for, extract and exploit natural resources.

	➤ It includes the main forms in which an investment may take place. ➤ Some of the categories may be formulated in a broader or narrower way. <i>“investment” means every kind of assets invested by investors of a Party in the territory of the other Party and shall include in particular, though not exclusively:</i> <i>a. movable and immovable property as well as any other rights, such as mortgages, liens, pledges, usufructs and similar rights;</i> <i>b. stock, shares, debentures and other forms of participation in companies;</i> <i>c. claims to money and claims to performance;</i> <i>d. intellectual property rights;</i> <i>e. rights to engage in economic and commercial activities conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.</i> ➤ Jordan-Singapore BIT (2004) <i>The term “investments” shall comprise every kind of asset invested before or after the entry into force of this Agreement by natural or juridical persons of one Contracting Party in the territory of the other Contracting Party and shall include in particular, though not exclusively:</i> <i>(a) movable and immovable property as well as any other property rights such as mortgages, liens or pledges, usufructs and similar right;</i> <i>(b) shares, stocks and debentures of companies or other rights or interests in such companies and government-issued securities;</i> <i>(c) claims to money or to any performance having an economic value associated with an investment;</i> <i>(d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets and trade names, and goodwill; and</i> <i>(e) any right conferred by law or under contract and any licenses and permits pursuant to law, including the right to search for, extract, cultivate or exploit natural resources.</i> ➤ Jamaica-Republic of Korea BIT (2003)
2.b	The enterprise-based approach identifies assets primarily by reference to an enterprise. ➤ It considers a locally-incorporated enterprise, owned or controlled by an investor, or its branch, a separate type of investment. ➤ In practice, an investor’s local subsidiary often serves as a vehicle for an investment project. ➤ Local enterprises (as opposed to their shareholders) are in most cases addressees of host State’s laws and regulations. ➤ The treaty protects an enterprise as a whole. ➤ In case of a treaty breach, this approach allows recovery of all damages suffered by the enterprise itself (not only by its shareholder(s)).

	➤ This approach is sometimes supplemented by the definition of “ownership” and “control”.
	enterprise means: <i>(i) any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally -owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and</i> <i>(ii) a branch of any such entity;</i> enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there; investment means: <i>(I) an enterprise;</i> <i>(II) an equity security of an enterprise;</i> <i>(III) a debt security of an enterprise [...]</i> <i>(IV) a loan to an enterprise [...]</i> <i>(V) [...]</i> <i>(VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;</i> <i>(VII) 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 subparagraphs (III) (IV) or (V);</i> <i>(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and</i> <i>(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under</i> <i>(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or</i> <i>(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;</i> ➤ Canada Model BIT (2004), (1) The term “investments” means every kind of asset owned or controlled, directly or indirectly, by an investor, including: <i>(a) an enterprise;</i> <i>(b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;</i> <i>(c) bonds, debentures, loans and other forms of debt, including rights derived therefrom;</i> <i>(d) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts;</i> <i>(e) claims to money and to any performance under contract having a financial value;</i> <i>(f) intellectual property rights;</i> <i>(g) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations, and permits, including those for the exploration and exploitation of natural resources; and</i>

	<i>(h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.</i> <i>[...]</i> <i>(3) An enterprise is:</i> <i>(a) “owned” by an investor if more than fifty (50) percent of the equity interest in it is owned by the investor; and</i> <i>(b) “controlled” by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.</i> <i>(4) The term “an enterprise of a Contracting Party” means any legal person or any other entity duly constituted or organized under the applicable laws and regulations of that Contracting Party, whether or not for profit, and whether private or government owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, organization, company or branch.</i> ➤ Japan-Laos BIT (2008)
3	States decide whether an asset, in order to be protected by the treaty, must satisfy certain characteristics.
	The treaty clarifies that an asset shall satisfy certain economic characteristics of an investment, namely (i) the commitment of capital or other resources, (ii) the expectation of gain or profit, and/or (iii) the assumption of risk⁵. ➤ It seeks to restrict the range of covered assets based on criteria established within the treaty text ➤ The requirement of “the expectation of gain or profit” can exclude from treaty coverage investments made for non-business purposes, i.e. not in connection with economic activity (property for personal use, etc.). ➤ The assessment may be difficult in practice as the precise content of each element can be subject to varying interpretations. ➤ Contracting Parties may set out a number of requirements that have to be met either alternatively or cumulatively. <i>“Investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, <u>or</u> the assumption of risk.</i> ➤ Uruguay-USA BIT (2004) <i>[T]he minimum characteristics of an investment shall be:</i> <i>a. The commitment of capital or other resources;</i> <i>b. The expectation of gain or profit; <u>and</u></i> <i>c. The assumption of risk for the investor.</i> ➤ Colombia Model BIT (2008)

⁵An additional characteristic of an investment, discussed in literature and some arbitral awards, is the requirement that the investment contribute to the economic development of the host State. See *Scope and Definition*, UNCTAD/DIAE/IA/2010/2, Sales No: E.11.II.D.9, pp. 48-66 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=354>

4	States decide whether to explicitly exclude certain assets or transactions from the definition of investments. This allows States to tailor and select which assets are afforded treaty protection.
4.a	Portfolio investment.
	➤ Exclusion of portfolio investment reduces States' exposure to multiple treaty claims by minority shareholders. ➤ However, exclusion of portfolio investment may also serve as a discouragement to inflow of a common source of capital and foreign exchange.
	<i>The term "investment" means every kind of asset, connected with business activities, <u>acquired for the purpose of lasting economic relations</u> in the territory of a Contracting Party in conformity with its laws and regulations, and include in particular, but not exclusively [illustrative list of qualifying assets] provided that such investments are not in the nature of acquisition of shares or voting power amounting to or representing of less than ten (10) percent of a company through stock exchanges which shall not be covered by this Agreement.</i> ➤ Tanzania-Turkey BIT (2011) <i>For the purpose of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as <u>investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.</u></i> ➤ EFTA-Mexico FTA (2000)
4.b	Sovereign debt securities (government bonds).
	➤ Exclusion of public debt securities would allow States to implement programs of debt restructuring in case of default or financial difficulties without the risk of facing international arbitral proceedings brought by multiple creditors. ➤ However, exclusion of public debt may also increase investor nervousness about debt repayment, potentially discouraging investment.
	<i>Investment does not include:</i> <i>(i) Public debt operations</i> ➤ Colombia-UK BIT (2010) <i>a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment</i> ➤ Canada Model BIT (2004)
4.c	Ordinary commercial transactions and credit extended in connection to such transactions.

	➤ This exclusion removes specifies that ordinary commercial transactions are not investments for purposes of the treaty. <i>For purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments.</i> ➤ CAFTA-DR FTA (2004) <i>Each Contracting Party recognizes that some claims to money that:</i> <i>(i) are immediately due and result solely from export and import contracts for the sale of goods or services other than such contracts based on orders habitually secured; or</i> <i>(ii) result from credit granted in relation with the contracts referred to in subparagraph (i), maturity date of which is less than twelve (12) months;</i> <i>do not have the characteristics of an investment.</i> ➤ Colombia-Japan BIT (2011)
4.d	Short-term loans and debt securities as well as loans to, and debt securities of, State enterprises. ➤ The exclusion excludes short-term loans and debt securities. ➤ Under this approach transactions between related parties may not be included within the exception, e.g. when the loan is given by the investor to its affiliate or subsidiary established in the host State.
	<i>Investment means</i> <i>[...]</i> <i>(III) a debt security of an enterprise</i> <i>(i) where the enterprise is an affiliate of the investor, or</i> <i>(ii) where the original maturity of the debt security is at least three years,</i> <i>but does not include a debt security, regardless of original maturity, of a state enterprise;</i> <i>(IV) a loan to an enterprise</i> <i>(i) where the enterprise is an affiliate of the investor, or</i> <i>(ii) where the original maturity of the loan is at least three years,</i> <i>but does not include a loan, regardless of original maturity, to a state enterprise</i> ➤ Canada Model BIT (2004) <i>“investment” [...] includes:</i> <i>[...]</i> <i>(d) loans to an enterprise:</i> <i>(i) where the enterprise is an affiliate of the investor; or</i> <i>(ii) where the original maturity of the loan is at least three years,</i> <i>but does not include a loan, regardless of original maturity, to a Contracting Party or an entity directly owned and controlled by a Contracting Party;</i> ➤ Mexico-Singapore BIT (2009)
4.e	Court judgments or administrative decisions.

	➤ This specifies whether such acts of authority qualify as “investments”. <i>The term “investment” does not include an order or judgment entered in a judicial or administrative action.</i> ➤ CAFTA-DR FTA (2004)
5	States decide whether to extend treaty protection only to those investments that complied with domestic entry requirements. The treaty provides that an investment must be made in accordance with the laws and regulations of the host State. ➤ Establishes that incoming investments must comply with various policies of the host State as expressed in its legislation, including development policy, national security controls, immigration laws, etc. ➤ If the host Contracting Party has a system of investment approvals in place, an investment must obtain any required approvals to be covered by the treaty. ➤ Arguably, an investment that is not established in accordance with the host country’s laws and regulations would not be considered a covered investment. ➤ Such provision is arguably unnecessary for a treaty, when host states can use their laws to exclude investments they deem illegal; inclusion of this treaty provision could also subject investments treated as legitimately established to subsequent vagaries and reinterpretations of host state law. <i>The term “investment” means every kind of asset established or acquired by investors of one Contracting Party in the territory of the other Contracting Party <u>in accordance with its laws and regulations</u> and shall include ...</i> ➤ Croatia-Thailand BIT (2000) <i>“investment” means every kind of asset, owned or controlled by investors of one Party and <u>admitted by the other Party subject to its law and investment policies applicable from time to time</u> and includes:</i> ➤ Australia-Egypt BIT (2001) <i>“covered investment” means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and <u>has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State</u></i> ➤ ASEAN Comprehensive Investment Agreement (2009)
6	States decide whether an investment should be directly owned or controlled by an investor or whether ownership/control may also be indirect. The treaty provides that the investment may be owned or controlled by the investor directly or indirectly.

	➤ To qualify as an investor, an individual or company, originating from the Contracting Party, may own an investment both directly or indirectly. ➤ This is consistent with the way investments are often structured, i.e. using one or more layers of intermediate companies. ➤ This can result in treaty shopping and/or claims under more than one treaty relating to the same facts and thus potentially increases the exposure of the host State to international claims. ➤ Many IIAs are silent on the issue; in these cases, the treaty is likely to be interpreted as covering both directly and indirectly owned/controlled investments. <u>"Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment...</u> ➤ Rwanda-USA BIT (2008)
7	States decide whether investments established prior to the treaty should be covered by it.
7.a	The treaty applies to investments made both prior to and after the treaty's entry into force. ➤ It extends treaty protection to all qualifying investments regardless of the time of their establishment. There is no discrimination between "old" and "new" investment. ➤ It increases States' exposure to international responsibility; although this can be reduced by excluding from the treaty scope disputes arising out of events that occurred prior to the treaty's entry into force (see <i>ISDS</i>). <u>the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement.</u> ➤ Barbados-Venezuela BIT 1994
7.b	The treaty protects only investments made after the treaty's entry into force. ➤ It reduces the exposure of the State to international claims. ➤ It introduces inequality between "old" and "new" investors. ➤ It may create legal uncertainty, e.g. with respect to reinvested earnings from "old" investments. <u>This Agreement shall apply to investment, which are <u>after its entry into force</u> by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.</u> ➤ China-Djibouti BIT (2003)

Other approaches

Returns	The definition of investment may expressly include “returns”, i.e. profits and other earnings produced by an investment.
	<i>For the purposes of this definition, investment also includes an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income. Such returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;</i> ➤ Malaysia-New Zealand FTA (2009)
Change in the form of an investment	The investment definition may explicitly clarify that changes in the form of an investment (e.g. from a claim under a contract into shares in a company) does not affect its status under the treaty, so long it still satisfies the corresponding definition.
	<i>A change in the form in which assets are invested does not affect their character as investments as long as they are covered by this definition.</i> ➤ Mexico-UK BIT (2006)

2.2 Definition of Investor of a Party⁶

The definition of “investor” identifies the range of persons, whether individuals or entities, that enjoy the protection afforded by the treaty.

The objective of this provision is to set forth the scope of application *ratione personae* of the treaty.

Common elements

2. Determining nationality of natural persons

- a. Unqualified nationality
- b. Nationality coupled with permanent residence
- c. Permanent residence without the requirement of nationality

3. Regulating dual nationality

- a. Exclusion of dual nationals from treaty coverage
- b. Dominant and effective nationality

4. Determining nationality of legal persons

- a. Place of incorporation
- b. Place of incorporation coupled with the requirement of substantive business operations
- c. Place of incorporation coupled with the requirement of the company seat

This provision interacts with:

Definition of Investment
National Treatment
Freedom of Transfers
Nationality of Senior Management
Investor Responsibility
Denial of Benefits
Subrogation
Exclusions from Treaty Scope
Investor-State Dispute Settlement

1	States determine which natural persons are considered investors of a Contracting Party for purposes of the treaty.
1.a	Nationals of a Contracting Party, without further qualifications, shall be deemed as investors. ➤ Determining nationality is in most cases an unambiguous and straightforward exercise. ➤ Whether a person is a national of a certain State is a matter assessed under the laws of that State. ➤ It protects nationals of the home State notwithstanding their place of residence, i.e. even if they reside outside the home State.

⁶ For a literature and case law review see *Scope and Definition*, UNCTAD/DIAE/IA/2010/2, 163 pages, Sales No: E.11.II.D.9 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=354>

	<i>The term “investor” means...</i> <i><u>a natural person having the nationality of a Contracting Party in accordance with its applicable law</u></i> ➤ Mauritius-Singapore BIT (2000) <i>the term “investor” means...</i> <i>(i) with respect to the Republic of the Philippines, <u>individuals who are citizens of the Philippines within the meaning of its Constitution, ...</u></i> ➤ Philippines-Turkey BIT (1999)
1.b	In addition to nationality, the investor shall be a permanent resident of the home State, i.e. be domiciled in such State. ➤ Whether a person qualifies as a permanent resident of a State is a matter assessed under the relevant laws of that State. ➤ It prevents coverage of home country nationals who reside in the host State. <i>The term ‘nationals’ shall mean [...]</i> <i>(b) in respect of the State of Israel: Israeli <u>nationals being permanent residents of the State of Israel.</u></i> ➤ Germany-Israel BIT (1976)
1.c	Permanent residents of the home State, regardless of their nationality, qualify as investors.
	➤ This approach may be relevant in high immigration countries where a considerable proportion of the economically active population may not be full nationals or citizens. ➤ Whether a person qualifies as a permanent resident of a State is a matter assessed under the relevant laws of that State. ➤ Through this approach, a State may end up granting treaty coverage to individuals of nationalities from non-party States, as well as create the possibility of treaty claims against a State by its own nationals.
	<i>...natural person of a Party means any natural person possessing the nationality or citizenship of, <u>or right of permanent residence in that Party in accordance with its laws and regulations;</u></i> ➤ ASEAN-Australia-New Zealand FTA (2008) <i>A natural person having the nationality of a Contracting Party in accordance with respect to Malaysia, any natural person possessing the citizenship of or permanently residing in Malaysia <u>in accordance with its laws.</u></i> ➤ Malaysia-Turkey BIT (2000)
2	States regulate those cases in which a natural person possesses the nationality of both Contracting Parties.
2.a	Investors that possess the nationality of both Contracting Parties are excluded from the scope of treaty application.

	➤ Ensures that dual nationals who possess a citizenship of the host State do not benefit from the treaty. ➤ The approach is consistent with Article 25(2)(a) of the ICSID Convention. ➤ It may lead to an unfair/exclusionary result if a <i>de jure</i> dual national has <i>de facto</i> a dominant and effective link with the home State and not with the host State.
	"Investor" means <i>In the case of The Republic of Croatia:</i> <i>(i) any natural person possessing the citizenship of or permanently residing in The Republic of Croatia in accordance with its laws... who makes the investment in the territory of Canada and who does not possess the citizenship of Canada</i> <i>In the case of Canada:</i> <i>(i) any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws... who makes the investment in the territory of The Republic of Croatia and who does not possess the citizenship of The Republic of Croatia</i> ➤ Canada-Croatia BIT (1997)
2.b	The investor shall be deemed to be exclusively a national of the State of his dominant and effective nationality. ➤ Allows for consideration of a dual national's individual circumstances in order to decide with which State the person has the closest connection. ➤ A <i>de jure</i> dual national having a <i>de facto</i> dominant and effective link with the home State would be protected by the treaty. ➤ The assessment of dominant and effective nationality depends on the balancing of multiple criteria, making its application dependent on the facts of a particular case..
	<i>Investor of a Party means [...] a national [...] that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;</i> ➤ CAFTA-DR FTA (2004)
3	States determine which legal entities qualify as investors of a Party for purposes of the treaty.
3.a	A company duly constituted or organized under the laws of the home country, without further requirements or qualifications, qualifies as an investor.
	➤ The place of incorporation, without further qualifications, is an objective criterion which is easy to verify. There is normally no doubt concerning the country under whose law a company has been constituted or organized.

	➤ Place of constitution/organization/incorporation is a permanent attribute of an entity that is not subject to change. ➤ It enhances the promotional character of the treaty: by not having any additional requirements, it enlarges the pool of potential investors. It is suitable if a country is willing to grant treaty protection to any investments channeled through the company of the other Contracting Party, regardless of the country of the investment's ultimate origin. ➤ Without a <i>Denial of Benefits</i> clause, it enables the use of "shell" (or "mailbox") companies with no material connections with the home State, established there with the sole purpose of benefiting from the protection of the treaty. ➤ Without a <i>Denial of Benefits</i> clause, nationals of the host State may incorporate an entity in the other Contracting Party, so as to take advantage of the protection afforded by the treaty against their own country. ➤ It therefore creates opportunities for treaty shopping of free riding by investors not intended to be beneficiaries of the treaty.
	<i>The term "investor" means...</i> <u>any entity constituted or organized under the applicable law of a Contracting Party, including a company, corporation, partnership, sole proprietorship, association, body or organization,</u> ➤ Mauritius-Singapore (2000)
3.b	A company duly constituted or organized under the laws of the home country, having substantive business operations (or substantial economic activities) in such country, qualifies as an investor. ➤ The place of incorporation is an objective criterion which is easy to verify. There is normally no doubt concerning the country under whose law a company has been constituted or organized. ➤ The "substantive business operations" requirement requires a genuine link between the company and the home State, but does not prescribe specific requirements such as requiring that the company have its seat, headquarters or effective management in the home State. ➤ It is meant to exclude from treaty coverage "mailbox" companies that do not have substantive business operations in the home State and have been constituted with the sole purpose of benefiting from the treaty. ➤ There is no clear-cut test to assess whether the company has substantive business operations in the home country; it requires a fact-based, case-specific inquiry. . ➤ The provision may be unnecessary if the IIA contains a <i>Denial of Benefits</i> clause that permits host States to deny benefits of the treaty to companies without substantive business activities in the territory of the treaty partner. <i>"investor of a Contracting Party" means:</i> <i>... a legal person either constituted or otherwise organized under the</i>

	<i>national legislation of a Contracting Party, and is <u>engaged in substantive business operations in the territory of that Contracting Party</u></i>; ➤ Belarus-Mexico BIT (2008)
3.c	A company duly constituted or organized under the laws of the home country and having its seat in such country, qualifies as an investor. ➤ The place of incorporation is an objective criterion which is easy to verify. There is normally no doubt concerning the country under whose law a company has been constituted or organized. ➤ The “seat” requirement creates a specific link between the company and the home State. The “seat” refers to an effective center of administration of the business operations (e.g. the place where the board of directors regularly meets or the shareholders’ meetings are held, where the company’s top management is located, etc.) ➤ It is meant to exclude “mailbox” companies constituted with the sole purpose of benefiting from the treaty. ➤ It may not always be easy to determine where a company has its “seat”, i.e. its effective management. ➤ The “seat” or “effective management” requirement may be too restrictive, and may not protect investors having a genuine economic link with the home country. <i>The term “companies” means:</i> <i>... in relation to the People’s Republic of China, enterprises, other economic organizations and associations. Companies constituted under the applicable laws and regulations of one State <u>and having their seat within its territory</u> shall be deemed companies of that State.</i> ➤ China-Republic of Korea BIT (1992)

Other possible elements

Including local companies of foreign control	The investor definition may expressly include local host State companies owned or controlled by investors of the home State. Equity in such companies usually falls under the definition of “investment”. Granting it a status of “investor” results in additional advantages, e.g. a right to commence international arbitration against the host State and recover damages suffered by the company itself (not by its shareholders).
	<i>A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and which, before a dispute arises, is controlled by nationals of the other Contracting Party shall, in accordance with article 25(2)(b) of the [ICSID] Convention be treated for purposes of the [ICSID] Convention as a national of the other Contracting Party.</i> ➤ Argentina-Netherlands BIT (1992)

Contracting Parties and State enterprises as investors	The treaty may expressly recognize the Contracting Parties as a distinctive category of “investors”, in addition to natural and legal persons. This can be helpful if a State invests abroad through state enterprises, sovereign wealth funds or similar forms. <i>Investor of a Party means in the case of Canada:</i> (i) <i>Canada or a state enterprise of Canada, or</i> (ii) <i>a national or an enterprise of Canada, that seeks to make, is making or has made an investment;</i> ➤ Canada Model BIT (2004) <i>The term “investor” means:</i> <i>(b) in respect of the Kingdom of Saudi Arabia:</i> [...] (iii) <i>the Government of the Kingdom of Saudi Arabia and its financial institutions and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar governmental institutions existing in Saudi Arabia</i> ➤ Malaysia-Saudi Arabia BIT (2000)
Types of entities included in the definition	The types of covered entities may be listed in order to clarify whether entities without legal personality, branches, non-profit organizations and governmental-owned companies are covered by the definition of “investor”. <u>‘[E]nterprise’ means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.</u> ➤ Rwanda-USA BIT (2008)
Companies constituted abroad but owned or controlled by nationals of the home State	Protection is extended to companies constituted abroad but owned or controlled by nationals of the home State. <i>The term “investor” refers with regard to either Contracting Party:</i> ... <i>legal entities established under the law of a third State but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.</i> ➤ China-Switzerland BIT (1986) <i>Investors means:</i> <i>(a) for China:</i> (i) ... (ii) ... (iii) <i>legal entities not established under the law of the People’s Republic of China but effectively controlled, by natural persons, as defined in subparagraph (a)(i) or by economic entities as</i>

	<i>defined in subparagraph (a)(ii), that have made an investment in the territory of the other Party...</i> ➤ China-Peru FTA (2009)
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2.3 Exclusions from Treaty Scope

This provision determines – together with the *Definition of Investment* – the subject matter to which treaty obligations apply (scope *ratione materiae*). While the *Definition of Investment* identifies the range of assets covered by the treaty, this provision can be used to exclude from treaty coverage specific policy areas (e.g. public procurement or subsidies) or specific industries (e.g. healthcare services).

Generally, the broader the treaty's scope, the wider its protective effect. By the same token, a broader scope widens the range of areas in which measures of a State could be subject a treaty-based claim.

In addition to exclusions from the treaty scope, there are other ways to preserve flexibility in specific policy areas or economic sectors, e.g. by using *Scheduling of Commitments*, *General Exceptions*, exceptions to specific provisions or exclusions from the scope of *Investor-State Dispute Settlement*.

Common elements

1. **Exclusion of specific policy areas from treaty coverage**
 - a. Carve out from the entire treaty
 - b. Carve out from the entire treaty except for certain obligations
 - c. Carve out from certain treaty obligations
2. **Exclusion of specific sectors and industries from treaty coverage**

This provision interacts with: *All substantive investor protection provisions*
Definition of Investment
Definition of Investor of a Party
Scheduling of Commitments
National Security Exceptions
General Exceptions
Investor-State Dispute Settlement

1	States decide whether to exclude specific policy areas from treaty coverage
1.a	The treaty carves out specific policy area(s) from the entire treaty.
	➤ It preserves flexibility for States to implement measures that may otherwise be inconsistent with treaty obligations. ➤ It can reduce or eliminate host States' exposure to investor claims with respect to measures that fall within an excluded policy area. ➤ Areas often carved out in existing IIAs include taxation, subsidies, grants and government procurement. ➤ The excessive use of policy-area carve outs may be considered to reduce the promotional character of the treaty.
	<i>The provisions of this Agreement shall not apply to <u>tax matters</u>.</i> ➤ Belgium/Luxembourg-Colombia BIT (2009) <i>This Chapter [Investment] shall not apply to <u>subsidies or grants</u> provided by a Party or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic investors and</i>

	investments. <i>This Chapter [Investment] shall not apply to laws, regulations or policies governing the <u>procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale.</u></i> ➤ Australia-Thailand FTA (2004)
1.b	The treaty carves out specific policy area(s) except for certain obligations ➤ Has the same purpose as option 1.a above but instead of excluding the policy area from the entire treaty, it keeps the given policy area subject to some selected treaty obligations. ➤ The host State retains flexibility in implementing otherwise treaty-inconsistent measures in the named policy areas, but solely in respect of certain treaty obligations. <i>This Chapter [Investment] shall not apply to <u>subsidies or grants provided by a Party or to any conditions attached to the receipt or continued receipt of such subsidies or grants except for Articles 10.5 [Performance Requirements] and 10.21 [ISDS], whether or not such subsidies or grants are offered exclusively to domestic investors and investments.</u></i> ➤ India-Korea CECA (2009) <i>This Agreement shall not apply to:</i> <i>(a) any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation).</i> ➤ ASEAN Comprehensive Investment Agreement (2009)
1.c	The treaty carves out specific policy area(s) from certain treaty obligations only. ➤ Such carve outs are most often made with respect to provisions on <i>National Treatment, MFN, Nationality of Senior Management and Performance Requirements.</i> ➤ This mechanism allows States to, for example, abstain from granting National Treatment and/or MFN Treatment to investors of the other party in policy issues such as taxation, government procurement and subsidies. ➤ States preserve flexibility to implement national policies such as the granting of preferential treatment to domestic investors or the imposition of certain performance requirements. ➤ It reduces host State exposure to investor claims with respect to measures that fall within an excluded policy area and that could otherwise be held in breach of the named obligations. ➤ The excessive use of policy-area carve outs may be considered to reduce the promotional character of the treaty. <i>The provisions of <u>Articles 3 (National treatment), 4 (MFN treatment) and 6 (Senior management, boards of directors) of this Agreement</u></i>

	shall not apply to: (a) <u>procurement by a Party or state enterprise</u> (b) <u>subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.</u> ➤ Canada Model BIT (2004) <i>Paragraph 1 of Article 2 [National Treatment], paragraph 1 of Article 3 [MFN] and Article 5 [Performance Requirements] shall not apply to any measure that a Contracting Party adopts or maintains with respect to <u>government procurement</u>.</i> ➤ Colombia-Japan BIT (2011)
2	States decide whether to exclude specific economic sectors and industries from treaty coverage.
2.a	Certain industries are excluded from the treaty scope.
	➤ Carved out sectors reflect sensitivities of respective Contracting Parties ➤ Some treaties allow each Contracting Party to make individual lists of carved out industries (see also <i>Scheduling</i>). ➤ With respect to excluded sectors, States preserve flexibility to implement policies inconsistent with certain treaty obligations ➤ Sectoral carve outs eliminate host State exposure to investor claims with respect to measures that apply to carved out industries. ➤ The excessive use of specific industry carve outs may be considered to reduce the promotional character of the treaty. <i><u>The provisions of this Agreement shall not apply to investments in cultural industries.</u></i> ➤ Canada model BIT (2004) <i>This Agreement shall not apply to:</i> <i>[...]</i> <i>(d) <u>services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Agreement, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers;</u></i> ➤ ASEAN-China Investment Agreement (2009) <i>This Chapter [Investment] shall not apply to measures adopted or maintained by a Party with respect to <u>financial services</u>.</i> ➤ India-Korea CECA (2009)

No exclusions from the treaty scope

Implications	➤ The treaty applies to the whole spectrum of governmental policies/measures and across the entire economies of the Contracting Parties, without exceptions ➤ Heightens the promotional character of the treaty. ➤ This reduces States' freedom to implement policies that may be inconsistent with certain treaty obligations. ➤ It heightens States' exposure to international arbitration claims. ➤ Further tools that may help achieve the same objectives include <i>Scheduling of Commitments</i>, <i>General Exceptions</i> and <i>Definition of Investment</i>. Treaty examples: Bangladesh-Thailand BIT (2002), India-Nepal BIT (2011), Republic of Korea-South Africa BIT (1995).
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3. Standards of Treatment and Protection

3.1 National Treatment

A *National Treatment* ("NT") obligation requires States to grant covered investors and/or their investments treatment which is no less favourable than that it accords, in like circumstances, to domestic investors and/or their investments.

The objective of this provision is to ensure a degree of competitive equality between foreign and domestic investors by preventing discrimination on the basis of the investor's nationality.

Common elements

1. **Substantive scope: investment phases**
 - a. Pre- and post-establishment
 - b. Post-establishment only
2. **Subjective scope: investors/investments**
 - a. Investments
 - b. Investors
 - c. Investments & investors
3. **Exceptions**
 - a. REIO & taxation treaties
 - b. Public procurement, subsidies and grants
 - c. Other specific exceptions
 - d. Intellectual property rights

Notes: (1) Exceptions, particularly those from 3.b to 3.d, may be influenced by the choice made in under 1. (2) Reservations to NT with respect to certain existing and future measures as well as economic sectors can in some approaches be taken by each Contracting Party (see *Scheduling of Commitments*). (3) *National Treatment* and *Most-Favoured-Nation Treatment* are sometimes merged into a single provision. (4) Exceptions to the NT obligation may also be achieved through general exceptions and exclusions (see *General Exceptions and Exclusions from Treaty Scope*).

This provision interacts with:

- Most-Favoured-Nation Treatment*
- Definition of Investment*
- Definition of Investor of a Party*
- Compensation for Losses*
- Freedom of Transfers*
- Scheduling of Commitments*
- Exceptions from Treaty Scope*
- General Exceptions*

1	States determine the range of investment-related activities to which the standard applies.
1.a	The obligation applies to the full life cycle of an investment, including an investor's entry and establishment in the host country and its participation in existing enterprises ("establishment, acquisition and expansion" of investments). It provides protection against discrimination to investors who seek to establish an investment and who are in the process of making one. The obligation also covers the post-establishment phase, i.e. the treatment of

	the investment after its entry. ➤ It maximizes the liberalisation function of the treaty by ensuring that establishment is permitted on a non-discriminatory terms, in parallel with investment protection. ➤ It limits the extent to which a host State can discriminate against investors of the treaty partner with respect to the entry phase of investment in those sectors and industries to which the application of the pre-establishment NT is extended. ➤ In general, it requires granting foreign investors the same investment opportunities as local investors in like circumstances. This may limit the extent to which sectors or areas of economic activity can be reserved to local investors, or otherwise subject to discriminatory entry procedures. ➤ Parties can identify economic sectors to which pre-establishment NT commitments will apply in one of the two ways: (1) <i>positive-list approach</i>, which offers selective liberalization by way of drawing up a “positive list” of industries to which the pre-establishment NT will apply; (2) <i>negative-list approach</i>, under which pre-establishment commitments apply to all sectors and industries except those that are explicitly excluded by way of reservations (see also <i>Scheduling</i>). ➤ Appropriately tailored exceptions to the obligation can be included to address specific policy objectives, including development considerations (e.g., carving out existing discriminatory measures and sensitive industries from the NT obligation, and allowing preferential treatment of domestic investors in specific policy areas such as subsidies and government procurement). ➤ To be comparable, investors must be in like circumstances; this is reflected in many treaty formulations. Whether investors are in “like circumstances” is a factual analysis undertaken on a case-by-case basis. <i>Each Party shall accord to investors of the other Party and to their investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and to their investments with respect to the <u>establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments</u> (hereinafter referred to in this Chapter as “investment activities”).</i> ➤ Japan-Mexico EPA (2004)
1.b	The obligation is limited to the post-establishment phase of the investment. States undertake no obligations with respect to the entry phase of investment; the latter remains subject to the unrestrained domestic legislation which can restrict participation of foreign investors in its economy. ➤ It preserves the host State’s discretion to discriminate against foreign investors in the entry phase of investment, while still offering NT to foreign investors and/or their investments at the post-entry stage. ➤ There is no commitment to reduce or eliminate discriminatory restrictions or barriers affecting the establishment of foreign investment in the host State’s territory. ➤ A covered investor is protected from nationality-based discrimination

	from the moment it lawfully establishes an investment in the host State. ➤ Post-establishment NT is often (although not always) granted without making reservations for existing non-conforming measures and carving out sensitive industries from the scope of the obligation. ➤ To be comparable, investors must be in like circumstances; this may or may not be reflected in the formulation of the obligation. Whether investors are in “like circumstances” is a factual analysis undertaken on a case-by-case basis.
	<i>Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and <u>shall admit such investments in accordance with its laws and regulations.</u></i> <i>Neither Contracting Party shall accord in its territory to the investors of the other Contracting Party, <u>as regards management, maintenance, enjoyment, use or disposal of their investments</u>, treatment which is less favourable than that which it accords <u>to its own investors</u> or to investors of any third State, whichever is more favourable to the investors concerned.</i> ➤ Croatia-Mongolia BIT (2006)
2	States determine the subjects (investors, investments or both) that may not be discriminated against.
2.a	National Treatment is accorded only to “investments” as defined in the treaty. ➤ The State retains discretion to implement regulations and policies that discriminate against foreign investors in favor of domestic investors, as long as these policies do not discriminate among their <i>investments</i>. ➤ It is restrictive given that there may be State measures affecting investors (without necessarily affecting their investments). ➤ The objective of ensuring competitive equality between investors may be compromised to some extent. ➤ It has to be noted that there may be State measures affecting investors without necessarily affecting investments. <i>Each Contracting Party shall accord to the <u>investments of investors</u> of the other Contracting Party made in its territory a treatment which is no less favourable than that accorded to investments of its own investors...</i> ➤ Mauritius-Zimbabwe BIT (2000)
2.b	National Treatment is accorded only to “investors” as defined in the treaty. ➤ It has to be noted that there may be State measures affecting investments without necessarily affecting investors. ➤ The objective of ensuring competitive equality between investors may be compromised to some extent.

	<i>Each Contracting Party shall in its territory accord <u>investors</u> of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords <u>to its own investors</u>...</i> ➤ Switzerland-Thailand BIT (1997)
2.c	National Treatment is accorded to “investments” and “investors” as defined in the treaty. • The competitive equality objective is best achieved when NT is accorded to both investments and investors, given that State measures may affect investments or investors, separately or jointly. • The host State has less discretion to implement regulations and policies that discriminate in favour of domestic investors. <i>Each Party shall, in its territory, accord <u>to investors of another Party and their investments</u> treatment no less favorable than it accords, in like circumstances, to its own investors and their investments with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments.</i> ➤ ASEAN-China Agreement on Investment (2009)
3	States include exceptions to the scope of the National Treatment obligation.
3.a	The benefits conferred by virtue of regional economic integration organizations or similar arrangements, as well as taxation treaties, are excluded from NT. ➤ It allows a Contracting Party to restrict benefits which are strictly offered on a reciprocity basis or based on membership considerations. ➤ It is more relevant for MFN treatment but is also sometimes extended to NT. <i><u>Articles 3 [National Treatment] and 4 shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefits of any treatment, preference or privilege which may be granted by such Contracting Party by virtue of:</u></i> <i><u>(a) any existing or future regional economic integration organization, free trade area, customs union, monetary union or any other similar integration arrangement, of which one of the Contracting Parties is or may become a party;</u></i> <i><u>(b) any rights or obligations of a Contracting Party resulting from an international agreement or arrangement relating wholly or mainly to taxation. In the event of any inconsistency between this Agreement and any tax-related international agreement or arrangement, the latter shall prevail.</u></i> ➤ Belarus-Mexico BIT (2008)
3.b	Government procurement, as well as subsidies and grants provided by a

	Contracting Party, are excluded from National Treatment.
	➤ It allows the host State to favour domestic investors in/through public procurement. Also, it allows implementing industrial policies to foster specific sectors or industries through subsidies or grants. This could be particularly helpful for small and medium enterprises or infant industries. ➤ Subsidy or procurement policies affecting foreign investors may not be challenged.
	<u>Articles 3 [National Treatment], 4 and 9 do not apply to:</u> <u>(a) government procurement; or</u> <u>(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.</u> ➤ USA Model BIT (2012)
3.c	Other specific exceptions as determined by the Contracting Parties.
	➤ Specific exceptions give States flexibility to address specific concerns and implement selective intervention policies. ➤ However, depending on the scope of these exceptions, the liberalizing or the protecting value of the treaty may be compromised. <i>Notwithstanding paragraphs 1 and 2 [NT], the Parties reserve the right to adopt or maintain any measure that accords differential treatment to socially or economically disadvantaged minorities and ethnic groups.</i> ➤ China-Peru FTA (2009)
3.d	It is provided that certain intellectual-property measures are not inconsistent with the NT obligation set forth in the treaty, if the measure is consistent with exceptions in certain other agreements.
	➤ Intellectual property rights usually fall within the definition of “investment” and thus are subject to IIA disciplines; at the same time, they are governed by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The latter also includes an NT obligation but allows WTO Members to derogate from the NT obligation through certain exceptions provided in the Paris Convention (1967), the Berne Convention (1971) and some others (Article 3 of the TRIPS Agreement). ➤ The exception gives primacy to the TRIPS Agreement and thereby resolves possible conflicts with the IIA. <i>Articles 87 [NT] and 88 [MFN] shall not apply to any measure covered by the exceptions to, or derogations from, obligations under Articles 3 and 4 of the TRIPS Agreement, as specifically provided in Articles 3 to 5 of the TRIPS Agreement.</i> ➤ Japan-Switzerland EPA (2009)

Other approaches

NT subject to domestic law	Subjecting the NT obligation to domestic laws and regulations means that States may afford preferential treatment to domestic investors in their domestic laws and regulations. In other words, discriminatory treatment is permitted under the treaty, so long as such treatment is provided for or permissible under a Party's laws and regulations <i>Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities in connection with such investments by investors of the other Contracting Party treatment not less favorable than that accorded to the investments and activity activities connected with such investments by its own investors.</i> ➤ China-Russia BIT (2006) <i>Each Contracting Party shall, <u>subject to its laws and regulations</u>, accord to investment of investors of the other Contracting Party treatment no less favorable than that which is accorded to investments of its investors.</i> ➤ India-Indonesia BIT (1999)
Sub-national level	A provision may be included in order to specify the “comparator” for the NT obligation as it applies to a subnational entity; i.e., “best in-province” or “best out-of-province” treatment. This is particular useful for federal States, which are structured by States having independent regulatory powers. <i>The treatment accorded by a Party under paragraphs 1 and 2 [NT] means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.</i> ➤ NAFTA (1992)
No specification of covered activities	The National Treatment obligation is often drafted without enumerating specific investment activities to which the standard applies. It thus relates to any measures that affect covered investments/investors. <i>Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that accorded to its own investors and their investments...</i> ➤ Austria-Philippines BIT (2003)

No National Treatment clause

Implications	➤ The host State fully retains its capacity to discriminate in favour of domestic investors. ➤ The absence of the NT obligation weakens the protective function of the treaty. However, if the treaty contains an absolute standard such as the Fair and Equitable Treatment standard, investors will still be entitled to a certain minimum standard of treatment and legal protection. ➤ The absence of the NT obligation may also be perceived as a disincentive to foreign investors as it fails to ensure competitive quality with domestic investors. Treaty examples: Australia-Peru BIT (1995), Finland-Mexico BIT (1993), Chile-Indonesia BIT (1999).
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3.2 Most-Favoured-Nation Treatment⁷

Most-Favored-Nation Treatment ("MFN") is an obligation of the host State to accord to foreign investors and/or their investments treatment which is no less favorable than that it accords, in like circumstances, to investors/investments of any third State. The objective of this provision is to ensure competitive equality between foreign investors by preventing discrimination on the basis of the investor's nationality.

Common elements

- 1. Substantive scope: investment phases**
 - a. Pre- and post-establishment
 - b. Post-establishment only
- 2. Subjective scope: investors/investments**
 - a. Investments
 - b. Investors
 - c. Investments & Investors
- 3. Exceptions**
 - a. Regional Economic Integration Organization ("REIO") & taxation treaties
 - b. Public procurement, subsidies and grants
 - c. Financial services
 - d. Other specific exceptions
 - e. Intellectual property rights
- 4. Regulating the interaction of MFN with third-party treaties**
 - a. With respect to dispute settlement provisions
 - b. With respect to substantive treaty obligations

Note: (1) Exceptions (particularly those listed from 3.a.ii to 3.a.v) may be influenced by the choice taken in option 1. **(2)** Reservations to MFN with respect to specific sectors or certain existing or future measures may in some approaches be taken by the Contracting Parties (see *Scheduling of Commitments*). **(3)** *Most-Favoured-Nation* and *National Treatment* ("NT") may be merged into a single provision. **(4)** See note on MFN in the Handbook's Introduction.

This provision interacts with:

- National Treatment*
- Compensation for Losses*
- Freedom of Transfers*
- Definition of Investment*
- Definition of Investor of a Party*
- Scheduling of Commitments*
- Exclusions from Treaty Scope*
- General Exceptions*
- Investor-State Dispute Settlement*

1	States determine investment-related activities covered by the standard.
1.a	The obligation applies to the full life-cycle of an investment, including an investor's entry and establishment in the host country and its participation in

⁷ For a literature and case law review see *Most-Favored-Nation Treatment*, UNCTAD/DIAE/IA/2010/1, 141 pages, Sales No: E.10.II.D.19 available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx)

	existing enterprises (normally when it refers to “establishment, acquisition and expansion” of investments). It can provide protection against discrimination to investors who seek to establish an investment or are in the process of “making it”. ➤ The treaty performs, in parallel with investment protection, a liberalization function by providing opportunities for market access to the extent they are afforded to investors of a third country. However, this result is achieved primarily through NT. ➤ It limits the extent to which a host State can discriminate among foreign investors with respect to the entry phase of investment in those sectors and industries to which the application of the pre-establishment MFN is extended. ➤ It has the effect of extending to the beneficiary investors any liberalisation offered by the host State to investors of any third State, subject to any exceptions and reservations taken by the Contracting Parties. ➤ It enhances the transparency of the rules relating to the entry conditions (the treaty offers a self-contained entry regime). ➤ From the negotiation perspective, it can require scheduling detailed exceptions and reservations. ➤ To be comparable, investors must be in like circumstances. For greater certainty purposes, this could be reflected in the treaty formulation. <i>Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party <u>with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.</u></i> ➤ CAFTA-DR FTA (2004)
1.b	The obligation is limited to the post-establishment phase, i.e. the life-cycle of the investment after its establishment in the host State. Contracting parties undertake no obligations with respect to the entry phase of investment and remain free to offer preferential terms of entry to foreign investors of particular nationalities. ➤ This policy option preserves the ability of the host State to discriminate among foreign investors at the entry phase of an investment, while still offering MFN treatment at the post-establishment stage. ➤ The approach may be suitable if the host State wishes to extend MFN treatment to established investors but does not wish to pursue strategies of investment liberalisation and market-access opening on a country-specific basis. ➤ To be comparable, investors must be in like circumstances. For greater certainty purposes, this can be reflected in the treaty formulation. <i>Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to investors of any third State <u>with respect to the</u></i>

	<u>operation, management, maintenance, use, enjoyment or disposal of investments.</u> ➤ China-Mexico BIT (2008)
2	States determine the subjects (investors, investments or both) to which the standard applies.
2.a	MFN Treatment is accorded only to “investments” as defined in the treaty. ➤ The host State retains discretion to implement regulations and policies that discriminate amongst foreign <i>investors</i>, as long as these policies do not discriminate among their <i>investments</i>. ➤ It has to be noted that there may be State measures that may affect investors without necessarily affecting the investment. ➤ The objective of ensuring competitive equality among investors may not be fully achieved. <i>Each Party shall at all times treat <u>investments in its own territory</u> on a basis no less favorable than that accorded to investments of investors of any third country...</i> ➤ Australia-Peru BIT (1995)
2.b	MFN Treatment is accorded only to “investors” as defined in the treaty. ➤ It has to be noted that there may be State measures that may affect investments without necessarily affecting investors. ➤ The objective of ensuring competitive equality among investors may not be fully achieved.
	<i>:Chaque Partie contractante garantit que la clause de la nation la plus favorisée sera appliquée aux investisseurs de l'autre Partie contractante dans toutes les matières visées au présent Accord, et plus particulièrement aux articles 4, 5 et 6...(emphasis added)</i> <i>Each Contracting Party shall guarantee that the Most Favored Nation clause will be applied to Investors of the other Contracting Party to all matters of the present Agreement, and more specifically to articles 4,5 and 6...(unofficial translation)</i> <i>Belgium-Luxembourg/USSR BIT (1989)</i>
2.c	MFN Treatment is accorded to both “investments” and “investors”. ➤ The competitive equality objective is best achieved when MFN treatment is accorded to both investments and investors, given that State measures may affect investments or investors separately or jointly. ➤ The host State has lesser discretion to implement regulations and policies that discriminate amongst either foreign investors or foreign investments. <i>Each Country shall accord <u>to investors of the other Country and to their investments</u> treatment no less favorable than that it accords in like circumstances to investors of a third State and to their investments, with respect to investment activities.</i>

	➤ Japan-Malaysia EPA (2005)
3	States include exceptions to the MFN obligation.
3.a	The benefits conferred by virtue of a regional economic integration organisation or similar arrangements, as well as taxation treaties, are excluded from the MFN obligation. ➤ These exceptions are highly common in post-establishment treaties. ➤ These exceptions allow a party not to extend benefits which are offered strictly on the basis of reciprocity by virtue of membership in an economic integration organization and other covered types of economic arrangements including double-taxation treaties. <i>Articles 3 and 4 [MFN] shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefits of any treatment, preference or privilege which may be granted by such Contracting Party by virtue of:</i> <i>(a) <u>any existing or future regional economic integration organization, free trade area, customs union, monetary union or any other similar integration arrangement</u>, of which one of the Contracting Parties is or may become a party;</i> <i>(b) any rights or obligations of a Contracting Party resulting from <u>an international agreement or arrangement relating wholly or mainly to taxation</u>. In the event of any inconsistency between this Agreement and any tax-related international agreement or arrangement, the latter shall prevail.</i> ➤ Belarus-Mexico BIT (2008)
3.b	Government procurement, as well as subsidies and grants provided by a Contracting Party, are excluded from the MFN obligation.
	➤ It allows the host State to implement selective procurement or subsidy measures. ➤ However, distortions may be created in prejudice of investors from the treaty partner vis à vis third countries.
	<i>Non-Conforming measures</i> <i>Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:</i> <i>(a) <u>government procurement</u>; or</i> <i>(b) <u>subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.</u></i> ➤ USA Model BIT (2004)
3.c	Financial services are excluded from the MFN obligation.
	States retain the right to discriminate among foreign investors in areas such as banking, insurance and other types of financial services, for example in the context of preferential market access offered to strategic partners and/or decisions based on reciprocity considerations.

	<i>The provisions of Article 4 [MFN] of this Agreement shall not apply to financial services.</i> ➤ Canada Model BIT (2004)
3.d	Other specific exceptions as determined by the Contracting Parties. ➤ Specific exceptions give States flexibility to address specific concerns and implement selective intervention policies in various areas. ➤ However, depending on the scope of these exceptions, the protective character of the treaty may be diminished. <i>Notwithstanding paragraphs 1 and 2 [MFN] the Parties reserve the right to adopt or maintain any measure that accords differential treatment:</i> <i>(a) to socially or economically disadvantaged minorities and ethnic groups; or</i> <i>(b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.</i> ➤ China-Peru FTA (2009)
3.e	Measures related to intellectual property rights and taken in compliance with the WTO TRIPS Agreement are excluded from the MFN obligation.
	➤ Intellectual property rights usually fall within the definition of “investment” and thus are subject to IIA disciplines; at the same time, they are governed by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The latter also includes an MFN obligation but allows WTO Members to derogate from the MFN obligation in certain defined circumstances (Article 4). ➤ The exception gives primacy to the TRIPS Agreement and thereby resolves possible conflicts between treaties.
	<i>Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.</i> ➤ USA Model BIT (2004)
4	States clarify the interaction of the MFN obligation with third-party treaties.
4.a	States clarify that the MFN obligation in the base treaty does not encompass <i>dispute settlement provisions</i> and, thus, does not allow “importing” more favourable dispute settlement provisions from another treaty of the host State concluded with a third State (“third-party treaty”).
	➤ The host State retains greater control over the manner in which the MFN obligation interacts with third-party treaties with respect to dispute settlement provisions. This is important given the conflicting arbitral decisions, some of which have allowed to use more favourable provisions from third-party treaties (e.g., shorter cooling-off

	periods or wider jurisdictional provisions) whereas others have decided that such use of MFN is impermissible. ➤ If dispute-settlement aspects of other treaties are excluded from MFN treatment, the conditions regarding jurisdiction and admissibility of investor claims set forth in the base treaty are self-contained and exclusively applicable. ➤ This clarification does not prevent the use of MFN to “import” allegedly more favorable <i>substantive</i> obligations from third-party treaties. ➤ An explicit exception can create an adverse inference with respect to previous treaties that do not contain a similar explicit exception or clarification. This however could be mitigated through drafting techniques that use expressions such as “for greater certainty” or “for the avoidance of doubt”.
	1. [Most-Favored-Nation Treatment] Note: It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes such as the mechanism set out in Chapter III [Settlement of disputes between the Contracting Parties] and Chapter IV [Settlement of investor-State disputes], that are provided for in other international agreements between a Contracting Party and a non-Contracting Party. ➤ Colombia-Japan BIT (2011) For greater certainty, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 of Article 10.4 [MFN] does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements. ➤ Peru-US FTA (2006) For greater certainty, the obligation in this Article [MFN] does not encompass a requirement to extend to the other Party dispute resolution procedures other than those set out in this Chapter. ➤ Malaysia-New Zealand FTA (2009)
4.b	States prevent the use of MFN for the purpose of “importing” <i>substantive obligations</i> from third-party treaties (this exception is common in schedules of exceptions, rather than within treaty texts). ➤ The host State retains greater control over the manner in which the MFN obligation interacts with third-party treaties with respect to substantive obligations. ➤ For example, a new generation of the country’s IIAs may give less rights and protections to foreign investors, compared to the earlier generation of treaties. Investor may be able to use MFN to gain access to greater protections in earlier treaties, unless the new base treaties clarifies that such use of MFN is impermissible. ➤ The MFN restriction may apply to third-party treaties concluded before the base treaty or both before and after the base treaty.

	➤ However, if the restriction applies to third-party treaties concluded after the base treaty, it can undermine one of the purposes of the MFN provision, to give investors from treaty partners the benefit of more liberal treatment provided to subsequent treaty partners. ➤ This mechanism impedes “treaty shopping” and ensures that the base treaty preserves its content, negotiated under its own conditions and circumstances. In other words, the specifically negotiated content of the treaty may not be modified or altered by activating the MFN obligation. ➤ It enables MFN to focus on the host State’s treatment accorded through domestic laws and regulations and their application to specific investors, and not on differences in the content of international obligations set out in various IIAs of the host State. ➤ An explicit exception can create an adverse inference with respect to previous treaties that do not contain a similar explicit exception or clarification. This however could be mitigated through drafting techniques or a reference to “greater certainty” purposes.
	ANNEX III Exceptions from Most-Favored-Nation Treatment <u>1. Article 4 shall not apply to treatment accorded under all <i>bilateral or multilateral international agreements in force or signed prior to the date of entry into of this Agreement.</i></u> <u>2. Article 4 shall not apply to treatment by a Party pursuant to <i>any existing or future bilateral or multilateral agreement:</i></u> (a) <i>establishing, strengthening or expanding a free trade area or customs union;</i> (b) <i>relating to:</i> <i>(i) aviation;</i> <i>(ii) fisheries;</i> <i>(iii) maritime matters, including salvage.</i> <u>3. For greater certainty, Article 4 shall not apply to any current or future foreign aid programme to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.</u> ➤ Canada Model BIT (2004)

No Most-Favoured-Nation Treatment Clause

Implications	➤ The host State fully retains its capacity to adopt or maintain regulations and policies that discriminate amongst foreign investors and their investments. ➤ There would be no possibility to “import” provisions from third-party treaties, thereby altering the negotiated content of the base treaty. This would increase legal certainty by limiting the additional sources of law relevant to particular treaty obligations, but would reduce legal certainty by having different sources of law and treatment applicable to investors from different countries. ➤ Absence of a MFN obligation may be perceived as contradicting the object and purpose of an IIA, as protection against all forms of discrimination is one of the key objectives of these agreements. However, similar protection can to some extent be achieved through NT. Treaty examples: ASEAN-Australia-New Zealand FTA (2009), India – Malaysia FTA (2011), Japan – Singapore FTA (2002).
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Other approaches

No specification of covered activities	The MFN obligation may be drafted without specifying the activities to which the obligation applies. This approach offers a broad application that could foster increased “treaty shopping”, i.e. “importing” substantive or procedural provisions from third-party treaties.
	<i>Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that accorded to its own investors and their investments or to investors of any third State and their investments.</i> ➤ Australia-Uruguay BIT (2001)

3.3 Fair and Equitable Treatment⁸

Fair and Equitable Treatment ("FET") is an extremely common treaty obligation, and one that is broad and general nature. Investors have claimed its violation in almost every investment dispute to date, and it has served as the most frequent basis for finding a treaty breach.

FET is an absolute, not relative, standard of treatment. Its objective is to guarantee a certain minimum standard of treatment that does not require comparison with the treatment which the host State accords to its own investors or to any other foreign investors. The content of this obligation varies and depends on the formulation adopted by the Contracting Parties when concluding the treaty.

Common elements

1. Linking the standard to a normative source

- a. No source indicated
- b. International law or principles of international law
- c. Customary international law ("minimum standard of treatment")

This provision interacts with:

Definition of Investment
Full Protection and Security
Expropriation
National Security Exceptions
General Exceptions
Exclusions from Treaty Scope
Investor-State Dispute Settlement

Note: This provision may be combined with *Full Protection and Security* into a single provision.

1	States decide whether to give content to the standard by making reference to a normative source.⁹
1.a	The obligation is set out without any qualifications. ➤ It maximizes protection and constitutes the best alternative from the investor's perspective. ➤ It is vague, subjective and uncertain and may thus generate diverging expectations as to the actual level of treatment that must be afforded. Interpreters (arbitrators) enjoy a high degree of discretion as far as determining the meaning and application of the standard is concerned. ➤ A tribunal is likely to assess, based on its own view and pre-conceptions but without regard to a normative basis or source, whether the challenged conduct of the host State is "fair" or

⁸ For a literature and case law review see *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5, 158 pages, Sales No: E.11.II.D.15 available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx)

⁹ Instead of making reference to a normative source, States may describe the standard in more precise terms or replace it with specific obligations see, *Ibid.* pp. 61-88 and 108.

	“equitable” under the particular circumstances. ➤ Arbitral tribunals have developed a number of elements that are examined with respect to FET: protection of investor’s legitimate expectations, stability of business and legal framework, consistency of State conduct, denial of justice, due process, arbitrariness, discrimination, abusive treatment and some others. The list of such elements is open-ended if the FET standard is unqualified. ➤ It heightens the exposure of the host State to international responsibility.
	<i>Investments of nationals of either Contracting Party shall at all times be accorded <u>fair and equitable treatment</u> and shall enjoy adequate protection and security in the territory of the other Contracting Party.</i> ➤ Cambodia-Philippines BIT (2000) <i>Investments made by investors of each Contracting Party shall at all times be accorded <u>fair and equitable treatment</u>, and shall enjoy full protection and security in the territory of the other Contracting Party.</i> ➤ Costa Rica-Republic of Korea BIT (2000)
1.b	The obligation is linked to “international law” (or “principles of international law”), which comprises international treaties, international custom and general principles of international law as primary sources, and judicial decisions and the teachings of the most highly qualified publicists as subsidiary sources. ➤ It provides a relatively high level of protection to investments and rests on an objective body of law (international law), from which the content of the standard is to be derived. ➤ It does not specify an applicable source or area of international law which has to be looked at. ➤ In practice, this formulation has been interpreted by tribunals as comprising the same elements as the unqualified FET standard (i.e. protection of investor’s legitimate expectations etc.). Reasoning and decisions by other tribunals, albeit not being a mandatory reference, have a great weight. ➤ A breach of another treaty not drafted for the purpose of investment protection, or of another provision of the IIA, may weight in favour of finding a breach of the FET obligation. ➤ It poses problems in terms of predictability and certainty. It still gives high discretion to interpreters (arbitrators). <i>Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment <u>in accordance with international law</u> and provisions of this Agreement.</i> ➤ Croatia-Oman BIT (2004) <i>Each Contracting Party shall accord investments or returns of investors of the other Contracting Party: fair and equitable treatment <u>in accordance with principles of international law</u>...</i> ➤ Canada-El Salvador BIT (1999)

1.c	The obligation is linked to the minimum standard of treatment of aliens under “customary international law”, i.e. the general and consistent practice of States that they follow from a sense of legal obligation.
	➤ It sets forth a high threshold of violation (the breach must be serious or egregious), thus diminishing the exposure of the host State to international responsibility. ➤ It offers a higher degree of predictability and legal certainty, as there is a broader consensus on the content of customary international law in this sphere. ➤ An allegation of breach requires evidence that the challenged conduct is prohibited by customary international law, which is formed by general and consistent State practice that States follow from a sense of legal obligation (<i>opinio juris</i>). The burden of demonstrating the content of customary international law is on the claimant (investor). ➤ In practice, it has been interpreted by tribunals to cover only limited forms of serious or egregious behavior (e.g., willful neglect of duty, manifest arbitrariness, egregious misconduct and gross denial of justice). ➤ The rules of customary international law on the treatment of aliens are not fully clear. In certain cases it may be difficult to accurately determine whether a certain obligation exists as a matter of international custom. ➤ The concept of customary international law offers certain flexibility as it is not frozen in time and evolves gradually. Hence it incorporates all such content that becomes international custom after the treaty is signed. ➤ Through “greater certainty” notes, certain implications of this approach may be explicitly articulated, such as: (i) a reference to the well-established notion of the “minimum standard of treatment of aliens” under customary international law and (ii) the fact that a violation of a different provision does not automatically mean a violation of the FET standard. ➤ While some consider that the approach has worked quite well in practice (for instance in the context of NAFTA), there is still the risk that a tribunal interprets the obligation broadly by considering non-classical elements as newly formed international custom.
	<i>Minimum Standard of Treatment</i> <i>Each Party shall accord to covered investments treatment <u>in accordance with customary international law, including fair and equitable treatment and full protection and security.</u></i> <i>For greater certainty, <u>paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.</u> 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.</i>

	<i>The obligation in paragraph 1 to provide:</i> <i>(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;</i> ➤ CAFTA-DR FTA (2004) <i>General Treatment</i> <i>Each Party shall accord to investments made in its Area by investors of the other Party, <u>treatment in accordance with customary international law, including fair and equitable treatment</u> and full protection and security.</i> <i>Note 1: <u>Article 75 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments made in the Area of a Party by investors of the other Party. 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 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.</u></i> <i>Note 2: 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 Article 75.</i> <i>Note 3: Each Party shall accord to investors of the other Party, non-discriminatory treatment with regard to access to the courts of justice and administrative tribunals and agencies of the former Party in pursuit and in defense of rights of such investors.</i> ➤ Chile-Japan FTA (2007) <i>The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], 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.</i> ➤ US Model BIT (2004)
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Other Approaches

Standard tied to level of development	A clause is included which requires the host State's level of development to be accounted for. ➤ The approach sets the basis for interpretations conditioned on the level of development of the host State. ➤ Parties may choose to specify that the treaty intends to establish varying standards of obligation for each Party, based on differing capabilities and institutional settings. ➤ Is, however, contrary to the notion of an absolute "minimum standard" on which investors can rely ➤ Investors are unlikely to know what the "minimum" standard means for treaty Parties in this approach, thereby possibly diminishing the treaty's promotional effect.
	<u>3. For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 [Fair and Equitable Treatment] and 2 [minimum standard of treatment] of this Article do not establish a single international standard in this context.</u> ➤ Investment Agreement for the COMESA Common Investment Area (2007)

No Fair and Equitable Treatment clause

Implications	➤ Exposure to international responsibility under the IIA and hence financial costs of the host State may be greatly diminished, considering that tribunals have found breaches of the FET obligation more often than of any other IIA obligation. ➤ The absence of the FET obligation may be perceived as a signal that the Contracting States are not willing to subject themselves to an internationally enforceable minimum absolute standard of treatment of foreign investors.
	Treaty examples: Australia-Singapore FTA (2003), Bangladesh-Uzbekistan BIT (2000), China-Czech Republic BIT (2005).

3.4 Full Protection and Security

The obligation to afford foreign investors *Full Protection and Security* requires the host State to exercise due diligence in protecting foreign investments from adverse acts of private parties (e.g. private violence) and of State organs, including law enforcement agencies and the armed forces.

The standard is an absolute one and does not require comparisons with treatment granted to domestic or other foreign investors. Traditional understanding of the obligation is that it requires providing a certain level of police protection and physical security. Broader interpretations, adopted by some arbitral tribunals, have additionally included legal, economic and regulatory protection and security.

Common elements

1. Stand-alone obligation or linked to a normative source

- a. Stand-alone (unqualified) obligation
- b. Linked to customary international law minimum standard of treatment of aliens

This provision interacts with:

Fair and Equitable Treatment
Compensation for Losses
National Security Exceptions
General Exceptions
Exclusions from Treaty Scope
Investor-State Dispute Settlement

Note: This provision is often combined into a single provision with *Fair and Equitable Treatment*.

1	States decide whether to give content to the standard by making a reference to a normative source.
1.a	The obligation is set out without any qualifications (no reference to a normative source). ➤ This approach lacks clarity on whether the standard requires only police/physical protection and security or also legal/economic/regulatory protection and security (e.g., ensuring a stable regulatory environment or providing investors with effective domestic legal means to enforce their rights). ➤ It affords a significant margin of discretion to arbitrators in interpreting the obligation. ➤ It increases the chances for a broad interpretation and thus heightens the exposure of the host State to international responsibility. ➤ It may generate different expectations between investors and States as to the actual level of treatment that must be afforded. ➤ Some IIAs use slightly different wording, e.g. “adequate protection and security” or “constant protection and security”. It is unlikely that such differences will have a perceptible impact on the clause’s interpretation.
	<i>Investments of investors of either Contracting Party shall at all times be</i>

	<u>accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.</u> ➤ Czech Republic-Vietnam-BIT (1997) <u>Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.</u> ➤ Cambodia-Cuba BIT (2001) <u>Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party shall enjoy the most constant protection and security under the law of the latter Contracting Party.</u> ➤ Peru-Thailand BIT (1991)
1.b	The obligation is linked to “customary international law”, i.e. the minimum standard of treatment of aliens under customary international law. ➤ It narrows down the possible interpretation of the obligation as there is general agreement that customary international law on this field is limited to the duty of due diligence (vigilance) to ensure the physical or police protection of people and property and does not comprise other types of protection and security. ➤ It decreases the types of claims that investors can make under this provision and ultimately diminishes the exposure of the host States to international responsibility. <u>Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</u> <u>For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</u> ... <u>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</u> ➤ Uruguay-USA BIT (2005) <u>Each Contracting Party shall accord to such investments and returns full physical protection and security in their respective areas which in any case shall not be less than that accorded either to investments and returns of their own investors or to investors of any other State, whichever is more favorable to the investor concerned</u> Hong Kong, China-Netherlands BIT (1992)

Other approaches

Different wording of the formulations	Some IIAs use wording that may affect the scope of the obligations. For example, the use of the phrase “full <u>legal</u> protection” is likely to entail a different interpretation that may include legal stability of domestic regulatory environment, effective enforcement of contract rights and other requirements. <i>Investments of national and legal persons of one Contracting party effected within the territory of the other Contracting Party shall receive in the other Contracting Party <u>full legal protection</u> ...</i> ➤ Croatia-Iran BIT (2000)
Taking into account the level of development	Provide that the expected level of police protection may vary for each Party, based on the level of development of the host State. ➤ May be viewed as unnecessary, as concept of “due diligence” underlying full protection and security obligation has been seen to incorporate notion that countries are only obligated to provide the extent of protection they can reasonably achieve. <i>For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context.</i> ➤ Agreement on COMESA Common Investment Area (2007) In the COMESA Agreement, the above formulation qualifies the <i>Fair and Equitable Treatment</i> standard but the same formulation can be used to clarify the obligation to provide <i>Full Protection and Security</i>.

No Full Protection and Security clause

Implication	➤ Absence of one potential basis for an investor claim should diminish exposure of the host State to international responsibility under the relevant IIA. However, this might not be achieved if the treaty contains a <i>Minimum Standard of Treatment</i> obligation as this clause, whether interpreted broadly or narrowly, could be seen as encompassing <i>Full Protection and Security</i>.
	Treaty examples: Chile-Peru BIT (2000), India-Indonesia BIT (1999), Italy-Dominican Republic BIT (2006),

3.5 Expropriation¹⁰

The expropriation provision does not deprive States of their right to expropriate property but regulates the manner in which the said right must be exercised. Protection against uncompensated expropriation is an essential guarantee for investors, and large number IIAs include an expropriation clause. Many of the relevant conditions and requirements find their roots in customary international law.

Common elements

- 1. Covered forms of expropriation**
 - a. Expressly covers direct and indirect
 - b. No reference to direct or indirect
- 2. Legality requirements (except compensation)**
 - a. Purpose of expropriation
 - i. *Public purpose or interest*
 - ii. *Narrower formulations*
 - b. Procedure
 - i. *Due process of law*
 - ii. *Domestic legislation*
 - c. Non-discrimination
- 3. Characteristics of compensation**
 - a. Standard of compensation
 - i. *Fair market value or similar*
 - ii. *Appropriate, or equitable compensation*
 - b. Temporal aspect (promptness)
 - i. *Promptly without delay*
 - ii. *No promptness reference*
 - c. Currency of compensation
 - i. *Freely convertible and transferable*
 - ii. *No reference to form of compensation*
 - d. Interest rate
 - i. *General guidance*
 - ii. *Specific mechanism*
- 4. Guidance in respect of indirect expropriation**

This provision interacts with:

- Definition of Investment*
- Fair and Equitable Treatment*
- Freedom of transfers*
- National Security Exceptions*
- General Exceptions*
- Exclusions from Treaty Scope*
- Investor-State Dispute Settlement*

¹⁰ For a literature and case law review see *Expropriation*, UNCTAD/DIAE/IA/2011/7, 184 pages, Sales No: E.12.II.D.7 available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

1	States expressly note establish the forms of expropriation covered by the treaty.
1.a	The treaty covers both forms of expropriation recognized by customary international law. <i>Direct expropriation</i> involves a mandatory transfer of title or outright seizure of property rights. <i>Indirect expropriation</i> happens when a measure or series of measures taken by the host State have effect equivalent to a direct expropriation. Indirect expropriation renders property rights useless, even though the owner may retain the legal title or remain in physical possession of the property. ➤ It is consistent with the promotional function of the treaty as it encompasses the two classical forms of expropriation recognized by customary international law. ➤ While the identification of a direct expropriation is straightforward, the assessment of an indirect expropriation usually involves a multi-factor assessment. ➤ In some circumstances, it may be difficult to distinguish between an indirect expropriation and a legitimate regulatory measure that does not require payment of compensation. Therefore, the provision on indirect expropriation (if improperly applied) may interfere with the legitimate right of the State to regulate in the public interest. Some IIAs have sought to draw the line between the indirect expropriation and non-compensable regulation (see section 4 below). ➤ Treaties use different formulations to refer to indirect expropriation, e.g. “measures tantamount to expropriation”, “measures having equivalent effect”, etc. The formulations used do not seem to have a perceptible interpretative effect. ➤ Even when an IIA does not specifically mention indirect expropriations, it can be argued that the notion of expropriation is broad enough to cover relevant measures of both direct and indirect kind. <u>Investments by investors of either Contracting State shall not <i>directly or indirectly be expropriated, nationalized or subjected to any other measures the effects of which would be tantamount to expropriation or nationalization</i> in the territory of the other Contracting State except...</u> ➤ Egypt-Germany BIT (2008) <u>Investments of investors of either Contracting Party shall not be nationalised or expropriated, either <i>directly or indirectly through measures having effect equivalent to nationalisation or expropriation (“expropriation”)</i> in the territory of the other Contracting Party except ...</u> ➤ Mexico-UK BIT (2006) <u>Neither Contracting Party shall expropriate or nationalise investments in its Area of investors of the other Contracting Party <i>or take any measure equivalent to expropriation or nationalisation</i> (hereinafter referred to as “expropriation”)</u> except... ➤ Japan-Lao PDR BIT (2008)
1.b	The treaty speaks only to “expropriation”, and does not make reference to

	“direct or indirect.” ➤ It is without effect to the protection afforded under customary international law, which recognizes both direct and indirect forms of expropriation. ➤ States’ exposure to international claims is likely unaffected, as even when an IIA does not specifically mention indirect expropriations, it can be argued that the notion of expropriation is broad enough to cover relevant measures of both direct and indirect kind. ➤ The absence of an explicit reference to indirect expropriation can deprive parties of an opportunity to provide guidance as to the line between the indirect expropriation and non-compensable regulation (see section 4 below). ➤ The provision may be considered as not affording sufficient guarantees to investors. <i>Investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Party except for ...</i> ➤ Germany-Mauritius BIT (1971)
2	States set forth conditions that an expropriation should meet in order to be lawful. The legality of the expropriation may have an - albeit sometimes small - effect on the amount of compensation due to the investor.
2.a.i	Expropriation should be effected in “public purpose” or “public interest”. ➤ This principle forms part of customary international law on expropriation. ➤ The two phrases have similar meanings – the taking of the property must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private gain or an illicit end. ➤ When deciding whether or not this requirement has been fulfilled, tribunals tend to give a wide margin of discretion to host States. <i>Investments of investors of either Contracting Party shall not be nationalized, confiscated, expropriated [...] except such measures are taken <u>in public interest</u>...</i> ➤ Austria-Iran BIT (2001) <i>Investments of investors of either Contracting Party shall not be nationalized, expropriated [...] except <u>for a public purpose</u>...</i> ➤ Bosnia and Herzegovina-Slovenia BIT (2001)
2.a.ii	A treaty may use other (or additional) formulas such as “social interest”, “legal ends”, “national interest” and others.

	➤ Many of these formulations are equivalent in their scope and may be a result of different legal cultures and languages. However, some formulations may be interpreted as giving a narrower meaning to the requirement. ➤ Some treaties include a special clarification in order to approximate the international law concepts to the ones used in the Contracting Parties' domestic law. <u>the expropriation is for a public purpose related to the internal needs of that Party...</u> ➤ Australia-Lithuania BIT (1998) <u>Investments [...] shall not be directly or indirectly nationalized [...] except for a public purpose in the national interest of that State...</u> ➤ Malaysia-United Arab Emirates BIT (1991) <u>1. Investments [...] will not be subject of nationalization, direct or indirect expropriation [...] except for reasons of public purpose, security of national interest...</u> <u>2. It is understood that the criterion “utilidad pública o interés social” contained in Article 58 of the Constitución Política de Colombia (1991) is compatible with the term “public purpose” used in this Article.</u> ➤ Belgium and Luxembourg-Colombia BIT (2009) <u>Neither Party may expropriate or nationalize a covered investment [...] except: (a) for a public purpose⁸...</u> <u>Footnote 8: The term “public purpose” is a treaty term to be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of the Parties, such as “national security” or “public necessity.”</u> ➤ Peru-Republic of Korea FTA (2011)
2.b.i	Expropriation must be carried out in accordance with due process of law. ➤ This principle forms part of customary international law on expropriation. ➤ It requires that States comply with certain fundamental rules of procedural and substantive fairness, including formal legal procedure, a right to have recourse to an independent court and absence of arbitrariness. ➤ This requirement is not equivalent to mere aspects or formalities of domestic law. On the one hand, a violation of domestic law does not necessarily presuppose a violation of the due process requirement. Conversely, formal compliance with domestic law does not necessarily mean that the international due-process requirement has been satisfied. <u>Investments [...] shall not be nationalized, expropriated [...] except for public interest, in accordance with due process of law...</u> ➤ Ethiopia-Spain BIT (2006)

2.b.ii	Expropriation must be carried out in accordance with domestic legal standards and procedures.
	➤ This element requires that States comply with applicable domestic law in respect of expropriation. ➤ The approach could be problematic (i) if domestic law is incompatible with international due-process standards and (ii) if a violation of domestic law is irrelevant from the viewpoint of international law. ➤ International tribunals may be unfit to assess formalities of domestic law beyond the fundamental due process requirements.
	<i>...in conformity with the procedure, laid down by legislation...</i> ➤ Egypt-Russia BIT (1997) <i>...under domestic legal procedures...</i> ➤ China-Romania BIT (1994) <i>... in accordance with domestic laws of general application...</i> ➤ Oman-Switzerland BIT (2009)
2.c	The expropriation must not be motivated by the investor's nationality.
	➤ This principle forms part of customary international law on expropriation. ➤ It protects investors against discriminatory expropriations, i.e. selective expropriations based on the investor's nationality. This is useful as an expropriation may be taken for a public purpose but still discriminatory.
	<i>...in a non-discriminatory manner...</i> ➤ Colombia-Japan BIT (2011) <i>... on a non-discriminatory basis...</i> ➤ Ethiopia-Spain BIT (2006)
3	States set forth the rules regarding the amount and manner of payment of compensation.
3.a.i	Compensation shall be equal to the fair market value of the investment, i.e. an amount that a willing buyer would pay for it to a willing seller under normal circumstances.
	➤ It adds concrete meaning to the Hull formula regarding the specific aspect of "adequate" compensation. ➤ It maximizes protection and constitutes a preferred standard of compensation from the investor's perspective. ➤ The amount of compensation could be high, particularly where market-based valuation methods such as discounted cash flow analysis are applied. ➤ Valuation for certain investments is highly complex and involves fact-based and case-specific assessments. ➤ Some treaties use formulas such as "genuine value", "real value", "just price". They have been interpreted to carry the same meaning as "fair market value".

	➤ Some treaties additionally provide an indicative list of applicable valuation criteria. These formulations provide a useful indication but ultimately the choice of an appropriate valuation method is case-specific. ➤ Standard treaties normally refer to compensation in case of a lawful expropriation. Unless otherwise provided for in the treaty, reparation for an unlawful expropriation would be determined in accordance with customary international law. Reparation could be greater or equal but never less than compensation. <u>1. Neither Contracting Party shall expropriate or nationalise investments [...] except [...] upon payment of prompt, adequate and effective compensation [...]</u> <u>2. The compensation shall be equivalent to the <u>fair market value of the expropriated investments</u> at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.</u> ➤ Japan-Peru BIT (2008) <u>Compensation shall be equivalent to the <u>fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation")</u>, and shall not reflect any change in value occurring because the intended expropriation had become known earlier. <u>Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.</u></u> ➤ NAFTA (1992)
3.a.ii	The treaty contains a less rigid standard, which allows more flexibility in determining compensation by taking into account equitable considerations. ➤ Treaty references to “appropriate” compensation and to equitable factors are conducive to this interpretation. ➤ Compared to the “fair market value” approach, it offers more flexibility and may justify less than full compensation where this is equitable in the circumstances of the case. ➤ It is more amenable to valuation methods such as liquidation value, replacement value or book value, which do not include lost future profits, and, where not reflecting market conditions surrounding an investment, tend to generate lower figures than the discounted cash flow method. ➤ The factors relevant to the assessment of compensation may include the type of taking (discrete or large-scale), financial situation of the debtor State, availability of foreign exchange, depletion of natural resources and any environmental damage, recoupment of funds necessary to rehabilitate property, the manner in which the foreign investor has profited from its investment <i>vis-à-vis</i> the benefits of the host State derived from such investment, and any other relevant factors. ➤ It is less common in treaty practice than the fair market value method, and may be viewed by investors as diminishing the promotional character of the treaty.

	➤ The standard is concerned with lawful expropriation. Reparation for unlawful expropriation is determined in accordance with customary international law. <i>Investments of investors of either Contracting Party shall not be nationalized [...] except [...] against a <u>fair and equitable compensation</u>.</i> ➤ India-UK BIT (1994) <i>Neither Contracting Party shall take any measures of nationalization or expropriation [...] unless the following conditions are complied with: [...]</i> <i>c) the measures are taken against <u>just and equitable compensation</u>.</i> ➤ Mozambique-Netherlands BIT (2001) <i>where [the market] value cannot be readily ascertained, the compensation shall be determined in accordance with <u>generally recognized principles of valuation and equitable principles taking into account, where appropriate, the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors</u>.</i> ➤ Australia-Thailand FTA (2004)
3.b.i	The treaty specifies that compensation shall be paid promptly, i.e. without (undue) delay. ➤ It adds concrete meaning to the Hull formula regarding the specific aspect of “prompt” compensation. ➤ It maximizes protection and constitutes a preferred standard of compensation from the investor’s perspective. ➤ Provision could be viewed as creating strict deadlines which may be inconsistent with the standards and procedures set forth in domestic law. ➤ The timeframe should be assessed in light of the normal procedures in place to make an effective payment. In many countries, a normal time to make such transfer would be between 3 and 6 months. <i>...against <u>prompt, effective and adequate compensation</u>...</i> <i>... shall be paid <u>without delay</u></i> ➤ Bosnia and Herzegovina-Slovenia BIT (2001)
3.b.ii	The treaty provides makes no reference to temporal aspects of compensation ➤ The host State may have more flexibility in order to comply with its obligation to compensate. This may be useful in cases where the State faces exceptional circumstances such as foreign exchange difficulties. <i>...(c) They shall be accompanied by provisions for the payment of an adequate and effective compensation.</i> ➤ Belgo-Luxembourg-Rwanda BIT (1985)
3.c.i	Treaty provides guidance as to the form and manner of compensation (e.g.,

	paid in convertible currency, be fully realizable, and transferable). ➤ It adds concrete meaning to the Hull formula regarding the specific aspect of “effective” compensation. ➤ It maximizes protection and constitutes a preferred standard of compensation from the investor’s perspective. ➤ The currency of payment may be freely usable or convertible into a freely usable currency. ➤ A freely convertible currency can be immediately converted into other currencies on the foreign exchange market. <i>Such market value shall be expressed in a freely convertible currency at the market rate of exchange prevailing for that currency on the valuation date... Compensation shall be paid without delay, be effectively realizable and freely transferable.</i> ➤ Ethiopia-Spain BIT (2008) <i>It shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.</i> ➤ Japan-Peru BIT (2008)
3.c.ii	Treaty provides no guidance as to the form and manner of compensation. ➤ May provide host State with greater flexibility in determining form and manner of compensation. ➤ This approach may reduce the practical value and effectiveness of compensation. ➤ Belgo-Luxembourg-Rwanda BIT (1985)
3.d.i	The treaty gives general guidance on the applicable interest rate. ➤ Payment of interest is meant to ensure full compensation by compensating investor for the loss of use of money between the date of the taking and the date of payment of compensation. ➤ General guidance on interest rate leaves the ultimate choice of the specific rate to be applied in a concrete case to the compensating State or, if compensation is determined by the arbitral tribunal, to arbitrators. ➤ Treaties usually do not specify whether interest should be simple or compounded, but the trend in arbitral practice is to award compounded interest. <i>... shall include interest at the <u>normal market rate</u> until the date of payment...</i> ➤ India-Latvia BIT (2010) <i>The amount of compensation shall carry the <u>usual commercial interest</u></i>

	<i>from the date of dispossession until payment</i> ➤ Oman-Switzerland BIT (2009) <i>If payment is made in a currency of the host or home state, compensation shall include interest at a <u>commercially reasonable rate</u> for that currency from the date of expropriation until the date of actual payment.</i> ➤ Agreement for the COMESA Common Investment Area (2007) <i>The compensation shall be paid without delay and shall carry an <u>appropriate interest</u>, taking into account the length of time from the time of expropriation until the time of payment.</i> ➤ Japan-Philippines EPA (2006)
3.d.ii	The treaty gives specific guidance on the applicable interest rate.
	➤ It provides more certainty, and leaves no discretion to the expropriating State or arbitrators, with respect to the interest rate that should be applied. ➤ It usually does not fix a specific interest rate but establishes a mechanism, using which it should be determined. ➤ The mechanism established would allow the actual rate to change from time to time, depending on the general financial situation prevailing globally or in the State concerned.
	<i>The compensation shall include interest at the rate of <u>London Interbank Offered Rate (LIBOR)</u> for 3-month deposits in the respective currency from the date of expropriation or loss until the date of payment.</i> ➤ Finland-Vietnam BIT (2008) <i>... such compensation [...] shall include interest at the <u>rate applicable under the law of the Contracting Party making the deprivation until the date of payment</u> [...].</i> ➤ Hong Kong, China-Thailand BIT (2005)
4	States decide whether to provide additional guidance for assessment of indirect expropriation.
	The treaty includes rules to facilitate distinguishing indirect expropriation from non-compensable regulatory measures. Such provisions usually confirm that: • Assessment requires a case-by-case factual inquiry that considers a series of factors, including the economic impact of the measures, presence of reasonable investment-backed expectations and the general character of the measure; • An adverse economic impact alone is insufficient to establish that an indirect expropriation has occurred; and • Non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives carry a presumption of being non-expropriatory.
	➤ It provides additional guidance for assessments of measure that have been alleged to constitute indirect expropriation.

	➤ It reinforces the ability of States to regulate in the public interest and can help preventing expansive interpretations of “indirect expropriation” by tribunals. ➤ Using the formula is coherent with a trend in arbitral practice going in the same direction. ➤ It is meant to clarify and not to derogate from customary international law. However, treaty formulations are not identical and may differ in some important details. ➤ The concept of “reasonable legitimate expectations” in the context of expropriation may be unfamiliar to some domestic legal systems.
	Expropriation <i>The Parties confirm their shared understanding that:</i> <i>....</i> 4. The second situation addressed by Article 6 [Expropriation and Compensation](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, non-discriminatory 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. ➤ United States Model BIT (2012) <i>The Contracting Parties confirm their shared understanding with respect to indirect expropriation referred to in Article 13, as follows:</i> <i>[...]</i> (b) The determination of whether a measure or series of measures by a Contracting 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 measure or series of measures, although the fact that such measure or series of measures has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the measure or series of measures interferes with distinct, reasonable expectations arising out of investments; and (iii) the characteristic of the measure or series of measures, including whether such measure or series of measures are non- discriminatory; and (c) Non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives stated in paragraph 1 of Article 19 [General Exceptions] do not

	constitute indirect expropriation. ➤ Japan-Peru BIT (2008) 3. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be: a. either severe or for an indefinite period; and b. disproportionate to the public purpose. 4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either: a. discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or b. in breach of the state's prior binding written commitment to the investor, whether by contract, licence, or other legal document. 5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation. ➤ China-New Zealand FTA (2008) 3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, license or other legal document; and (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1 [Expropriation]). 4. Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation. ➤ ASEAN Investment Agreement (2009)
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Other approaches

Narrowing down the scope of protected interests	The treaty may clarify that the expropriation provision applies only to actions that interfere with tangible or intangible property rights (a concept that is narrower than "investment"). This formulation would seem to exclude interests such as customer base or market share as well as licenses, permits and other government authorizations, which do not create property rights.
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	<u>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.</u> ➤ Australia-Chile FTA (2008)
Specific rules regarding compensation for certain types of assets	Special rules regarding compensation are created for expropriations of certain types of assets. <u>Where a Contracting Party expropriates investments which consist only of immovable property, the provisions of paragraph (1) of this Article shall apply, except that the moment at which the real value of such property is determined shall be governed by the laws and policies of the Contracting Party which is expropriating that immovable property.</u> ➤ Hong Kong, China-Thailand BIT (2005) <u>Notwithstanding paragraph (1), any measure relating to land, which shall be as defined in its domestic legislation of each Contracting Party, shall be for a public purpose and upon payment of compensation in accordance with the aforesaid legislation and any subsequent amendment thereto.</u> ➤ Indonesia-Singapore BIT (2005)
Right of review before local courts	The treaty provides that an affected investor shall have a right to prompt review of its case before the courts of the expropriating State. It serves as an express recognition of a right that stems from the due process requirement. <u>The investor, whose investments are expropriated, shall have the right to prompt review of its case by a judicial or other competent authority of that Contracting Party, valuation of its investments and payment of compensation in accordance with the principles set out in this Article.</u> ➤ Croatia-Thailand BIT (2000)
Expropriation of assets owned by investor's local subsidiary	A special provision is inserted for cases involving expropriations of assets owned by an investor's local subsidiary (as opposed to assets owned by the investor itself). This provision may be unnecessary in those treaties that include the foreign-owned local subsidiaries the definition of "investor" or where investors are given a right to bring treaty claims on behalf of their local enterprises. <u>Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of this Article are applied so as to guarantee prompt, adequate and effective</u>

	<i>compensation in respect of their investments to such investors of the other Contracting Party who are owners of those shares.</i> ➤ Ethiopia-Spain BIT (2006)
An exception for TRIPS-compliant compulsory licenses	A special exception relating to the intellectual property rights (IPRs) regime under the WTO TRIPS Agreement is included in some recent IIAs. It aims to ensure that issuance of TRIPS compliant compulsory licenses is not viewed as expropriating investors' IPRs (the latter are routinely included in the definition of "investment" in IIAs) and thereby promotes consistency between the TRIPS and the IIA. <i>This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.</i> ➤ ASEAN Investment Agreement (2009).

No Expropriation clause

Implications	➤ The protective character of the treaty would be affected. ➤ Even though the absence of an expropriation provision is without effect to the protection afforded under customary international law, the enforcement mechanisms would be very different. ➤ State exposure to international responsibility of the host State would be diminished, particularly as regards potential claims of indirect expropriation under the relevant IIA. ➤ In most probability the determination of whether an expropriation has occurred, together with the amount of compensation due, would have to be made in domestic courts under domestic law.
	Treaty practice: New Zealand–Singapore FTA (2000), EC-CARIFORUM EPA (2008).

3.6 Compensation for Losses Due to Armed Conflict or Civil Strife

This provision deals with compensation for losses incurred by investors as a result of extraordinary situations such as war, armed conflict, insurrections and civil disturbances. Customary international law is generally understood as not requiring compensation in these circumstances, unless the State has failed to act in a duly diligent way. The majority of IIAs contain a special provision on *Compensation for Losses* (also sometimes referred to as *Protection from Strife*), which clarifies the rules on compensation due and which constitutes *lex specialis* in relation to the general standard of *Full Protection and Security*.

Common elements

1. **Extent of the obligation to compensate**
 - a. Linked to MFN Treatment
 - b. Linked to National Treatment and MFN Treatment
2. **Covered situations**
 - a. War or armed conflicts
 - b. Civil disturbances
 - c. "Acts of God"
 - d. State of national emergency
3. **Absolute obligation of compensation in specific cases**

Note: In some circumstances, the *Compensation for Losses* provision may be overridden by host State's invocation of a national security exception (see *National Security Exceptions*).

This provision interacts with:

- National Treatment*
- Most-Favoured-Nation Treatment*
- Full Protection and Security*
- Freedom of Transfers*
- National Security Exceptions*
- General Exceptions*
- Investor-State Dispute Settlement*

1	States determine whether the obligation to compensate is conditioned on the treatment the host State accords in these circumstances to national or to other foreign investors.
1.a	The provision requires MFN Treatment in the matter of compensation of covered investors. ➤ The treaty does not require that covered investors be compensated for the losses suffered in all cases. ➤ The host State is obliged to compensate covered investors insofar, and to the same extent, as it compensates investors from a non-Party. In other words, covered investors may not be discriminated against vis-à-vis other foreign investors. ➤ Compensation may take the form of any type of benefit conferred including restitution of property, monetary grants and others. ➤ The host State may provide compensation to its own nationals without compensating foreign investors. ➤ It provides the flexibility for host State in deciding the appropriate

	conditions for compensation and the range of beneficiaries By not assuring non-discrimination vis-à-vis domestic investors, may reduce the promotional character of the treaty. <i>Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party <u>shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to investors of any third State.</u></i> ➤ Malaysia-Turkey BIT (1998)
1.b	The standard requires National Treatment and MFN Treatment, whichever is more favourable, in the matter of compensation of covered investors. ➤ The treaty does not require that covered investors be compensated for the losses suffered in all cases. ➤ The host State is obliged to compensate covered investors insofar, and to the same extent, it compensates national and/or other foreign investors. In other words, covered investors may not be discriminated against vis-à-vis other investors, whether domestic or foreign. ➤ Compensation may take the form of any type of benefit conferred including restitution of property, monetary grants and others. ➤ The host State is prevented from granting preferential treatment to domestic investors. If it compensates locals, it has to extend the same treatment benefit to foreigners. ➤ Compared to 1.a, this approach is potentially more burdensome for States but provides a higher level of protection to investors. <i>When investments made by investors of a Party suffer loss or damage owing to war or other armed conflict, civil disturbances, state of national emergency, revolution, riot or similar events in the territory of the other Party, they shall be accorded by the latter Party <u>treatment, as regards restitution, indemnification, compensation or other settlement, not less favorable than the treatment that it accords in like circumstances to its own investors or to investors of any non-Party, whichever is more favorable to the investors concerned.</u></i> ➤ Jordan-Singapore BIT (2004)
2	States determine which events are covered by the provision.
2.a	War and armed conflict.
	➤ Armed conflicts, including wars, are very often covered by the IIA provisions in question. Losses arising out of such events may take the form of physical destruction of, or damage to investor's property, looting, seizure by non-State armed groups or requisitioning by the State.

	<i>When investments made by investors of a Party suffer loss or damage <u>owing to war or other armed conflict</u>...</i> ➤ Jordan-Singapore BIT (2004)
2.b	Revolution, revolt, insurrection or riot.
	➤ Various types of civil disorder and disobedience are very often covered by the IIA provisions in question. Losses arising out of such events may take the form of physical destruction of, or damage to investor's property, looting or seizure by rebels.
	<i>Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses including damages, <u>owing to war or any other form of armed conflict, revolution, a state of emergency, revolt, insurrection, riot or other similar events</u> in the territory of the latter Contracting Party...</i> ➤ Bosnia and Herzegovina-Slovenia BIT (2001)
2.c	Events which are out of human control, mainly natural disasters.
	➤ Natural disasters/acts of God are less frequently covered by the relevant IIA provisions. They are out of human control and may create enormous and unpredictable stresses on host States.
	<i>Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party <u>owing to acts of God</u>...</i> ➤ Mexico-Netherlands BIT (1998) <i>Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory <u>owing to armed conflict, civil strife or a natural disaster</u>.</i> ➤ Canada-Peru FTA (2008)
2.d	State of national emergency.
	➤ A State of national emergency can be declared by a government for various reasons, e.g. natural disaster or armed conflict. ➤ The grounds for, and consequences of, declaring a state of national emergency are often laid down in countries' domestic legislation. It usually entails temporary suspension of the normal functions of State organs and citizens' rights in order to address the extraordinary circumstances that have caused it.

	<i>Investors of one Contracting Party who suffer losses relating to their investments in the State territory of the other Contracting Party <u>due to war, a state of national emergency</u>,...</i> ➤ Azerbaijan-Croatia BIT (2007)
3	States decide whether to assume an absolute obligation to compensate investors in certain circumstances.
3.a	The host State assumes an obligation to provide restitution or compensate foreign investors for particular types of losses, irrespective of whether compensation is made to local investors or investors of non-Parties.
	➤ The losses concerned usually involve those incurred due to requisitioning of property by the host State's armed forces or authorities and for destruction of property by the host State's armed forces or authorities not caused in combat action and/or not required by the necessity of the situation. ➤ In the described circumstances, the obligation to provide restitution or compensate is absolute, i.e. does not depend on the treatment accorded in this respect by the host State to its own investors or other foreign investors. ➤ The standard of compensation may differ from treaty to treaty, e.g. "prompt, adequate and effective" compensation, "reasonable" compensation, etc. ➤ The host State's responsibility in the described circumstances is essentially likened to the requirement to pay compensation for expropriated property (see <i>Expropriation</i>). ➤ Compensation is usually due only if the adverse act was caused by government forces or authorities and not, for example, by rebel forces. ➤ This approach can create an additional burden for States but provides a higher level of protection to investors.
	<i>...investors of one Contracting Party who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting Party resulting from:</i> <i>(a) requisition of their property or part thereof by the forces or authorities of the latter Contracting Party, or</i> <i>(b) destruction of their property or part thereof by the forces or authorities of the latter Contracting Party which was not caused in combat action or was not required by the necessity of the situation,</i> <i>shall be accorded <u>prompt restitution or prompt and adequate compensation where restitution is not possible for the damage or loss sustained</u>.</i> <i>Resulting payments shall be made in a freely convertible currency and be freely transferable without undue delay.</i> ➤ Austria-Philippines BIT (2002) <i>Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:</i>

	(a) <i>requisitioning of its covered investment or part thereof by the latter's forces or authorities; or</i> (b) <i>destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,</i> <i>the latter Party shall provide the investor <u>restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), mutatis mutandis.</u></i> ➤ US Model BIT (2004)
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Other approaches

Different treatment depending on the type of event	With respect to some events, the clause provides for MFN treatment, with respect to other events – National Treatment and MFN. This allows differentiating between different types of events and legal consequences.
	<i>Each Party shall accord to investors of the other Party whose investments suffer losses in its territory owing to <u>armed conflict or civil strife, state of emergency and other similar circumstances</u>, treatment no less favourable, with respect to a consideration of value, <u>than would be accorded to its own investors or investors of any third State, whichever is more favourable to the investor. For compensation for losses suffered by virtue of unforeseeable circumstances or force majeure, each Party shall accord treatment no less favourable than would be accorded to investors of any third State.</u></i> ➤ Cuba-Mexico BIT (2001)

No Compensation for Losses clause

Implications	➤ A State would still be bound to provide MFN treatment and National Treatment to covered investors to the extent that it had agreed to those obligations in the IIA. ➤ In addition, a reasonable level of protection of covered investors would still be required under the <i>Full Protection and Security</i> provision, if contained in the treaty.
	Treaty examples: Argentina-Armenia BIT (1993), Chile-Spain BIT (2003), Egypt-Cyprus BIT (1998)

3.7 Freedom of Transfers

Freedom of Transfers is an obligation of the host State to allow a foreign investor to transfer capital and funds relating to its investment in and out of the host State.

The objective of this provision is to ensure that a foreign investor can make free use of invested capital, returns on its investment and other payments related to the establishment, operation or disposal of an investment.

It is particularly important to foreign investors as they see the timely transfer of funds and profits as a key condition for the proper operation of their investment. At the same time, in an increasingly interdependent international economy, host countries may seek the ability to pre-empt potentially destabilizing capital inflows and outflows. In this context, the inclusion of exceptions affirming host country flexibility to properly administer monetary and financial policies becomes prudent.

Common elements

- 1. Scope**
 - a. Inward & outward
 - b. Outward only
- 2. Currency conversion**
 - a. At administered rate
 - b. At market rate
- 3. Exceptions relating to the enforcement of bankruptcy, criminal and administrative laws of the host State**
- 4. Exceptions concerning balance-of-payment and other macroeconomic difficulties of the host State**

This provision interacts with:

Definition of Investor of a Party
Definition of Investment
Expropriation
Protection from Strife
National Treatment
Most-Favoured-Nation Treatment
National Security Exceptions
General Exceptions
Investor-State-Dispute Settlement

1	States determine the type of movements of capital that benefit from the provision.
1.a	The provision applies to both inward transfers, i.e. transfers into the territory of the host State, and outward transfers, i.e. repatriation of funds to the home State or transfer of funds to any third country. Freedom of transfers into the territory of the host State includes the necessary funds to establish, maintain, develop, and/or expand an investment. Freedom of transfers out of the territory of the host State includes the various types of funds generated by the investment activity or derived from the application of the treaty (e.g. compensation for expropriation or awards issued in investor-State dispute settlement). Types of payments covered by the provision can be set out in an illustrative or exhaustive list.

	➤ This is a core element in global IIA practice. ➤ Inward transfers are particularly important for those treaties that extend to the pre-establishment phase of investment (see National Treatment and Most-Favoured-Nation Treatment). ➤ It can be perceived as risking the ability of the host State to regulate capital transactions and administer its currency and its foreign reserves. This may be mitigated through the inclusion of exceptions that affirm the right to implement appropriate macroeconomic and prudential policies. <i>Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of the other Contracting Party may be freely transferred <u>into and out</u> of its territory without delay. Such transfers shall include, <u>in particular, though not exclusively</u>:</i> <i>a) the initial capital and additional amounts to maintain or increase an investment;</i> <i>b) returns;</i> <i>c) the amounts required for payment of expenses which arise from the operation of the investment under contract, loan repayments, payment of royalties, management fees, licence fees or other similar expenses;</i> <i>d) proceeds from the sale or liquidation of all or any part of an investment;</i> <i>e) payments of compensation under Article 5 and 6 of this Agreement;</i> <i>f) payments arising out of the settlement of an investment dispute;</i> <i>g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.</i> ➤ Croatia-Thailand BIT (2000)
1.b	The provision applies only to outward transfers, i.e. repatriation of funds to the home country of the investor and, sometimes, also transfers to any third country. Freedom of transfers out of the territory of the host State includes the various types of funds generated by the investment activity or derived from the application of the treaty (e.g. compensation for expropriation or awards issued in investor-State dispute settlement). Types of payments covered by the provision may or may not be set out in an illustrative or exhaustive list. ➤ It is a core element of global IIA practice. ➤ Treaty protection for transfer of funds <i>out</i> of the host State may be more important for investors than protection for import of capital <i>into</i> the host State, based on actual impediments in place. ➤ The outward-only approach may be better suited to treaties protecting established investments only (post-establishment treaties). ➤ Perceived risks to the ability of the host State to regulate capital transactions, and administer its currency and its foreign reserves may be mitigated through the inclusion of exceptions that affirm the right to implement macroeconomic and prudential policies.

	Article 6. <u>Repatriation of Investment and Returns</u> <i>Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns.</i> ➤ Ethiopia-UK BIT (2009)
2	States determine the type of currency and applicable currency exchange rules. Normally, the treaty would refer to (i) a “freely convertible currency”, that is, a currency that has immediate value on the foreign exchange market or (ii) a “freely useable currency”, that is, a currency designated as such, from time to time, by the International Monetary Fund (US Dollar, the Japanese Yen, the Euro and the British Pound).
2.a	The conversion would be effected at the applicable market exchange rate or another exchange rate pursuant to domestic regulations. ➤ The treaty may provide for currency exchange at a rate determined in accordance with domestic legislation. Domestic currency exchange rules may change from time to time and may affect investors. ➤ If the State uses an official fixed rate that differs from the prevailing market rate, this may have an effect of decreasing the real value of the investor's funds being transferred. ➤ This approach may be less attractive for investors, as the currency conversion is controlled by the State. <i>The transfer of payments shall be effected without delay <u>in freely convertible currency</u>, in accordance with the currency exchange rate, applied as on the date of the transfer <u>in conformity with the operating currency rules of that Contracting Party</u>, on whose territory the capital investments have been carried out.</i> ➤ Egypt-Russia BIT (1997) <i>Transfers shall be made in a <u>freely convertible currency</u> at the rate of exchange in force at the date of transfer <u>in accordance with laws and regulations of the Contracting Party which admitted the investment</u>.</i> ➤ Philippines-Turkey BIT (1999)
2.b	The conversion would be effected through the market rate of exchange prevailing on the date of transfer. ➤ The approach is more attractive to investors as the conversion is to be effected through market rates as opposed to an administered official rate. This approach gives more certainty and allows for a fair transfer. ➤ Although the approach limits somehow the State control over the use of its foreign reserves (as a consequence of possibly sudden and unconstrained conversion of local currency), the risks of such a situation may be addressed through the inclusion of relevant exceptions. <i>Such transfers shall be made at the prevailing market rate of exchange on the date of transfer <u>in freely usable currency</u>.</i> ➤ Indonesia-Singapore BIT (2005)

	<i>Each Contracting Party shall further ensure that such transfers may be made without delay in <u>freely usable currencies at the market rate of exchange prevailing on the date of the transfer.</u></i> ➤ Japan-Lao PDR BIT (2008)
3	States establish specific cases in which a transfer may be prevented due to regulatory or other policy needs.
	➤ Without affecting the general <i>Freedom of Transfers</i> right, the host State reserves the right to restrict free transfers in appropriate circumstances, e.g. to prevent fraud on creditors, safeguard the integrity of the stock market system, guarantee the reparation of the damage in the context of criminal proceedings, keep record of the inflow or outflow of transfers or other monetary instruments, adopt precautionary measures in adjudicatory proceedings and guarantee compliance with administrative and tax obligations. ➤ To prevent abuse of the exceptions by the host State, the relevant exceptions usually provide that transfer restrictions must be a result of “equitable, non-discriminatory, and good faith application” of the host State’s laws and regulations.
	<i>Notwithstanding paragraphs 1 and 2, a Member State may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:</i> <i>(a) bankruptcy, insolvency, or the protection of the rights of creditors;</i> <i>(b) issuing, trading, or dealing in securities, futures, options, or derivatives;</i> <i>(c) criminal or penal offenses and the recovery of the proceeds of crime;</i> <i>(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;</i> <i>(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;</i> <i>(f) taxation;</i> <i>(g) social security, public retirement, or compulsory saving schemes;</i> <i>(h) severance entitlements of employees; and</i> <i>(i) the requirement to register and satisfy other formalities imposed by the Central bank and other relevant authorities of a Member State.</i> ➤ ASEAN Comprehensive Investment Agreement (2009)
4	States establish situations in which transfers may be prevented due to balance-of-payments difficulties, economic hardship or prudential reasons.
	States may restrict transfers in case of a balance-of-payments difficulty, i.e. a shortage or depletion of foreign exchange reserves which may lead to a severe depreciation or devaluation of the local currency. If the treaty so provides, restrictive measures may also be taken on broader grounds such as “external financial difficulties”, “macroeconomic instability” or “macroeconomic management” problems. A treaty may also allow imposition of transfer restrictions for prudential reasons in order to maintain the safety, soundness and integrity of the

	financial sector.
	➤ The host State preserves policy space to implement otherwise treaty-inconsistent measures designed to protect its financial stability in case of a balance-of-payments crisis or other macroeconomic difficulty. ➤ Countries may seek to guard against abuse of these exceptions by providing that said restrictions should have a duration and scope not greater than those strictly necessary and should be progressively eliminated while corrective policies take hold. It is also implied that such measures are applied across the economy and do not target specific investors. ➤ A specific exception related to prudential measures allows the host country to implement measures that are aimed at protecting the soundness and stability of the financial sector. ➤ Inclusion of such exceptions may reduce the perceived protective value of the <i>Freedom of Transfers</i> provision.
	<i>In case of a serious <u>balance of payments difficulty</u> or of a threat thereof, a Contracting Party may temporarily restrict transfers provided that such a Contracting Party implements measures or a programme in accordance with international standards. These restrictions should be imposed on an equitable, non-discriminatory and in good faith basis.</i> ➤ Mexico-UK BIT (2006) <i>In the event of <u>serious balance-of-payments and external financial difficulties</u> or threat thereof, a Member State shall adopt or maintain restrictions on payments or transfers related to investments. It is recognized that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.</i> ➤ ASEAN Comprehensive Investment Agreement (2009) <i>[...] [A] Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non- discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.</i> ➤ Canada Model BIT (2004)

Other approaches

Prohibition to require repatriation of capital	This provision prohibits the home State of the investor from requiring such investor to repatriate its capital or funds relating to its investment in the host State. Therefore, the investor has a free choice of whether to
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	reinvest or transfer such capital or funds. <i>Neither Party may require its investors to transfer, or penalize its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party, provided that the investor is seeking to make, is making or maintains an investment in the territory of the other Party.</i> ➤ Canada-Colombia FTA (2008)
Timing to allow transfers	A specific time limit to effect the transfer upon request may be provided for. This approach however may reduce flexibility of the host State to postpone the transfer for reasonable cause. <i>Each Contracting Party shall, subject to its laws and regulations, allow without delay, <u>in any case within a period not exceeding six months</u>, the transfer in a freely convertible currency.</i> ➤ Finland-Indonesia BIT (2006)
Subordination to domestic law	The freedom of transfers may be subordinated to the laws of the host State. However, this goes beyond mere formalities and does not remove obstacles to the movement of capital if they exist pursuant to domestic law. <i>Each Contracting Party shall, <u>subject to its laws and regulations</u>, guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including...</i> ➤ China-Djibouti BIT (2003)

No Freedom of Transfers clause

Implications	➤ The host State fully retains its capacity to place restrictions on capital inflows and outflows, and restrict transfers as and when it deems appropriate. ➤ The absence of a <i>Freedom of Transfers</i> right could send a negative signal to investors, as this provision constitutes a core element of international investment treaties.
	Treaty examples: CEFTA (2006).

3.8 Transparency¹¹

This provision establishes State transparency obligations. This provision has historically been drafted to enable the investor and its home State to become acquainted with the host State's regulatory framework and the process of domestic rulemaking affecting investments. Recent formulations have also included provisions regarding direct exchange of investment-related information between treaty Parties.

The traditional objective of this provision is to create for investors a more predictable institutional framework within the overall investment climate.

Common elements

1. Transparency obligations

- a. Making information publicly available
 - i. *Laws and regulations*
 - ii. *Administrative procedures, administrative rulings, judicial decisions, and international agreements*
 - iii. *Draft or proposed rules*
- b. Exchange of information
 - i. *Intent to pro-actively exchange information*
 - ii. *Obligation to respond to information requests*
- c. Inserting words to expand or limit host State obligations
- d. Exclusion of State transparency obligations from investor-State arbitration

This provision interacts with: *Investment Promotion*
 Investor-State Dispute Settlement

Note: Promotion elements and schemes for joint cooperation are addressed in *Investment Promotion*.

1	States decide whether and what type of transparency obligations to impose on the Contracting Parties
1.a.i	States assume an obligation to publicize laws and regulations relating to investment activities. ➤ It reinforces a basic rule common to most legal systems that a binding instrument of general application should be made public and be publicly available. ➤ It reduces information costs for investors. <i>Each Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by investors of the other Party, <u>make such laws public and readily accessible.</u></i> ➤ Australia-Egypt BIT (2001)
1.a.ii	In addition to laws and regulations, States assume an obligation to publish additional materials. These may include administrative procedures, administrative rulings, judicial decisions, and international agreements.

¹¹ For a literature and case law review see *Transparency*, UNCTAD/DIAE/IA/2011/6, 101 pages, Sales No: E.11.II.D.16 available at http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf

	➤ This formulation increases transparency by requiring States to disclose additional relevant domestic legal documents beyond its laws and regulations. ➤ It reinforces the basic rule common to most legal systems that any binding instrument of general application should be made public and be publicly available. ➤ It further reduces information costs for investors. ➤ This formulation may be more burdensome for host States as it greatly expands the amount of material that must be made public. ➤ Some countries may not have the capacity to promptly publish all types of measures.
	<i>Each Party shall ensure that its:</i> <i>(a) laws, regulations, procedures, and administrative rulings of general application; and</i> <i>(b) adjudicatory decisions</i> <i>respecting any matter covered by this Treaty <u>are promptly published or otherwise made publicly available.</u></i> ➤ Uruguay-USA BIT (2005)
1.a.iii	States assume an obligation to publicize in advance the enactment of a measure affecting investments and to allow the submission of commentaries by stakeholders and interested parties, including the home State and foreign investors.
	➤ This formulation fosters government openness, accountability and the participation of stakeholders in the public decision-making process. ➤ It may help attract investment by curtailing investor exposure to volatility in the regulatory framework of the host State. ➤ This type of transparency mechanism can be quite costly to implement as it requires human resources and technological infrastructure, although the IIA provision often does not prescribe a particular means of publication, and is often not absolute. ➤ Extending the right of prior comment to the home State or foreign investors may be controversial on sovereignty or political grounds. ➤ It may be particularly challenging to implement this formulation in sub-government units not directly managed by the national government (i.e. state governments in a federal system). ➤ It may trigger claims by investors for issues not actually related to the treatment of investments; however this potential risk can be mitigated through exclusion of the obligation from the scope of the investor-State arbitration provision.
	<i>To the extent possible, each Party shall:</i> <i>(a) publish in advance any such measure that it proposes to adopt; and</i> <i>(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.</i> ➤ Canada Model BIT (2004)
1.b.i	States articulate an intent to pro-actively exchange information with the other Contracting Party regarding investment opportunities and/or laws and regulations that affect investors of the other contracting party.

	➤ This formulation fosters bilateral cooperation. ➤ It may facilitate investment opportunities. ➤ It is not a binding obligation, which may result in little action taken by the Contracting Parties. ➤ It is not a binding obligation, so States are able to adopt measures commensurate with their capacity to implement. <i>With the aim to significantly increase bilateral investment flows, the Contracting Parties may elaborate investment promotion documents and may provide each other with detailed information regarding:</i> <i>(a) investment opportunities;</i> <i>(b) the laws, regulations or provisions that, directly or indirectly, affect foreign investment including, among others, currency exchange and fiscal regimes; and</i> <i>(c) foreign investment statistics in their respective territories.</i> ➤ Mexico-UK BIT (2006)
1.b.ii	States assume an obligation to designate a contact point to respond to information requests from the other Contracting Party regarding measures that affect investments. ➤ This formulation fosters bilateral cooperation. ➤ It may facilitate information exchange by creating a mechanism to fulfill the obligation. ➤ This transparency mechanism may impose costs on the Contracting Parties by requiring additional human resources and technological infrastructure. <i>Each Party shall designate a contact point to facilitate communications among the Parties on any matter covered by this Chapter. Upon the request of another Party, the contact point shall:</i> <i>(a) identify the office or official responsible for the relevant matter; and</i> <i>(b) assist as necessary in facilitating communications with the requesting Party with respect to that matter.</i> <i>Each Party shall respond within a reasonable period of time to all requests by any other Party for specific information on:</i> <i>(a) any measures or international agreements referred to in Paragraph 1;</i> <i>(b) any new, or any changes to existing, measures or administrative guidelines which significantly affect investors or covered investments, whether or not the other Party has been previously notified of the new or changed measure or administrative guideline.</i> ➤ ASEAN-Australia-New Zealand FTA (2009)
1.c	States include words to change the scope of the obligation. Words that expand the obligation include “may affect” and “might affect”. Words that limit the obligation include “to the extent possible”, “substantially affect”, and

	“materially affect”. ➤ These word choices can help States achieve a desired balance between investor protection and State flexibility. ➤ Words that expand the State obligation protect investors. ➤ Words that limit the State obligation preserve State flexibility to fulfill transparency obligations at a level commensurate with their policy preference or capacity. Expanding the State obligation: <i>Each Contracting Party shall ensure that its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, which <u>may affect</u> the investments of investors in the other Contracting Party in its territory are promptly published, or otherwise made publicly available.</i> ➤ Azerbaijan-Finland BIT (2003) Limiting the State obligation: <i>To the maximum extent possible, a Party shall notify the other Party of an existing or proposed measure <u>that the Party considers might materially affect the operation of this Agreement or substantially affect the other Party's interests under this Agreement.</u></i> ➤ Canada-Panama FTA (2010) Adding words that both limit and expand the State obligation: <i>Each Contracting Party shall ensure that, <u>to the extent possible</u>, its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, <u>which may affect</u> the investments of investors of the other Contracting Party in its State territory, are promptly published, or otherwise made publicly available.</i> ➤ Azerbaijan-Croatia BIT (2007)
1.d	States explicitly exclude from investor-State arbitration any dispute arising from the State transparency obligation. ➤ This formulation prevents investors from challenging breaches of the treaty’s transparency obligation. ➤ States may be less likely to fulfil transparency obligations since they are isolated from the accountability mechanism of investor-State arbitration. ➤ State transparency obligations may still be enforced through State-State arbitration. <i>No investor may have recourse to dispute settlement under Section C [investor-State dispute settlement] for any matter arising under this Article [State transparency obligations].</i> ➤ Canada Model BIT (2004)

Other approaches

Information from home State	➤ This formulation speaks to the right of a host States when vetting potential investors by using the other Contracting Party as a source of information regarding the past practices of potential investors. ➤ It does not compel the production of information, but confirms the right of a Party to “seek” information. ➤ This formulation may only be relevant in cases where investors are subject to screening mechanisms ➤ This formulation balances investor protections with the host State’s interest in admitting foreign investors that will support the policy objectives of the host State. <i>Host Contracting Party has the right to seek information from a potential investor <u>or its home state</u> about its corporate governance history and its practices as an investor, including in its home state. Host Contracting Party shall protect confidential business information they receive in this regard. Host Contracting Party may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable national legislation.</i> ➤ Azerbaijan-Croatia BIT (2007)
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No Transparency clause

Implications	➤ State transparency provisions may still be established under domestic law. ➤ The absence of an international legal obligation in this area can afford States more flexibility to implement transparency schemes on a timeframe and in a manner that aligns with their institutional capacity and policy preferences. ➤ The absence of State institutional transparency provisions may inhibit cooperation between the Contracting Parties and hinder foreign investment by increasing the information costs of potential investors. Treaty examples: China-Djibouti BIT (2003), India-Nepal BIT 2011), Chile-Japan FTA (2007).
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3.9 Performance Requirements

Performance requirements (PRs) are conditions imposed by host countries on investors in pursuance of certain economic policy goals, e.g. generation of local employment, increase in the demand for local supplies, boosting of exports or increase in foreign exchange earnings. Performance requirements limit investors' economic choices and managerial discretion and may negatively affect the businesses efficiency.

The objective of IIA provisions on PRs is to discipline their use by host States in order to allow investors to operate their investments in the most economically efficient manner.

Common elements

1. Substantive scope of commitments

- a. In accordance with/incorporating WTO TRIMs obligations
- b. Listing prohibited PRs beyond WTO TRIMs obligations
 - i. Circumstances in which the use of PRs is prohibited
 1. *As a condition for investment activities*
 2. *As a condition for both investment activities and the receipt of advantages*
 - ii. Exceptions to the prohibition

2. Subjective scope of commitments

- a. Investments of investors of the Contracting Party
- b. Investments of all investors, including those from non-Contracting Party

Notes: **(1)** PRs can be imposed as a condition of both establishment and operation of investments; therefore, PRs obligations are relevant for treaties of both pre- and post-establishment type. **(2)** Specific economic sectors as well as certain existing or future non-conforming PRs can in some approaches be excluded from the PRs obligation (see *Scheduling of Commitments*).

This provision interacts with:

Definition of Investment
National Treatment
Scheduling of Commitments
Exclusions from Treaty Scope
Investor-State Dispute Settlement

1	States determine the depth of the commitments, i.e. the type of prohibited PRs, the circumstances in which they may not be used and any applicable exceptions.
1.a	The IIA provision on PRs reproduces or incorporates by reference obligations enshrined in the WTO Agreement on Trade-Related Investment Measures (TRIMs). The latter prohibits PRs in the goods sector inconsistent with Articles III (National Treatment) and XI (Quantitative Restrictions) of the GATT 1994 and includes an illustrative list of prohibited measures (e.g., those requiring the purchase of local products or establishing certain levels of exports or imports of products). ➤ The relevant TRIMs provision prohibits the host State to impose only

	PRs that discriminate between domestic and foreign investors or that are linked to restrictions on imports or exports; other PRs such as the location of production, employment of local workers or technology transfer are not prohibited. ➤ Incorporating the TRIMs Agreement into the IIA means that it becomes enforceable through the IIA's dispute settlement provisions. It also may have an additional value if one or both of the Contracting Parties are not WTO members. ➤ The TRIMs Agreement is limited to measures affecting trade in goods.
	<i>Neither Contracting Party may impose, in connection with permitting the establishment or acquisition of an investment, or enforce in connection with the subsequent regulation of that investment, any of the requirements set forth in the World Trade Organization Agreement on Trade-Related Investment Measures contained in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakech on April 15, 1994.</i> ➤ Canada-Costa Rica BIT (1998)
1.b	States set out a list of prohibited PRs, going beyond TRIMs obligations.
1.b.i	States determine circumstances in which the use of PRs is prohibited.
1.b.i.1	The provision sets out a list of PRs which the host State may not impose on the investor as a condition of performing investment activities in its territory. ➤ The list of prohibited measures typically goes beyond WTO TRIMs commitments in terms of both types of requirements and their scope (not limited to goods). The number and specific types of prohibited PRs are subject to negotiations. ➤ It offers a certain degree of legal certainty as all the measures which are prohibited are specifically listed. ➤ It prohibits measures that force investors to conduct business in ways that reduce business efficiency, but reduce the ability of States to use PRs as a tool of economies policy (although the provision can be subject to exceptions). ➤ PRs are prohibited throughout the full life-cycle of investment, including those imposed as a condition of establishment of investments. ➤ The host State retains the right to impose PRs as a condition to receive a benefit or advantage. <i>Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:</i> <i>(a) to export a given level or percentage of goods;</i> <i>(b) to achieve a given level or percentage of domestic content;</i> <i>(c) to purchase, use or accord a preference to goods produced or services</i> <i>provided in its territory, or to purchase goods or services from</i>

	<i>persons in its territory;</i> <i>(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;</i> <i>(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;</i> <i>(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or</i> <i>(g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market.</i> ➤ Canada Model BIT (2004)
1.b.i.2	The provision prohibits the imposition of certain PRs (i) as a condition for the investor to perform investment activities in the territory of the host State and (ii) as a condition for obtaining benefits or advantages offered by the host State. With respect to the prohibition of PRs as a condition to perform investment activities, see implication listed under 1.b.i.1. With respect to the prohibition of PRs as a condition for obtaining benefits or advantages: ➤ It restricts the ability of the host State to implement measures which condition receipt of advantages on compliance with PRs. ➤ The list of such measures is typically shorter. The Contracting Parties accordingly retain the ability to link PRs other than the ones listed, with the receipt of benefits or advantages. ➤ Exceptions may be used in order to implement special programs. <i>Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:</i> <i>(a) to achieve a given level or percentage of domestic content;</i> <i>(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;</i> <i>(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or</i> <i>(d) to restrict sales of goods or services in its territory that such investment</i>

	<i>produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.</i> <i>Nothing in paragraph [above] shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.</i> ➤ Canada Model BIT (2004)
1.b.ii	Exceptions to the prohibition of PRs
	Allows States to implement otherwise treaty-inconsistent programs which pursue certain policy objectives, e.g. export promotion or support of domestic suppliers.
	➤ States retain a right to implement measures designed to achieve specified policy objectives. ➤ Another mechanism to preserve policy freedom in particular economic sectors or to keep in place certain existing PRs is to use <i>Scheduling of Commitments</i>. <i>A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph (f) above.</i> ➤ Canada Model BIT (2004) <i>Paragraphs [] do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.</i> <i>Paragraphs [] do not apply to government procurement.</i> <i>Paragraphs [] do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.</i> ➤ US Model BIT (2004)
2	States establish the beneficiaries of the provision.
2.a	States make this provision applicable only to investors of a Contracting Party.
	➤ The obligation extends only to investments of investors of the other Contracting Party. ➤ It allows differential treatment of foreign investors. However, it may be impractical for States to introduce PRs for investors of selected nationalities only.

	<i>Each Contracting Party shall not impose mandatory measures on investments by investors of the other Contracting Party concerning purchase of materials, means of production, operation, transport, marketing of its products, or similar orders having unreasonable or discriminatory effects.</i> ➤ Azerbaijan-Finland BIT (2003)
2.b	States make this provision applicable not only to investors of a Contracting Party, but to all investors. ➤ This approach aims to prevent different treatment amongst investors, which may lead to distortions in the host State economy. Therefore it fosters a uniform level playing field as well as a single investment policy. ➤ However, third-country beneficiaries would not be entitled to use the procedural mechanisms of the treaty (investor-State dispute settlement), only available to investors of a Contracting Party. <i>Neither Contracting Party shall impose or enforce, in connection with investment activities in its Area of an investor of the other Contracting Party or of a non-Contracting Party, any of the following requirements...</i> ➤ Colombia-Japan BIT (2011) <i>This Chapter applies to measures adopted or maintained by a Party relating to:</i> <i>(a) investors of another Party;</i> <i>(b) investments of investors of another Party in the territory of the Party; and</i> <i>(c) with respect to Articles [Performance Requirements] and [Environmental Measures], all investments in the territory of the Party.</i> ➤ NAFTA (1992)

No Performance Requirements clause

Implications	➤ It preserves the ability of the host State to implement PRs which may form part of its development strategy and represent an instrument to achieve particular policy objectives or implement industrial policies (transfer of technology, jobs creation, etc.). ➤ Investors may be deterred from investing in a country which conditions the operation of investments on the fulfilment of PRs adversely affecting the economic efficiency of an investment. ➤ Even if there is no clause explicitly ruling out performance requirements, the National Treatment clause could prohibit the discriminatory imposition of PRs in investors only. ➤ Even in the absence of an IIA obligation, the imposition certain PRs may remain prohibited by virtue of WTO TRIMS obligations. Treaty examples: Algeria-Indonesia BIT (2000), Germany-Guatemala BIT (2003), India-Nepal BIT (2011).
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3.10 Umbrella Clause

This provision requires the host State to observe any obligation or commitment it has assumed in respect of investments in its territory by investors of the other Contracting Party (for example, in an investment contract).

Depending on its interpretation, the provision may offer protection to investors beyond the rules and standards of treatment specifically set forth in the treaty. Specifically, it can be read as bringing contractual and other individual commitments undertaken by the host State towards investors under the “umbrella” of the IIA, thus making them potentially enforceable through investor-State dispute settlement.

Common elements

1. **Legal force**
 - a. Binding commitment
 - b. Soft-law commitment
2. **Range of commitments covered**
 - a. Any obligation of the host State
 - b. Obligations assumed in writing by a competent authority
3. **Settlement of disputes pursuant to underlying contracts**

This provision interacts with: *Investor-State Dispute Settlement*

1	States determine the binding force of the clause.
1.a	The provision establishes a binding obligation of the State to abide by any obligation it may have entered into with respect to investments ➤ It effectively widens the scope of the treaty by giving protection to investors' rights beyond those arising from the treaty itself. ➤ It provides investors greater certainty that host States will honour commitments made to investors. ➤ It significantly increases the exposure of the host State to international responsibility, as the provision may be interpreted as turning ordinary breaches of contract into breaches of international law. ➤ International tribunals may be less well suited to resolve disputes governed purely by domestic law. This can also have an effect of displacing competent dispute settlement bodies, usually domestic courts and tribunals. ➤ There has been uncertainty as to the precise nature and effect of the umbrella clause, and there have been major inconsistencies in the manner in which arbitral tribunals have interpreted their meaning. <i>Each Contracting Party <u>shall observe</u> any obligation arising from a particular commitment it may have entered into with regard to a specific investment of nationals or companies of the other Contracting Party.</i> ➤ Philippines-UK BIT (1980) <i>Each Party <u>shall observe</u> any obligation it may have entered into with regard to investments.</i> ➤ Argentina-USA BIT (1991) <i>Either Contracting Party <u>shall constantly guarantee the observance of</u></i>

	<i>the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.</i> ➤ Pakistan-Switzerland BIT (1995)
1.b	The provision establishes a soft-law commitment of the State to abide by any obligation it may have entered into with respect to investments. ➤ It does not set an upfront commitment to abide by all obligations entered into by the host State. The obligation is made subject to domestic law and good faith efforts of the host State. ➤ Without containing hard and fast commitments, it sends a message that the host State is willing to respect the obligations it makes towards investments of investors. ➤ It still imposes a material obligation upon the host State but provides much more latitude for compliance with it. The normative effect of such obligation is somewhat uncertain, as are the chances for its successful enforcement by investors. <i>A Contracting Party shall, <u>subject to its law, do all in its power to ensure that a written undertaking given by a competent authority to a national of the other Contracting Party with regard to an investment is respected.</u></i> ➤ Australia-Poland BIT (1991)
2	States identify the types of obligations whose violation may trigger the application of the umbrella clause.
2.a	The provision covers “any kind” of obligation or commitment, in a broad sense, which may therefore include both contractual and unilateral obligations, regardless of whether they have been assumed in written form or otherwise. ➤ It offers the broadest scope of protection to investors. ➤ It significantly increases the exposure of the host State to international liability. ➤ The range of commitments covered by the provision is wide and not precisely defined, allowing expansive interpretations by arbitral tribunals. ➤ It may be interpreted to cover obligations assumed by host States, whether explicitly in contracts entered into with investors, or implicitly through unilateral statements, domestic legislation or as part of the conditions of a license or authorization issued to the foreign investor. ➤ In addition to obligations assumed in writing, the provision may potentially be understood to cover a broad range of other obligations, including those arising from political statements, declarations, understandings, etc. <i>Each Contracting Party shall observe <u>any other obligation it may have entered into with regard to investments</u> in its territory by investors of the other Contracting Party.</i> ➤ Belarus-Republic of Korea BIT (1997) <i>Each Contracting Party shall observe <u>commitments</u>, additional to those specified in this Agreement, it has entered into with respect to investments of the investors of the other Contracting Party.</i> ➤ Czech Republic-Singapore BIT (1995)

2.b	The provision only covers certain type of obligations, namely those stemming from commitments made in writing by competent authorities. ➤ It focuses solely in obligations assumed in writing by a competent authority. It therefore provides more certainty as to the types of obligations covered by the clause. ➤ Depending on the formulation, it may exclude commitments made by organs or authorities of the host State which have no authority to make such commitments under applicable domestic law. ➤ Depending on the formulation, it may cover only contractual commitments or both contractual and obligations of the host State. <i>A Contracting Party shall, subject to its law, adhere to any <u>written undertakings</u> given to a national or company of the other Contracting Party concerning an investment, provided that the undertaking is given by a person lawfully entitled to give it.</i> ➤ Australia-Papua New Guinea BIT (1990) <i>Each Contracting Party shall observe <u>any contractual obligation</u> it may have entered into towards an investor of the other Contracting Party with regard to investments <u>approved</u> by it in its territory.</i> ➤ Austria-Philippines BIT (2002)
3	States decide whether to explicitly subject any dispute arising from the obligations covered by the umbrella clause to the forum selected in the underlying sources of host State's obligations (e.g., contracts).
3.a	The inclusion of this provision excludes the application of the dispute settlement mechanisms contained in the treaty in relation to disputes arising from the breach of obligations covered by the umbrella clause. ➤ It respects contractual choice of the dispute settlement forum specified in the relevant contract between an investor and the host State. ➤ It minimizes the risk of exposure of the host State to international responsibility in case of a breach-of-contract dispute. An investor retains the right to start a treaty arbitration if the same State conduct allegedly violates one of the treaty provisions, such as the fair and equitable treatment or expropriation. ➤ The provision loses much of its practical effect. <i>Each Contracting Party shall observe any other obligations it has assumed in writing, with regard to investments in its territory by investors of the other Contracting Party. <u>Disputes arising from such obligations shall be settled under the terms of the specific agreement underlying the obligations.</u></i> ➤ Belgo-Luxembourg Economic Union-Mexico BIT (1998) <i>Where the written agreement referred to in paragraph 3 of Article 4 ["umbrella" clause] stipulates a dispute settlement procedure, such procedure shall prevail over this Chapter [ISDS]</i> ➤ Colombia-Japan BIT (2011)

No Umbrella Clause

Implications	➤ Disputes arising out of contracts with foreign investors will be adjudicated solely in domestic courts or other fora specified in the contract. ➤ Arbitral tribunals will only be competent to decide on claims that allege a breach of the treaty itself, not a breach of other obligations that the host State has assumed with regard to an investment. ➤ Exposure to international responsibility of the host State is diminished. Treaty examples: Canada-China BIT (2012), Canada-Peru FTA (2008), Costa Rica-Ecuador 2001 (BIT).
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3.11 Entry and Sojourn

This provision is designed to facilitate the entry and sojourn of individuals into the host State to perform activities connected with investments. The obligation, however, is normally subject to national legislation of the host State.

Common elements

1. Subjective coverage

- a. Nationals of the other Contracting Party
- b. Any personnel employed by the foreign investor regardless of nationality.

2. Substantive scope

- a. Activities in connection with investments
- b. Executive, managerial or specialized positions
- c. Mixed approach

This provision interacts with: *Definition of Investment*
 Nationality of Senior Management
 Scheduling of Commitments

1	States determine the kind of individuals that are covered by the provision.
1.a	Nationals of the home State only. ➤ It sends a signal that the States are willing to facilitate admission of home country nationals in connection with investment activities. ➤ It does not provide an absolute right, as the entry and sojourn of non-citizens are subject to the immigration laws and regulations of the host State. The host State thus retains ample discretion to refuse entry or sojourn. ➤ Its coverage is limited to nationals of the home State. ➤ National legislation determines if family members may accompany nationals of the home State. ➤ It may introduce certain pressure to the host State to give favourable consideration to visa and work permit applications made before competent authorities. This may be sensitive for certain countries facing immigration problems. ➤ Measures regarding immigration regulations or policies potentially may be challenged using the IIA's dispute settlement procedures, where the host State's conduct is inconsistent with its own laws and regulations. <i>Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and work permits for <u>nationals of the other Contracting Party</u> engaging in activities associated with investments made in the territory of that Contracting Party.</i> ➤ Botswana-China BIT (2000) <i>Each Contracting Party shall, in accordance with its applicable laws and regulations, give due consideration to applications for the entry, sojourn and residence of a natural person having the nationality of the other</i>

	<i>Contracting Party who wishes to enter the territory of the former Contracting Party and to remain therein for the purpose of investment activities.</i> ➤ Colombia-Japan BIT (2011)
1.b	Natural persons of any nationality as long they are employed by the investor. ➤ It sends a signal that the States are willing to facilitate the free movement of workers, regardless of nationality, in connection with investment activities. ➤ It does not provide an absolute right, as the entry and sojourn of non-citizens are subject to the immigration laws and regulations of the host State. The host State thus keeps ample discretion to implement its respective regulations and policies. ➤ It is not limited to nationals of the home State and covers persons of any nationality as long as they are employees of the enterprises owned by an investor of the home State. ➤ National legislation determines if family members may accompany investors and employees. ➤ It may introduce certain pressure to the host State to give favourable consideration to visa and work permit applications made before competent authorities. This may be sensitive for certain countries facing immigration problems. ➤ Measures regarding immigration regulations or policies potentially may be challenged using the IIA's dispute settlement procedures, where the host State's conduct is inconsistent with its own laws and regulations. <i>Subject to its applicable laws relating to the entry and sojourn of non-citizens, a Contracting Party shall permit <u>natural persons of the other Contracting Party and personnel employed by enterprises of the other Contracting Party</u> to enter and remain in its territory for the purpose of engaging in activities connected with investments.</i> ➤ India-Mexico BIT (2007)
2	States determine the kinds of activities covered by the provision.
2.a	It covers any kind of activities, whether managerial or not, specialized or not. ➤ It covers all activities performed by individuals in connection to an investment. <i>Each Contracting Party shall, in accordance with its applicable laws and regulations, give sympathetic consideration to applications for the entry, sojourn and residence of a natural person having the nationality of the other Contracting Party who wish to enter the territory of the former Contracting Party and remain therein <u>for the purpose of investment activities.</u></i> <i>The term "investment activities" means establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.</i> ➤ Japan-Peru BIT (2008)
2.b	It only covers certain kinds of activities in connection with investments, namely those having a managerial, executive or specialized nature.

	➤ It is restricted to certain (named) kinds of activities that are key to operating the investment.
	<i>Subject to its laws, regulations and policies relating to the entry of aliens, each Party shall grant temporary entry to nationals of the other Party, employed by an investor of the other Party, who seeks to render services to an investment of that investor in the territory of the Party, <u>in a capacity that is managerial or executive or requires specialized knowledge.</u></i> ➤ Canada Model BIT (2004)

Other approaches

Prohibition for quotas or economic tests	A provision may be included in order to prohibit or discourage the host State from applying labour certification tests or similar procedures as well as any numerical restrictions relating the entry of natural persons. This approach limits the discretion of immigration authorities. Due to the sensitivity of immigration policies, this approach is not used widely.
	<i>1. Subject to its laws relating to entry, stay and authorization to work, each Contracting Party shall grant temporary entry, stay and authorization to work to investors of the other Contracting Party for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Contracting Party of an investment to which they, or an enterprise of that other Contracting Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources, so long as they continue to meet the requirements of this Article.</i> <i>2. Neither Contracting Party, in granting entry under paragraph 1 of this Article, shall apply a <u>numerical restriction in the form of quotas or the requirement of an economic needs test</u>, unless (a) it notifies the other Contracting Party of its intent to apply the restriction no later than sixty days before the intended date of the implementation of the restriction, and (b) it, upon request by the other Contracting Party, consults with that other Contracting Party before the implementation of the restriction.</i> ➤ Japan-Republic of Korea BIT (2002)

No Entry and Sojourn clause

Implications	➤ A considerable number of investment treaties do not include this provision. ➤ States may see little reason to include this provision given that the obligation remains subject to domestic immigration laws. ➤ However, the provision provides support for applying
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	pressure on the immigration authorities of the host State in cases of delays, etc. It could also be of use if the host State's immigration authority refuses entry and sojourn of foreign personnel in violation of its own domestic law.
	Treaty examples: Belgium and Luxembourg-Costa Rica BIT (2002), Chile-Peru BIT (2000), China-Tunisia BIT (2004).

3.12 Nationality of Senior Management

This provision prohibits States to require that senior management positions in local companies be held by persons having a particular nationality. The objective of this provision is to allow investors to freely appoint top managers to operate their companies in order to allow decisions taken on efficiency considerations.

Common elements

1. Domestic nationality requirements for senior managerial personnel
2. An exception for members of boards of directors

Note: Contracting Parties may in some approaches make reservations in relation to this obligation in order to exempt certain existing or future measures or to exclude economic sectors from the scope of the obligation (see *Scheduling of Commitments*).

This provision interacts with:

- Definition of Investment*
- Definition of Investor of a Party*
- Entry and Sojourn of Personnel*
- Scheduling of Commitments*
- Exclusions from Treaty Scope*

1	States decide whether to prohibit domestic nationality requirements for senior managerial personnel.
	The treaty prohibits the host State to require that senior management positions in local companies be held by persons having a particular nationality. ➤ Investors may freely employ those managers who they consider to be most suitable for the job, regardless of their nationality. Although there is no universal definition, the executive management typically consists of the highest ranks of the enterprise's organization such as the chief executive officer, president, director general or directors of the various divisions, e.g. chief financial officer or the chief operating officer. ➤ The obligation applies to "enterprises" covered by the treaty (as defined in the <i>Definition of Investment</i>) or to companies owned or controlled by the covered investors ("ownership" and "control" may also be defined in the treaty). ➤ Entry and sojourn of the relevant personnel in the host State remains subject to domestic immigration legislation (see <i>Entry and Sojourn of Personnel</i>). ➤ Making treaty reservations in respect of this obligation, e.g. in those industries where the host State wishes to build local managerial capacity, can provide flexibility to use such policies selectively (see <i>Scheduling of Commitments</i>).
	<i>A Party may not require that an enterprise of that Party, that is a covered investment, appoint to senior management positions individuals of any particular nationality.</i> ➤ Canada Model BIT (2004)

	<i>Neither Contracting Party may require that an enterprise of that Contracting Party considered as investments of an investor of the other Contracting Party appoint to senior management positions natural persons of any particular nationality.</i> ➤ Colombia-Japan BIT (2011)
2	States decide whether to provide flexibility with respect to the composition of companies' boards of directors.
2.a	Nationality requirements with respect to board-of-directors members are allowed as long as they do not impair control over the company. ➤ Without impairing the investor's ability to control its investment, flexibility is provided in respect of the composition of boards of directors of local foreign-owned companies. ➤ Only with respect to board-of-directors members, States retain the right to impose minimum quotas for local nationals or limit the number of expatriate members. ➤ As a safeguard, treaties usually provide that such domestic requirements may not materially impair the investors' control of the investment. ➤ Host governments themselves may not appoint particular individuals as members of the boards of directors; such appointment remains the prerogative of investors.
	... <i>A Contracting Party may require that a majority of the board of directors or any committee thereof, of an enterprise that is investments of an investor of the other Contracting Party, be of a particular nationality, or resident in the former Contracting Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investments.</i> ➤ Japan-Peru BIT (2008)

No Nationality of Senior Management Clause

Implications	➤ States remain free to impose requirements with respect to the nationality of senior managers in locally-incorporated companies, in so far as these requirements do not contravene other treaty obligations (e.g. <i>National Treatment</i>). ➤ This does not mean that host governments themselves may <i>appoint</i> particular individuals as top managers in such companies. ➤ The majority of traditional BITs do not include the <i>Nationality of Senior Management</i> clause.
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	Treaty examples: Botswana-Germany BIT (2000), Chile-Spain BIT (2003), Dominican Republic-Finland BIT (2001).
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3.13 Subrogation

Many countries have put in place insurance programs to protect investments of their investors abroad against certain non-commercial risks such as expropriation, non-convertibility of currency, losses incurred due to war or civil disturbance, political violence or terrorism. The mechanism of subrogation supports the effective functioning of insurance schemes.

By virtue of this provision, the host State recognizes the transfer of all rights and claims in favour of the insurer upon payment of an insurance contract or guarantee, i.e. the insurer substitutes in the place of the investor in respect of a lawful claim. The insurer shall not be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise.

Common elements

1. Types of insurers covered

- a. State or designated agency thereof
- b. Any insurer

2. Exercise of assigned rights

- a. By the home State or its designated agency
- b. By the home State or its designated agency, or the investor itself

This provision interacts with: *Definition of Investor of a Party*
 Investor-State Dispute Settlement

1	States determine which types of insurers qualify for subrogation under the treaty.
1.a	Contracting Party itself or a designated agency thereof. ➤ The insurer may only be the treaty-partner State or an agency thereof. Therefore, this option excludes private companies. ➤ It allows the implementation of governmental insurance programmes between the Contracting Parties. ➤ <i>If a <u>Contracting Party or its designated agency</u> makes a payment under an indemnity, guarantee or contract of insurance against non-commercial risks given in respect of an investment of an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.</i> ➤ Croatia-Thailand BIT (2000)
1.b	Any insurer. ➤ Same as 1.a., except that it also covers private insurers including those that are not based in the investor's home State.

	<i>If the investment of an investor of one Contracting Party are insured against non-commercial risks, any subrogation of <u>the insurer or re-insurer</u> to the rights of the said investor pursuant to the terms of such insurance shall be recognized by the other Contracting Party, provided, however, <u>that the insurer or the re-insurer</u> shall not be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise.</i> ➤ Indonesia-Singapore BIT (2005)
2	States determine who has a procedural right to pursue claims against the host State.
2.a	The treaty explicitly confirms a procedural right of the subrogee to enforce its acquired rights against the host State. ➤ It guarantees that the subrogation right is fully operational by entitling the Contracting Parties or their designated agencies to exercise the rights assigned to them. ➤ If the range of recognised insurers includes <i>any</i> insurers (option 1.b above), any subrogee is able to file claim. ➤ Under this approach, an investor who received an insurance payment may only pursue a claim if authorised by the insurer. <i>A Contracting Party or any agency thereof which is subrogated to the rights of an investor in accordance with paragraph (1) of this Article, shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment concerned and its related returns. <u>Such rights may be exercised by the Contracting Party or any agency thereof or by the investor if the Contracting Party or any agency thereof so authorizes.</u></i> ➤ Canada-Croatia BIT (1997) <i>Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, <u>that investor shall not, unless authorized to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.</u></i> ➤ Australia-Lithuania BIT (1998)
2.b	The treaty provides that subrogation does not prevent the investor from bringing treaty claims against the host State. ➤ It is more flexible as it provides that both the insurer and the investor itself may pursue treaty rights against the host State. ➤ It allows the investor and the insurer to determine between themselves who is going to pursue a claim and who is entitled to any compensation awarded by an authority or tribunal. <i>If one Contracting Party or its designated agency ("the first Contracting Party"), makes a payment to any of its investors under an indemnity given in respect of an investment in the territory of the other Contracting Party ("the second Contracting Party"), the second Contracting Party shall recognize:</i> <i>(a) the assignment to the first Contracting Party by law or by legal</i>

	<i>transaction of all the rights or claims of the investor indemnified and (b) that the first Contracting Party is entitled to exercise such rights and to enforce such claims by virtue of subrogation, to the same extent as the investor indemnified.</i> <i>[...]</i> <i>During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of its loss.</i> ➤ Brunei Darussalam-Republic of Korea BIT (2000)
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No Subrogation clause

Implications	➤ The lack of this provision may impede the host State, an agency thereof or a private company providing an investor with insurance, which in some cases may be an important factor for making the investment. ➤ It creates uncertainty about whether an insurer would be entitled to enforce the IIA rights. In the absence of a subrogation clause, this question would have to be assessed by an arbitral tribunal under applicable law. ➤ It avoids any concerns that may be raised by allowing the home State or an agency thereof to bring a treaty claim as subrogee against the host State. ➤ Provision may also be unnecessary, where a country has other relevant international agreements in place that permit their insurance guarantee authorities to be subrogated to claims of insured investors.
	Treaty examples: Canada-Chile FTA (1996), Chile-Australia FTA (2008), Chile-Columbia (2006)

4. Flexibilities and General Exceptions

4.1 Denial of Benefits

The *Denial of Benefits* provision allows the host State to deny the benefits of the treaty to certain companies owned or controlled by nationals of a third country (non-party to the treaty) or by nationals of the host State itself.

The objective of this provision is to give host States an opportunity to exclude from the scope of the treaty certain companies that are not eligible to enjoy the benefits of the treaty due to economic, political or regulatory considerations.

Common elements

1. Activation of denial of benefits

- a. Through unilateral (with or without prior consultation) State action
- b. Through mutual consent

2. Grounds for denial of benefits

- a. Company with no substantive business activities and owned by non-Party national
- b. Company with no substantive business activities and owned by a national of the host State
- c. Absence of diplomatic relations or introduction of economic sanctions

This provision interacts with: *Definition of Investor of a Party*
 National Security Exceptions
 Investor State Dispute Settlement

1	States determine the manner in which the denial of benefits is activated
1.a.	The host State may invoke the clause without requiring the consent of the home State. A requirement of prior notification to the home State could be added. ➤ It allows the host State to exercise the clause unilaterally. ➤ The host State preserves the flexibility over whether it wishes to deny the benefits of the treaty to a particular non-eligible investor. ➤ A notification requirement ensures that the home State is informed. <i>A Party may deny the benefits of this Treaty...</i> ➤ US Model BIT (2004) <i>Subject to prior notification and consultation...a Party may deny the benefits of this agreement...</i> ➤ Canada Model BIT (2004)
1.b	The host State needs the consent of the home State in order to be entitled

	to invoke the clause. ➤ It still keeps, albeit in more restrictive terms, the possibility to deny treaty benefits, requiring the agreement of both Contracting Parties. ➤ It restricts the host State's possibility to deny benefits in a speedy manner. ➤ The home State may choose to obstruct the activation of the clause in some circumstances. <i>The Contracting Parties may decide jointly in consultation to deny the benefits of this Agreement to...</i> ➤ Mexico-Trinidad and Tobago BIT (2006)
2	States establish the grounds for the denial of benefits.
2.a	The company is owned or controlled by nationals of a State that is not a party to the treaty. Despite having been constituted or organized in the home State, such company does not have a genuine economic connection with the home State. ➤ It allows the State to deny protection in the case of “shell” or “mailbox” companies owned by non-Party investors and thereby prevent “treaty shopping”. ➤ This can be unnecessary if a State is willing to grant treaty protection to all investments regardless of the country of their ultimate origin. ➤ For the benefits to be denied, two criteria must be satisfied: (1) the company does not have substantial business activities in the home country; and (2) the owner/controller of the company originates from a third State. ➤ The “substantial business activities” test requires a fact-based, case-specific assessment. ➤ The “ownership” and “control” tests can be highly fact-specific in some circumstances (some treaties contain a separate definition of these terms). ➤ The concerns regarding a “material link” of the investor with the home State may be also addressed through the <i>Definition of Investor</i>. <i>Each Contracting Party reserves the right to deny the advantages of this Part to:</i> <i>(1) a legal entity if citizens or nationals <u>of a third state</u> own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;</i> ➤ The Energy Charter Treaty (1994)
2.b	The company is owned or controlled by nationals of the <u>host State</u> and does not have a genuine economic connection with the home State. ➤ It prevents “roundtrip” investments whereby nationals of the host State establish a foreign legal entity and channel their investments through it solely for the purpose of obtaining treaty protections. ➤ It diminishes the risk that a person starts international arbitration proceedings against its own State, which may be seen as an

	abusive practice that defeats the purpose of the treaty. ➤ States may formulate the denial-of-benefits clause so that it covers (1) only those investments where the direct owner (home State company) has no substantial business activities in the home State, or (2) <i>all</i> investments indirectly owned by host State nationals. <i>A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Contracting Party and to investments of such investor if the company <u>has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organized, and investors of a non-Contracting Party or investors of the denying Contracting Party, own or control the company.</u></i> ➤ Gabon-Turkey BIT (2012) <i>...to investors of the other Party where the investment is being made by an enterprise that is owned or controlled <u>by persons of the denying Party.</u></i> ➤ China-Peru FTA (2009)
2.c	The company is owned or controlled by nationals of a non-party State with which the host State does not have diplomatic relations and/or against which the denying Party maintains economic sanctions. In this case, the existence of any genuine economic link between the company and the home State is irrelevant. ➤ It allows the State to deny protection when ultimate investors originate from countries with which the State does not have diplomatic relations. ➤ Sometimes, the criterion of “diplomatic relations” is replaced with “normal economic relations” (e.g., Korea-US FTA (2007)). ➤ The clause can also address a separate situation, where the denying Party maintains economic sanctions against a certain non-Party, and thus help avoid the obligation to grant treaty protections to ultimate investors from that non-Party. <i>...to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise <u>and the denying Party does not maintain diplomatic relations with the non-Party.</u></i> ➤ US Model BIT (2004) <i>... to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a non-Party own or control the enterprise <u>and the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.</u></i> ➤ Canada-Colombia FTA (2008)

Other approaches

Investor misconduct	The Contracting Parties may also list other grounds for the denial of benefits, e.g. fraud, misconduct, misrepresentation or violations of domestic laws.
	<i>...to investors of another Member State and to investments of that investor, where it establishes that such investor <u>has made an investment in breach of domestic laws of the denying Member State by misrepresenting its ownership in those areas which are reserved for natural or juridical persons of the denying Member State.</u></i> ➤ ASEAN Comprehensive Investment Agreement (2009)

No Denial of Benefits clause

Implications	➤ States are willing to grant treaty protections to any investment in its territory, regardless of the ultimate origin of capital. ➤ The scope of application of the treaty is more certain. ➤ Potentially fact-intensive assessments (“substantial business operations”, “ownership” and “control”) are avoided. ➤ States have lesser discretion to control the beneficiaries of the treaty in exceptional circumstances. ➤ The clause may be unnecessary if certain elements are included in the treaty’s scope of application (<i>Definition of Investor</i>). For instance, a qualification may be effected in the sense that the investor must have a genuine economic link with the home State. ➤ Enables treaty shopping by nationals and companies from non-Parties and from the host State.
	Treaty examples: Australia-Turkey BIT (2005), Canada-Ecuador BIT (1996), Chile-Dominican Republic BIT (2000).

4.2 Scheduling of Commitments and/or Reservations¹²

Scheduling is employed when certain treaty provisions apply only to some industries, namely those included in each Party's Schedule (positive list) or when it applies across the economy with the exception of certain measures and/or industries included in each Party's Schedule (negative list).

Often a treaty has some obligations that apply across the board (e.g., *Fair and Equitable Treatment* or *Expropriation*) while other obligations apply on the basis of scheduling. Most often, the latter category of obligations include *National Treatment*, *Most-Favoured-Nation Treatment*, *Nationality of Senior Management* and *Performance Requirements*. Scheduling is typical for pre-establishments IIAs although some agreements of the post-establishment type have also employed this technique.

Scheduling is a process individual to every country, so that each Contracting Party provides its own schedule of measures and/or industries. The Contracting Parties must agree to each other's schedule.

Common elements

1. **General approach to scheduling**
 - a. Positive list
 - b. Negative list
2. **Type of scheduled non-conforming measures**
 - a. Existing
 - b. Future
3. **"Standstill" effect v. "ratchet" effect**
 - a. Standstill
 - b. Ratchet

This provision interacts with: *National Treatment*,
Most-Favoured-Nation Treatment
Nationality of Senior Management
Performance Requirements
Exclusions from the Treaty Scope
General Exceptions
Investor-State Dispute Settlement

1	States select the general approach to scheduling.
1.a	<i>Positive list</i> : specified treaty obligations apply only to those industries which are included in the Schedule. ➤ States can negotiate as to which sectors or areas of activity they wish to subject to IIA disciplines. Thereby, States must expressly specify the economic areas in which the treaty applies.

¹² For a literature and case law review see *Preserving flexibility in IIAs: the use of reservations*, UNCTAD/ITE/IIT/2005/8, 104 pages, Sales No: E.06.II.D.14 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=423>

	➤ In the “committed” areas, reservations can be made to exempt particular activities or measures from the catch of the treaty obligations. ➤ Generally, when aiming to preserve space to implement discriminatory measures, making commitments on a positive-list basis is considered to be an easier scheduling convention, as compared to the “negative list”. ➤ Depending on the number of the scheduled measures, the protective character of the treaty may be compromised. ➤ While positive lists have not been often used in IIAs, this approach is at the core of the WTO's General Agreement on Trade in Services (GATS). <i>In the sectors inscribed in Annex 8, and subject to any conditions and qualifications set out therein, each Party shall accord investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, with respect to the establishment and acquisition of investments in its territory.</i> ➤ Australia-Thailand FTA (2004) <i>In the sectors where market access commitments are inscribed in Annex IV [Annex IV contains a positive list of committed industries] and subject to any conditions and qualifications set out therein, with respect to all measures affecting commercial presence, the EC Party and the Signatory CARIFORUM States shall grant to commercial presences and investors of the other Party treatment no less favourable than that they accord to their own like commercial presences and investors.</i> ➤ CARIFORUM-EC EPA (2008)
1.b	<i>Negative list:</i> the treaty obligations apply to all economic sectors and to all governmental measures unless a specific reservation has been made by a Party. ➤ It allows States to preserve critical or sensitive policies potentially inconsistent with the treaty obligations. ➤ In their schedules, States list and describe (1) existing non-conforming measures that are exempted from the treaty scope, and (2) sectors or areas that are exempted from the treaty scope (in these areas new non-conforming measures may be introduced in the future). ➤ The negative-list approach is meant to “lock in” existing regulatory regimes in the Contracting Parties. ➤ Countries effectively commit to openness in those sectors/activities, which, at the time IIA is signed, are not exempted. ➤ Properly managing a negative-list approach requires countries to have at the time of treaty negotiation sufficient institutional capacity for properly designing and negotiating the schedule of reservations. <i>1. Articles 10.4 (National treatment) and 10.5 (Most Favoured Nation Treatment), shall not apply to:</i> <i>[types of exempted measures and industries as listed in each Party's Schedule]</i> ➤ Malaysia-New Zealand FTA (2009)

	1. Articles 10.3 [National Treatment], 10.4 [MFN], 10.9 [Performance Requirements], and 10.10 [Senior Management and Boards of Directors] do not apply to: [types of exempted measures and industries as listed in each Party's Schedule] ➤ CAFTA-DR FTA (2004)
2	States decide whether to preserve existing and/or future non-conforming measures.
2.a	Each Party lists in its Schedule exempted measures that <i>are in place</i> at the time when the treaty is concluded. ➤ This implies scheduling non-conforming measures that exist at the time of treaty negotiation. They usually take the form of specific laws, regulations or generalized administrative practices of the respective Contracting Party. ➤ These non-conforming measures are exempted from the treaty scope or specific obligations, i.e. may not be deemed as breaching the relevant treaty obligation(s). ➤ These measures are asymmetrical. In other words, their nature, number and effect are individual to each Contracting Party. ➤ In those sectors, to which a given non-conforming measure applies, States may not introduce new non-conforming measures in the future ("locked in" effect), unless the whole sector is carved out. ➤ It is usually provided that those measures that are time-bound can be continued or promptly renewed after their expiration. ➤ An existing non-conforming measure that is not scheduled may be challenged through the dispute settlement mechanism. ➤ This approach is demanding in terms of resources and requires a thorough audit of existing measures that are inconsistent with the treaty's obligations in all sectors of the economy.

	1. Articles 10.4 (National treatment) and 10.5 (Most Favoured Nation Treatment), shall not apply to: (a) any <u>existing non-conforming measure</u> maintained by a Party at: (i) the central and regional level of Government, as set out by that Party in its Schedule to Annex I; or (ii) a local level of Government; (b) the <u>continuation or prompt renewal of any non-conforming measure</u> referred to in subparagraph (a); or (c) an amendment to any non-conforming measures referred to in subparagraph (a), provided that the amendment does not decrease the level of conformity of the measure as it existed at the date of entry into force of the Party's Schedule to Annex I with Articles 10.4 (National Treatment) and 10.5 (Most Favoured Nation Treatment). ➤ Malaysia-New Zealand FTA (2009) 1. Articles 10.3 [National Treatment], 10.4 [MFN], 10.9 [Performance Requirements], and 10.10 [Senior Management and Boards of Directors] do not apply to: (a) any <u>existing non-conforming measure</u> that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I, (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or (iii) a local level of government; (b) the <u>continuation or prompt renewal of any non-conforming measure</u> referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 10.3, 10.4, 10.9, or 10.10. ➤ CAFTA-DR FTA (2004)
2.b	Each Party lists in its Schedule exempted sectors and economic activities, in which <i>future</i> non-conforming measures may be introduced. ➤ With respect to exempted sectors, States retain flexibility to discriminate or otherwise pursue treaty-inconsistent policies in the future without contravening the treaty. This avoids the “locking in” effect which is present when scheduling existing non-conforming measures (option 2.a). ➤ In exempted sectors, a State may introduce new non-conforming measures in the future. It may also amend existing measures in a way that will <i>increase</i> their non-conformity with the relevant treaty obligations. ➤ Parties’ schedules of exempted sectors are asymmetrical and subject to negotiation between them. ➤ In practice, most IIAs adopt a <i>mixed approach</i>. First, they list existing non-conforming measures for which the Parties agree not to enact more restrictive measures. Secondly, they carve out sectors or areas in which new restrictive measures can be enacted. The measures and sectors listed are typically compiled in two separate schedules.

	[...] 2. Articles 10.4 (National Treatment) and 10.5 (Most Favoured Nation Treatment) do not apply to <u>any</u> measure that a Party adopts or maintains with respect to <u>sectors, sub-sectors, or activities</u>, as set out in its Schedule to Annex II. ➤ Malaysia-New Zealand FTA (2009) [...] 2. Articles 10.3 [National Treatment], 10.4 [MFN], 10.9 [Performance Requirements], and 10.10 [Senior Management and Boards of Directors] do not apply to <u>any</u> measure that a Party adopts or maintains with respect to <u>sectors, subsectors, or activities</u>, as set out in its Schedule to Annex II. ➤ CAFTA-DR FTA (2004)
3	“Standstill” effect v. “ratchet” effect.
3.a	The Contracting Parties agree on a “standstill” effect. ➤ “Standstill” effect concerns future amendments to scheduled existing non-conforming measures. ➤ “Standstill” effect implies that existing non-conforming measures may not be amended in the future in a way that would decrease the level of their conformity with the treaty <i>compared to the measure as it existed at the date of the treaty’s entry into force</i>. ➤ For example, at the time of treaty’s entry into force maximum foreign participation in local media companies was limited at 49%; two years later it was increased to 75% (FDI-liberalizing measure). After that time, if the government so decided, this equity participation ceiling <i>may</i> be lowered again albeit not below 49%. ➤ In other words, non-conforming measures are “locked in” as of the time of the treaty’s entry into force. 1. Articles 10.4 (National treatment) and 10.5 (Most Favoured Nation Treatment), shall not apply to: (a) any existing non-conforming measure maintained by a Party at: (i) the central and regional level of Government, as set out by that Party in its Schedule to Annex I; or (ii) a local level of Government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) <u>an amendment to any non-conforming measures</u> referred to in subparagraph (a), provided that the amendment does not decrease the level of conformity of the measure <u>as it existed at the date of entry into force of the Party’s Schedule to Annex I with Articles 10.4 (National Treatment) and 10.5 (Most Favoured Nation Treatment)</u>. ➤ Malaysia-New Zealand FTA (2009)
3.b	The Contracting Parties agree on a “ratchet” effect.

	➤ Like the “standstill” effect, the “ratchet” effect concerns future amendments to scheduled existing non-conforming measures. ➤ “Ratchet” effect implies that existing non-conforming measures may not be amended in the future in a way that would decrease the level of their conformity with the treaty <i>compared to the measure as it existed immediately before the amendment or modification</i>. ➤ For example, at the time of treaty’s entry into force maximum foreign participation in local media companies was limited at 49%; two years later it was increased to 75% (FDI-liberalizing measure). After that time the government <i>may not</i> lower it again below 75% (the “ratchet” effect). ➤ In other words, any improvements in the host State’s investment regime are automatically locked and may not be annulled without breaching the treaty. ➤ The “ratchet” effect is stricter towards countries and grants less flexibility; at the same time it may be seen as heightening the promotional value of the treaty.
	1. Articles 10.3 [National Treatment], 10.4 [MFN], 10.9 [Performance Requirements], and 10.10 [Senior Management and Boards of Directors] do not apply to: (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I, (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or (iii) a local level of government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) <u>an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 10.3, 10.4, 10.9, or 10.10.</u> ➤ CAFTA-DR FTA (2004)

Other approaches

Providing flexibility for the adoption of new restrictive measures	This clause gives Contracting Parties a right to adopt new non-conforming measures even if they relate to sectors that have not been carved out. The exercise of this right is subject to the condition that the new measure shall “<i>not affect the overall level of commitments of that Party under this Agreement</i>” or to some “<i>compensatory adjustment</i>”. The balance can potentially be re-established by offering additional concessions in a different (less sensitive) area of regulation.
	<i>National treatment shall not apply to any <u>new reservation</u> adopted by a Party, and incorporated into its Schedule, which does not affect the overall level of commitments of that Party under this Agreement.</i> ➤ Chile-EFTA FTA (2003)

	1. [...] 2. <i>A Party may, at any time, incorporate a new reservation into this Annex [Schedule], or amend an existing reservation, provided that the Party has offered compensatory adjustments that maintain the overall level of commitments of that Party under this Agreement as it existed immediately prior to the modification:</i> i. <i>A Party shall notify its intent to modify its list of reservations to the other Party and at the same time suggest appropriate compensatory adjustments. The Joint Committee shall immediately be seized of the matter. Where the Joint Committee approves the modifications, they shall enter into force [3 months] after the decision by the Joint Committee.</i> ii. <i>Where the Joint Committee has not made a decision within [6 months] of receipt of the notification by the modifying Party, the modification shall take effect. In such circumstances, the other Party may withdraw concessions equivalent to the modification within [6 months] thereafter.</i> <i>A modification pursuant to this Article may not impose on an investor a requirement to sell or otherwise dispose of an investment in the territory of the Party.</i> ➤ Norway draft Model BIT (2007)
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No Scheduling of Reservations

Implications	➤ States miss an opportunity to calibrate the reach of treaty obligations and to safeguard certain existing or possible future discriminatory or otherwise treaty-inconsistent policies. ➤ Failure to schedule reservations may diminish the ability of the State to administer the foreign investment regime and pursue discriminatory policies. ➤ This can reduce a government's toolbox for industrial and other policies and heighten the host country's exposure to investor claims and financial liabilities. ➤ Scheduling of reservations is not required if a State does not have any non-conforming measures in place (such as foreign investment screening, equity caps, performance requirements, preferential treatment of domestic investors in some areas, etc.) and does not foresee imposition of such measures in the future, nor wishes to safeguard sensitive areas of economy. ➤ Other treaty mechanism such as <i>Exclusions from the Treaty Scope</i>, <i>General Exceptions</i> or <i>Exclusions from the Scope of Investment-State Dispute Settlement</i> may fully or partially replace the need for scheduling of reservations.
	Treaty examples: India-Nepal BIT (2011), Mexico-Spain BIT (2006), Republic of Korea-Kuwait BIT (2004).

4.3 General Exceptions

General exceptions enable States to adopt measures aimed at specified policy objectives (e.g. protection of the environment, public health and safety, cultural heritage etc.) that could otherwise be in breach of the treaty and could require payment of compensation to affected investors.

General exceptions are one mechanism for achieving a balanced agreement that meets the needs of different stakeholders, including the general public. Absence of such provisions may create uncertainty as to whether legitimate policy interests other than investment protection will be duly considered by arbitrators in case a dispute arises, where IIA obligation themselves do not make this clear.

Common elements

1. **Types of policy objectives covered**
 - a. Protection of the public order, health and safety, environment
 - b. Protection of public health and safety
 - c. Protection of public order and morals
 - d. Prudential regulations in financial services
 - e. Other policy objectives
2. **Nexus between a measure and policy objective**
 - a. Measures “necessary” to achieve a policy objective
 - b. Measures “related to”, “designed to”, “directed at” or “aimed at” a policy objective
 - c. Measures that a Party “considers necessary”
3. **Mechanisms for preventing abuse of general exceptions**

Notes: (1) General exceptions are common practice in international trade agreements, but they are relatively rare in IIAs, even though in the past few years an increasing number of IIAs have included them. (2) General exceptions in IIAs can be modelled on Article XX of the GATT and Article XIV of the GATS. (3) Sometimes, *General Exceptions* and *National Security Exceptions* are merged into a single article. (4) In broader economic agreements such as FTAs or EPAs general exceptions may be found in a separate chapter or article that applies to the whole agreement including its Investment chapter.

This provision interacts with: *All substantive investor protection provisions*
Exclusions from Treaty Scope
Scheduling of Commitments
National Security Exceptions
Investor-State Dispute Settlement

1	States decide to list a number of policy objectives, for the pursuit of which measures otherwise inconsistent with the treaty can be justified
	➤ This safeguards States’ ability to take otherwise treaty-inconsistent measures for the achievement of specified policy objectives without breaching treaty obligations. ➤ It can help alleviate concerns that IIAs can hamper environmental, health and other public-interest policies. ➤ It can reduce host States’ exposure to investor claims. ➤ Similar objectives can be achieved through the use of clarifying language in IIA obligations themselves.

	➤ The provision may set out a broader or narrower (exhaustive) list of specific policy objectives that allows for treaty-inconsistent measures. ➤ The challenge for the Parties is to focus on the inclusion of today's most important policy objectives while at the same time foreseeing which legitimate policy objectives may arise in the future.
1.a	Protection of the public order, public safety, health, and environment.
	➤ Formulations may use (i) reference to specific public policy areas ("protection of the environment", etc.); (ii) the language found in GATT Article XX; or (iii) mid-way solutions. ➤ Given the vagueness of the terms "public order" and "morals", some treaties attempt to provide a clarification as to when the exception may be invoked. ➤ Protection of public order may also be covered in <i>National Security Exceptions</i>.
	<i>Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action that is considered as necessary for the protection of public security, order or public health or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</i> ➤ Macedonia-Morocco BIT (2010) <i>[...] nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers:</i> <i>a) necessary to protect public order or morality, public safety, peace and good order and to prevent crime;</i> <i>b) necessary to protect human, animal or plant life or health;</i> ➤ New Zealand-Singapore CEPA (2000) <i>[...] nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:</i> <i>(a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</i> <i>(b) to protect human, <u>animal or plant life</u> or health; or</i> <i>[...] (c) <u>for the conservation of living or non-living exhaustible natural resources.</u></i> ➤ Canada-Latvia BIT (2009)
	<i>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of <u>public health</u> or the prevention of diseases and pests in animals or plants.</i> ➤ Singapore-Pakistan BIT (1995) <i>[...] nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers:</i>

	a) necessary to protect public order or morality, <u>public safety</u>, peace and good order and to prevent crime; b) necessary to protect <u>human</u>, animal or plant life or <u>health</u>; ➤ New Zealand-Singapore CEPA (2000)
1.c	Protection of public order and/or morals. ➤ Protection of public order may also be covered in National Security Exceptions. ➤ Given the vagueness of the terms “public order” and “morals”, some treaties attempt to provide a clarification as to when the exception may be invoked. <i>Provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of <u>public order</u>.</i> ➤ China-Finland BIT (2004) <i>1. [...] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:</i> <i>(a) necessary to protect <u>public morals</u> or to maintain <u>public order</u> [footnote omitted];</i> ➤ ASEAN-China CECA Investment Agreement (2009) <i>[...] nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers:</i> <i>a) necessary to protect <u>public order or morality</u>, public safety, peace and good order and to prevent crime;</i> ➤ New Zealand-Singapore CEPA (2000) <i>Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</i> ➤ Colombia-Japan BIT (2011)
1.d	Prudential measures relating to the financial services sector. ➤ It permits States to take prudential measures that may otherwise be inconsistent with treaty obligations, e.g. (i) measures to protect individual financial market participant, or financial institutions such as banks, for instance when there is a risk of default of large banks, or (ii) measures to protect the financial system against threats to its integrity and stability in the circumstances of a financial crisis.
	<i>Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking measures relating to financial services sector for prudential reasons, including measures for the protection of investors, depositors, policy holders or persons to whom</i>

	a fiduciary duty is owed by an enterprise supplying financial services, or measures to ensure the integrity and stability of its financial system. ➤ Colombia-Japan BIT (2011) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution; (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and (c) ensuring the integrity and stability of a Contracting Party's financial system. ➤ Canada-Czech Republic BIT (2009)
1.e	Other policy objectives. ➤ The Contracting Parties may list further objectives that correspond to their policy preferences or needs. [...] nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers: [...] g) in connection with the <u>products of prison labour</u>. ➤ New Zealand-Singapore CEPA (2000) Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote <u>cultural and linguistic diversity</u>. ➤ France-Uganda BIT (2003) [...] nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures: [...] (c) <u>aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of the Parties;</u> [...] (e) <u>imposed for the protection of national treasures of artistic, historic, or archaeological value;</u> ➤ Australia-Malaysia FTA (2012)
2	States define the required relationship between the host State's measure and the policy objective (i.e. the "nexus")
	➤ The formulation that describes the relationship, or the nexus, between the measure and the policy objective provides an important element in an assessment of whether the adopted measure falls within the exception. ➤ The formulations range from strict to more relaxed, the latter

	making it easier for States to invoke exceptions and, if required, to justify specific measures before an arbitral tribunal. ➤ While WTO jurisprudence has addressed this issue, to date, there has been little arbitral interpretation of different types of nexuses under IIAs.
2.a	The measure must be “necessary” to achieve the objective.
	➤ From GATT Article XX experience, the term “necessary” is the strongest standard which involves a rigorous review of the appropriateness of the measure at issue. ➤ Based on WTO jurisprudence, the review is not limited to the question whether the measure contributes to the policy objective but also requires an assessment of whether it is necessary (indispensable) and consideration of alternative measures that would allow achieving the same result with less negative impact on international trade/investors. ➤ The use of this nexus restricts States’ flexibility in the choice of means to achieve a given objective. ➤ By requiring genuinely necessary measures, it serves to prevent the abuse of general-exceptions clauses as a means to circumvent treaty obligations. <i>Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures <u>necessary</u>:</i> <i>(a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</i> <i>(b) to protect human, animal or plant life or health; or</i> <i>(c) for the conservation of living or non-living exhaustible natural resources.</i> ➤ Canada-Latvia BIT (2009) <i>[...] nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:</i> <i>(a) <u>necessary</u> to protect national security and public morals;</i> <i>(b) <u>necessary</u> to protect human, animal or plant life or health;</i> ➤ Australia-Malaysia FTA (2012) <i>This Treaty shall not preclude the application by either Party of any and all measures <u>necessary</u> for the maintenance of public order...</i> ➤ Bangladesh-United States BIT (1986)
2.b	The measure must be “related to”, “directed to”, “designed to” or “aimed at” a specific policy objective.
	➤ Based on WTO jurisprudence, such formulations (in particular, “related to”) establish a “nexus” that is less stringent than the “necessity” relationship and hence grant a State more flexibility as regards the actual design of the measure. ➤ Accordingly, a measure must contribute to the policy objective,

	without necessarily being the best one or the least restrictive one out of the range of possible measures. ➤ At the same time, States' discretion is not unlimited: the relationship between the means and ends must be substantial, not incidental, and the effectiveness of the measure in contributing to the objective may be assessed. ➤ Arbitral practice on this issue is not developed, and it is unclear whether there is a difference between different terms in this category. <i>Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies <u>designed to</u> preserve and promote cultural and linguistic diversity.</i> ➤ France-Uganda BIT (2003) <i>Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:</i> a) <i><u>designed and applied for the protection of human, animal or plant life or health, or the environment;</u></i> b) <i><u>related to the conservation of living or non-living exhaustible natural resources</u></i> ➤ Nigeria-Turkey BIT (2011) <i>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures <u>directed to</u> the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</i> ➤ Hong Kong, China-New Zealand BIT (1995) <i>[...] nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:</i> <i>[...]</i> (c) <i><u>aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of the Parties</u></i> ➤ Australia-Malaysia FTA (2012)
2.c	A State is entitled to adopt measures "it considers necessary" to achieve a given objective (a "self-judging" exception). ➤ Although there is no unanimity on the precise meaning of this nexus, its self-judging nature implies that, in its assessment of the measure, a tribunal would be deferential to the government's selection of measures. ➤ However, this approach does not give a full <i>carte blanche</i> to States: tribunals would still be able to review State action against the principle of good faith to prevent overt abuse of an exception. ➤ This nexus is almost never used in general-exceptions clauses; it is more frequently encountered in <i>National Security Exceptions</i>.

	<i>[...] nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures <u>it considers necessary</u>:</i> <i>(a) to protect public order and morals or to maintain national security;</i> <i>(b) to protect human, animal or plant life or health; or the environment</i> <i>(c) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or</i> <i>(d) for the conservation of living or non-living exhaustible natural resources.</i> ➤ Egypt Model BIT (2010)
3	States decide whether to build in mechanisms to prevent abuse of the general-exceptions clause.
	The treaty specifies conditions on how the measure implemented for exceptional reasons must be applied. ➤ Such requirements address the application of the measure, rather than its design or content. ➤ This requirement introduces checks and balances, ensuring that “exceptional” measures are applied in good faith and do not result in abuse of the clause. ➤ Clauses modeled on Article XX of the GATT often provide that a measure must not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment. ➤ While the requirement has been interpreted and applied in the WTO context, it has not yet been tested in investment disputes. ➤ Another possible formulation requires that an exceptional measure must not be used as a means of avoiding the Contracting Party’s obligations. In other words, the measure must be genuine in its pursuit of the stated policy objective, satisfy the nexus requirement and be implemented in good faith. <i>Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:</i> <i>[...]</i> ➤ Canada-Latvia BIT (2009) <i>Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of that other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement [...]</i> ➤ Colombia-Japan BIT (2011)

	2. Where the measures referred to in paragraph 1 [exception for prudential measures] do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Contracting Party's obligations under this Agreement. ➤ China-Japan-Republic of Korea Trilateral Investment Treaty (2012)
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Other approaches

Clauses resembling general exceptions	Some treaties include clauses that only <i>resemble</i> general exceptions. While this type of provision may give an impression of exempting relevant measures (health, safety, environmental, prudential), this is not so: the words "<i>consistent with this Chapter/treaty</i>" suggest that the measures must still be in conformity with the Chapter/treaty. In other words, if a measure is inconsistent with the substantive treaty protections, the State will be held liable for a breach, regardless of whether the measure falls within the scope of this clause.
	<i>Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure <u>consistent with this Chapter</u> that is in the public interest, such as measures to meet health, safety or environmental concerns or reasonable measures for prudential purposes.</i> ➤ EFTA-Ukraine FTA (2010) <i>Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure <u>otherwise consistent with this Chapter</u> that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.</i> ➤ NAFTA (1992)

No General Exceptions clause

Implications	➤ It preserves the high standards of treaty protection for investors. ➤ Some argue that unlike in international trade agreements, exceptions are not needed for IIAs. According to this view, exceptions are inherent in such treaty provisions as <i>Fair and Equitable Treatment</i> and <i>Expropriation</i> and need not be made explicit. Hence, to the extent that IIAs do not focus on liberalization (i.e. are pure post-establishment treaties), they do not require general exceptions. ➤ Similar objectives can also be achieved through the drafting of specific IIA obligations and exceptions thereto. ➤ In the absence of such obligation-specific language or exceptions, absence of general exception may cause concern that the IIA is one-sided and/or may be understood as the Contracting Parties' intention to place investor protection above
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	other policy interests. ➤ Absent other treaty safeguards, absence of general exceptions can increase the risk of facing investors' challenges to public policy measures in international arbitration fora. ➤ As noted above, absence of general exceptions can be compensated by clarifying certain key obligations (e.g. <i>Expropriation</i>), exempting measures and/or sectors from selected treaty obligations (see <i>Scheduling</i>), excluding policy areas from the treaty (see <i>Exclusions from the Treaty Scope</i>) or from the scope of dispute settlement (see <i>ISDS</i>).
	Treaty examples: Bangladesh-Thailand BIT (2002), Republic of Korea-South Africa BIT (1995), UAE-Russian Federation BIT (2010)

4.4 National Security Exceptions¹³

Security exceptions enable States to adopt certain measures that could otherwise be deemed in breach of the treaty and require payment of compensation to affected investors. Security exceptions help to achieve a balanced agreement that gives States a certain level of discretion on national and international security issues, while ensuring that investment protection is not unduly compromised. Absence of such provisions may create uncertainty as to whether legitimate national security interests will be duly considered by arbitrators in case a dispute arises.

Common elements

- 1. Types of situations covered**
 - a. Protection of State's essential security interests
 - i. *An open formulation*
 - ii. *An exhaustive list of circumstances covered*
 - b. Protection of public order
 - c. Protection of international peace and security
 - d. Protection of sensitive information
- 2. Nexus between a measure and situation/policy objective**
 - a. Measures "necessary"
 - b. Measures "directed to" or "designed to"
 - c. Measures that a Party "considers necessary"
- 3. Mechanisms for preventing abuse of security exceptions**

Notes: (1) Many older BITs do not include security exceptions but many, if not most, more recent treaties do have them. **(2)** Security exceptions in IIAs can be modelled on Article XXI of the GATT and Article XIV-bis of the GATS. **(3)** Sometimes, *General Exceptions* and *National Security Exceptions* are merged into a single article. **(4)** In broader economic agreements such as FTAs or EPAs security exceptions may be found in a separate chapter or article that applies to the whole agreement including its investment chapter.

This provision interacts with:

- All substantive investor protection provisions*
- Transparency*
- Exclusions from Treaty Scope*
- Scheduling of Commitments*
- General Exceptions*
- Investor-State Dispute Settlement*

1	States decide that in certain security-related situations they can take measures inconsistent with other treaty obligations.
1.a.i	Protection of essential security interests (open formulation). ➤ Provision may use the terms such as "essential security interests", "national security", "public security" or other similar terms. ➤ The meaning of these terms is not spelt out, and they are open to interpretation.

¹³ For a literature and case law review see *The Protection of National Security in IIAs*, UNCTAD/DIAE/IA/2008/5, 180 pages, Sales No: E.09.II.D.12 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=430>

	➤ While the expression “essential” may be perceived to narrow the range of situations for exceptional measures, arbitral interpretation has provided little clarification on the meaning of different formulations. <i>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action, which is directed to the protection of its <u>essential security interests</u>, or to the protection of public health or the prevention of diseases and pests in animals or plants.</i> ➤ Belgium and Luxemburg-Mauritius BIT (2005) <i>This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, <u>national security</u> and public order, protection of the environment, morality and public health.</i> ➤ Hungary-Russian Federation BIT (1995) <i>Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action that is considered as necessary for the protection of <u>public security</u>, order or public health or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</i> ➤ Macedonia-Morocco BIT (2010)
1.a.ii	Protection of specifically identified security interests. ➤ Considering that the terms “essential security interests” or “national security” are vague, the provision fills them with specific meaning. ➤ The list of specified circumstances is usually exhaustive. ➤ The exception can be relied upon only if at least one of the listed circumstances is present. ➤ It may be used to prevent invocation of the security exception, e.g., for protection of strategic industries, in situations of economic crises, etc. <i>Nothing in this Agreement shall be construed: [...] (b) to prevent a Party from taking any actions which it considers necessary for the protection of <u>its essential security interests</u>:</i> <i>(i) <u>relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials or relating to the supply of services as carried on, directly or indirectly, for the purpose of supplying or provisioning a military establishment;</u></i> <i>(ii) <u>taken in time of war or other emergency in international relations;</u></i> <i>(iii) <u>relating to fissionable and fusionable materials or the materials from which they are derived; or</u></i> <i>(iv) <u>relating to protection of critical public infrastructure, including communications, power and water infrastructure from deliberate attempts intended to disable or degrade such infrastructure</u></i> ➤ India-Malaysia CECA (2011) <i>1. Notwithstanding any other provisions in this Agreement other than</i>

	<i>the provisions of Article 12 [Compensation for losses due to armed conflict or civil strife], each Contracting Party may take any measure:</i> <i>(a) which it considers necessary for the protection of its <u>essential security interests</u>:</i> <i>(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or</i> <i>(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;</i> <i>(b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</i> ➤ China-Japan-Republic of Korea Trilateral Investment Treaty (2012)
1.b	Protection of public order.
	➤ Threats to “public order” can be caused by various factors including economic crises that entail civil unrest or similar disturbances. ➤ Given the vagueness of the term “public order”, some treaties attempt to provide a clarification as to when the exception may be invoked. ➤ Protection of public order is sometimes also covered in a <i>General Exceptions</i> clause.
	<i>This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of <u>public order</u>, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</i> ➤ Bangladesh-United States BIT (1986) <i>[...] nothing in this Agreement other than Article 12 [Treatment in Case of Strife] shall be construed to prevent that former Contracting Party from adopting or enforcing measures [...]</i> <i>(b) necessary to protect public morals or to maintain <u>public order</u>;</i> <i>Note: The <u>public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</u></i> ➤ Columbia-Japan BIT (2011)
1.c	Protection of international peace and/or security.
	➤ This can be a separate justification for invoking the security exception in case of international conflict where States have an obligation to maintain or restore security, even if the conflict does not directly threaten their own national security. ➤ It broadens the scope of the security exception. ➤ Sometimes the relevant international obligations are limited to those that arise under the United Nations Charter.
	<i>This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, <u>the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its</u></i>

	own essential security interests. ➤ Bangladesh-United States BIT (1986) <i>Nothing in this Agreement shall be construed: [...] (c) to prevent any Party from taking action <u>in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</u></i> ➤ Canada-Jordan BIT (2009)
1.d	Disclosure of sensitive information.
	➤ A State is allowed to restrict access to information whose disclosure would be contrary to its essential security interests. ➤ It does not deal with investment restrictions imposed for security reasons, but only affirms the rights of the parties not to give access to certain information that could affect its essential security interests. ➤ It may be relevant if the IIA includes an explicit transparency obligation (see <i>Transparency</i>). It also applies in the context of investor-State arbitration proceedings.
	<i>Nothing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests .</i> ➤ Canada-Jordan BIT (2009) <i>The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, <u>or which it determines to be contrary to its essential security.</u></i> ➤ ASEAN-Australia-New Zealand FTA (2009)
2	The provision defines the required relationship between the host State's measure and the policy objective.
	➤ The formulation that describes the relationship, or the nexus, between the measure and the policy objective provides an important element in an assessment of whether the adopted measure falls within the exception. ➤ The formulations range from strict to more relaxed, the latter making it easier for States to invoke exceptions and, if required, to justify specific measures before an arbitral tribunal. ➤ To date, there has been little arbitral interpretation of different types of nexuses.
2.a	The measure must be "necessary" to achieve the objective.
	➤ From GATT Article XX experience, the term "necessary" is the strongest standard which involves a rigorous review of the appropriateness of the measure at issue. ➤ It is not limited to whether the measure contributes to the policy

	objective but also requires an assessment of whether it is necessary (indispensable) and consideration of alternative measures that would allow achieving the same result with less negative impact on investors. ➤ The use of this nexus restricts States' flexibility in the choice of means to achieve a given objective. ➤ By requiring genuinely necessary measures, it serves to prevent the abuse of national-security clauses as a means to circumvent treaty obligations.
	<i>Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action <u>necessary</u> for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.</i> ➤ China-Finland BIT (2004) <i>Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action that is considered as <u>necessary</u> for the protection of public security, order or public health or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</i> ➤ Macedonia-Morocco BIT (2010)
2.b	The measure must be "directed to" or "designed to" achieve a specific policy objective. ➤ This type of nexus is less stringent than the "necessity" relationship and grants States more flexibility as regards the actual design of the measure. ➤ A measure must contribute to the policy objective, without necessarily being the best one or the least restrictive one out of the range of possible measures. ➤ At the same time, States' discretion is not unlimited: the relationship between the means and ends must be substantial, not incidental, and the effectiveness of the measure in contributing to the objective may be assessed. ➤ There appears to be no perceptible difference between different terms used in this category. <i>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action where such prohibitions, restrictions or actions are <u>directed to</u>:</i> <i>(a) the protection of its essential security interests</i> ➤ Singapore-Viet Nam BIT (1992) <i>[...] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:</i> <i>(a) <u>designed and applied to</u> protect national security and public morals;</i> ➤ COMESA Investment Agreement (2007)
2.c	A State is entitled to adopt measures "it considers necessary" to achieve a

	given objective (a “self-judging” exception). ➤ Although there is no unanimity on the precise meaning of this nexus, its self-judging nature implies that, in its assessment of the measure, a tribunal would be deferential to the government. ➤ However, this approach does not give a full <i>carte blanche</i> to States – tribunals may still be able to review State action against the principle of good faith to prevent overt abuse of an exception. ➤ This nexus is used in Article XXI of the GATT and Article XIV bis of GATS.
	<i>[...] nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures <u>it considers necessary</u>:</i> <i>(a) to protect public order and morals or to maintain national security</i> ➤ Egypt Model BIT (2010) <i>Nothing in this Treaty shall be construed:</i> <i>1. to require a Party to furnish or allow access to any information the disclosure of which <u>it determines to be</u> contrary to its essential security interests; or</i> <i>2. to preclude a Party from applying measures that <u>it considers necessary</u> for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</i> ➤ US Model BIT (2012)
3	States decide whether to build in mechanisms to prevent abuse of the security-exceptions clause.
	The treaty imposes additional conditions for the application of exceptional measures. ➤ These mechanisms are more frequently used in <i>General Exceptions</i> than <i>Security Exceptions</i> clauses. ➤ National security clauses in many IIAs tend to give States a maximum degree of discretion. However, some clauses provide that a measure must not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, ➤ This requirement introduces checks and balances, aimed at ensuring that “exceptional” measures are applied in good faith and do not result in abuse of the clause. ➤ It addresses the application of the measure, rather than its design or content. ➤ While the requirement has been interpreted and applied in the WTO context, it has not yet been tested in investment disputes. ➤ Other possible formulations require that exceptional measures (1) must be in accordance with domestic laws, reasonably applied and non-discriminatory; or (2) not be used as a means of avoiding the Contracting Party’s obligations. <i>Nothing in this Agreement shall be construed to prevent a Contracting</i>

	<u>Party from taking any action that is considered as necessary for the protection of public security, order or public health or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</u> ➤ Macedonia-Morocco BIT (2010) <u>Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.</u> ➤ India-Lithuania BIT (2011) <u>[...] 2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 [security exceptions], that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12 [Treatment in Case of Strife], that Contracting Party shall not use such measure as a means of avoiding its obligations.</u> ➤ China-Japan-Republic of Korea Trilateral Investment Treaty (2012)
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Other approaches

Non-justiciability of security exceptions in arbitral proceedings	The Parties may exclude measures allegedly falling within the security exception from judicial review. This method gives Contracting Parties the highest degree of autonomy, because they do not have to be concerned that an arbitration tribunal may examine the legality and appropriateness of their security-related measures. This technique may be seen as an extreme version of the self-judging approach. It is rarely applied in IIAs as it may open opportunities for abuse of security exceptions.
	<u>With respect to the interpretation and/or implementation of this Chapter, the Parties confirm their understanding that disputes submitted to arbitration pursuant paragraphs 7 and 8 of Article 10.14 (The Settlement of Investment Disputes between a Party and an Investor of the Other Party), where the disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a security exception as set out in Article 12.2 (Security Exceptions), any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.</u> ➤ India-Malaysia CECA (2011)

Relationship with the provisions on compensation for losses due to armed conflicts and civil strife	It may be useful to regulate the relationship between security exceptions, on the one hand, and the treaty clause that governs <i>Compensation for Losses Due to Armed Conflict or Civil Strife</i>. The two clauses will often apply in the same circumstances such as war, armed conflict, civil disturbances, etc. Thus, some treaties provide that invocation of a security exception does not render the <i>Protection from Strife</i> clause inapplicable. <u>1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10 [compensation for losses due to armed conflicts and civil strife], each Contracting Party may: (a) take any measure which it considers necessary for the protection of its essential security interests [...]</u> ➤ Japan-Viet Nam BIT (2003) <u>Nothing in this Agreement other than Article 12 [Treatment in case of Strife] shall be construed:</u> <u>(a) to require a Contracting Party to furnish or to allow access to any information whose disclosure would be contrary to its essential security interests;</u> <u>(b) to prevent a Contracting Party from taking any action which it considers necessary for the protection of its essential security interests: [...].</u> ➤ Colombia-Japan BIT (2011)
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No National Security Exceptions clause

Implications	➤ It preserves the high standards of treaty protection for investors. ➤ It may cause concern that the IIA is one-sided and places investor protection above essential security interests. ➤ States would still be able to take measures against foreign investors based on national security concerns but they should do so as long as such measures do not contravene their IIA obligations (e.g., that they are non-discriminatory, fair and equitable, etc.) ➤ It increases uncertainty, unpredictability and arbitrator discretion with respect to measures adopted in the interests of national security. ➤ It increases the risk of facing investors' challenges to national security measures in international arbitration fora. ➤ To some extent, absence of national security exceptions can be compensated by the coverage of <i>General Exceptions</i>, <i>Exclusions from Treaty Scope</i> and/or exemptions of measures and/or industries from selected treaty obligations (see <i>Scheduling</i>). Treaty examples: Australia-Mexico BIT (2005), Barbados-Canada BIT (1996), China-Guyana BIT (2003).
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5. Dispute Settlement

5.1 Investor-State Dispute Settlement

Investor-State Dispute Settlement (ISDS) mechanism offers investors recourse to international arbitration to settle investment disputes with the host State.¹⁴ It serves as a main means of enforcement of substantive treaty protections and allows depoliticization of disputes.

There are two broad approaches to regulating ISDS in IIAs. The “minimalist” (and more traditional) approach is characterized by few procedural specifications, leaving most procedural matters to the applicable arbitration rules and arbitrators’ discretion. The “detailed” approach features much more sophisticated procedural regulation that adds to or modifies the applicable arbitration rules with a view to enhancing the efficiency, predictability, legitimacy and cost-effectiveness of the process.

In the interest of completeness, this module covers most provisions that form part of the “detailed” approach. When constructing the ISDS mechanism in a specific treaty, in addition to the essential ISDS elements (scope, consent, arbitration fora), the Contracting Parties may consider incorporating additional elements in order to protect the integrity of arbitral process.

This provision interacts with: *All substantive investor protection provisions*
Definition of Investor of a Party
Exclusions from Treaty Scope
Scheduling of Commitments
General Exceptions
National Security Exceptions
Subrogation

Common elements

1. Scope and coverage of ISDS

- a. Material scope
 - i. *Selected treaty breaches or conflicts*
 - ii. *Any treaty breaches*
 - iii. *Any dispute in connection to investments*
 - iv. *Investment authorizations or agreements*
- b. Specific exclusions (sectors, policy areas or provisions)
- c. Time limit for the submission of claims
- d. Exclusion of past measures and/or disputes
 - i. *Exclusion of pre-treaty disputes*
 - ii. *Exclusion of pre-treaty acts, facts and situations*

2. States’ consent to arbitration

- a. Explicit consent
- b. Implicit consent
- c. Limited consent

¹⁴ Some IIAs also provide for the right of investors to bring treaty claims in host State domestic courts. This aspect is not covered in this module.

- i. Mandatory consent for each dispute*
 - ii. Voluntary consent for each dispute*
 - iii. Consent conditioned upon the fulfilment of certain requirements by the investor (conditions precedent)*
- 3. Amicable settlement and alternative dispute resolution (ADR) procedures**
 - a. Consultations and negotiations
 - b. Mediation and conciliation
- 4. Conditions precedent to arbitration**
 - a. Relationship with domestic procedures
 - i. Fork-in-the-road clause*
 - ii. Waivers ("no U-turn" clause)*
 - iii. Mandatory recourse to local remedies*
 - iv. Exhaustion of local remedies*
 - b. Related to other procedural aspects
 - i. Investor's explicit consent to arbitration*
 - ii. Investor's notice of intent*
 - c. Consequences of not complying with the conditions precedent
- 5. Arbitration rules**
 - a. ICSID
 - b. Other rules
 - i. UNCITRAL*
 - ii. ICSID Additional Facility Rules*
 - iii. Other arbitral institutions (ICC, LCIA, SCC etc)*
 - iv. Other rules as agreed by the disputing parties*
 - c. Choice of rules
 - i. Investor's free choice*
 - ii. Regulated choice*
- 6. Presentation of claims**
 - a. Claim of an investor on its own behalf
 - b. Claim of an investor on behalf of its enterprise
- 7. Establishment of the tribunal**
 - a. Appointment of arbitrators
 - i. As provided for in the applicable arbitration rules*
 - ii. Special appointment procedure*
 - b. Arbitrator qualifications
 - c. Arbitrators' remuneration
- 8. Place of arbitration**
 - a. Unregulated, i.e. pursuant to the applicable arbitration rules
 - b. Country which is a party to the New York Convention
- 9. Consolidation of claims**
 - a. Upon request of a disputing party
 - b. Upon agreement between all disputing parties
- 10. Objections to frivolous claims**
 - a. Expedited procedure for allegedly frivolous claims
 - b. Special rules on allocation of costs
- 11. Applicable substantive law**
 - a. Treaty and international law
 - b. Treaty, international law and domestic law of the host State
 - c. As agreed by the disputing parties
 - d. No provision on applicable law
- 12. Transparency and openness**
 - a. Public access to hearings
 - b. Disclosure of arbitration-related documents
 - c. *Amicus curiae* submissions

d. Publication of arbitral awards

i. *Public*

ii. *Confidential*

13. Participation of States in the interpretative process

- a. Joint interpretations of the treaty
- b. Referral of certain issues to the Parties for joint determination
- c. Non-disputing Contracting Party participation

14. Provisional measures

15. Available remedies

- a. No restrictions
- b. With restrictions

16. Finality and enforcement of arbitral awards

- a. Binding nature of award and obligation to enforce
- b. Waiting periods for enforcement
- c. Consequences of the failure to comply with the award

1. Scope and coverage of ISDS

1	States identify the range of disputes that can be brought to arbitration.
1.a	Material scope – nature and types of arbitrable disputes.
1.a.i	Narrow range of specifically identified disputes. ➤ It establishes a narrow jurisdictional ambit limited to selected types disputes or treaty provisions, e.g. disputes related to the amount of compensation due in case of expropriation. ➤ It deprives investors of procedural means to enforce those treaty provisions which are not included, and thereby diminishes the effectiveness of the treaty. ➤ It minimises State exposure to international liability. <u>If a dispute involving the amount of compensation resulting from expropriation, nationalisation, or other measures having effect equivalent to nationalisation or expropriation, mentioned in Article 6 [Expropriation] cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the investor concerned, it may be submitted to an international arbitral tribunal established by both parties.</u> ➤ Mauritius-Swaziland BIT (2000)
1.a.ii	Disputes involving alleged breach(es) of any treaty provision. ➤ It provides investors with a means to enforce all substantive protections found in the treaty. ➤ It excludes non-treaty-based claims, e.g. alleged violations of domestic law, customary international law, or investment contracts. ➤ States may exclude certain treaty provisions that are not intended to be litigated through arbitration (see <u>option 1.b</u>). ➤ Relevant formulations often require that an investor may bring a claim only if it incurred material loss or damage as a result of the treaty violation, thereby emphasising that there must be a sufficient causal connection between the breach and the damage.

	➤ This approach is often combined with the applicable-law clause that allows application of the treaty and international law only (but not domestic law) (see <u>option 11.a</u>) <i>This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former Party under this Chapter, which causes loss or damage to the investor or its investments.</i> ➤ India-Republic of Korea FTA (2009)
1.a.iii	Any investment-related disputes between an investor and the host State. ➤ This approach is common in traditional IIAs. ➤ Formulations used vary and may refer to any disputes “related to”, “concerned with”, “connected to”, “arising out of” an investment or similar. ➤ It opens an opportunity to arbitrating disputes not related to the treaty’s substantive protections, e.g. those arising out of domestic law, customary international law or investment contracts. ➤ This approach is sometimes combined with the applicable-law clause that allows application – in addition to the treaty and international law – of the host State’s domestic law (see <u>option 11.b</u>). ➤ The jurisdictional ambit is broad and not precisely defined. Its reach would depend on the interpretative approach taken by the arbitral tribunal in a given case. ➤ It heightens the exposure of the State to international responsibility. ➤ In practice, most disputes brought under this type of provision to date have involved alleged violations of the treaty itself and not other bodies of law. <i>If <u>any dispute</u> arises between a Contracting Party and an investor of the other Contracting Party <u>with respect to an investment</u>...</i> ➤ Austria-Iran BIT (2001) <i><u>Any dispute</u> between an investor of one Party and the other Party <u>in connection with an investment</u> in the territory of the other Party...</i> ➤ China-Peru FTA (2009) <i><u>Any investment dispute</u> between a Contracting Party and an investor of the other Contracting Party shall...</i> ➤ Croatia-Latvia BIT (2002) <i><u>Any dispute</u> between one Contracting Party and an investor of the other Contracting Party <u>concerning the investment</u> shall...</i> ➤ Gambia-Morocco BIT (2006)
1.a.iv	Disputes involving treaty breaches as well as those arising out of breaches of investment authorizations granted by the host State and written agreements entered into by the host State. ➤ It is narrower and more precisely defined than any “investment-related” disputes (<u>option 1.a.iii</u>) but broader than disputes arising out of treaty breaches only (<u>option 1.a.ii</u>).

	➤ A definition of both “investment authorizations” and “investment agreements” would be required to clarify the type of disputes covered under these headings. ➤ This approach may include certain disputes of domestic law unrelated to the treaty’s substantive obligations. ➤ This approach may require application of the host State’s domestic law when the dispute arises out of the breach of investment authorization or investment agreement. <i>[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim:</i> <i>(i) that the respondent has breached</i> <i>(A) an obligation under Section B [substantive treaty obligations],</i> <i>(B) an <u>investment authorization</u>, or</i> <i>(C) an <u>investment agreement</u>; and</i> <i>(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach</i> <i>“<u>Investment authorization means</u> an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party”</i> <i>“<u>Investment agreement means</u> a written agreement [...] between a national authority of a Party and a covered investment or an investor of the other Party (i) that grants rights with respect to natural resources or other assets that a national authority controls, and (ii) that the covered investment or the investor relies on in establishing or acquiring the covered investment”</i> ➤ Singapore-USA FTA (2003)
1.b	States exclude from the scope of ISDS specific areas, provisions or sectors. ➤ It allows the States to exclude from ISDS certain economic sectors, specific treaty provisions or sensitive policy areas, preserving full regulatory autonomy subject to the control of national courts in such matters. ➤ It diminishes State exposure to international liability and allows States to implement policies as they see fit without facing the prospect of arbitration claims. ➤ The promotional role of the treaty may be compromised depending on the magnitude of exclusions. ➤ Exclusion can be Party-specific or apply to both/all Contracting Parties. ➤ Other treaty mechanisms that pursue similar objectives are <i>Exclusions from Treaty Scope</i>, <i>Scheduling of Commitments</i>, <i>General Exceptions</i> or <i>National Security Exceptions</i>. <i>This Article [ISDS] shall not apply to any dispute arising between a Party and an investor of the other Party on any right or privileges conferred or created by Article 89 [National Treatment] and 92 [Performance Requirements].</i> ➤ Malaysia-Pakistan CEPA (2007)

	<i>The disputes settlement provisions of Chapter Two, shall not apply to the resolutions adopted by a Contracting Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Contracting Party, according to the legislation of each Contracting Party.</i> ➤ Iceland-Mexico BIT (2005) <i>[T]he disputes related to the property and real rights upon the real estates [sic] are totally under the jurisdiction of the courts of the host Contracting Party and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism.</i> ➤ Nigeria-Turkey BIT (2011) <i>[A]n investor of the other Party may not submit a claim under this Chapter [ISDS] that a restructuring of debt issued by a Party breaches an obligation under this Chapter (other than Article 9.3 or 9.4) [national treatment and most-favoured-nation treatment]</i> ➤ Peru-Republic of Korea FTA (2011) <i>Exclusions from Dispute Settlement</i> <i>1. A decision by Canada following a review under the Investment Canada Act (1985, c.28, 1st supp.), with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B of this Chapter [ISDS] or of Chapter Twenty-One (Dispute Settlement).</i> <i>2. A decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of the other Party, or its investment, pursuant to Article 2202 (Exceptions –National Security) shall not be subject to the dispute settlement provisions of Section B of this Chapter [ISDS] or of Chapter Twenty-One (Dispute Settlement).</i> <i>3. Article 815 [Health, Safety and Environmental Measures] shall not be subject to the dispute settlement provisions of Section B of this Chapter [ISDS] or of Chapter Twenty-One (Dispute Settlement).</i> ➤ Canada-Colombia FTA (2008)
1.c	The treaty establishes a time limit for the submission of claims.
	➤ A claim may not be submitted to arbitration if a certain period of time has elapsed from the moment in which the investor knew or should have known about the alleged breach or about the damage suffered as a result of the breach. ➤ It introduces a time-factor that fosters certainty and predictability with regard to the assumed treaty obligations. Without it, claims could be filed at any time, exposing States to uncertainty. ➤ Interpretative difficulties may arise in respect of “continuous breaches” and “composite acts” that are protracted in time. ➤ It may be useful to clarify whether the limitation period includes the time that the investor spends pursuing its claim in domestic courts. ➤ A timeframe that is too short may discourage recourse to domestic law remedies, whereas a timeframe that is too long would affect the proper management of the State’s treaty commitments.

	➤ A limitation period of three, sometimes five years is common in recent treaties. <i>The submission of a dispute to conciliation or arbitration [...] shall be conditional upon:</i> <i>(a) the submission of the dispute to such conciliation or arbitration taking place <u>within three (3) years</u> of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the investor or its investment.</i> ➤ ASEAN-China Investment Agreement (2009) <i>no investment dispute may be submitted to conciliation or arbitration under paragraph 3, <u>if more than five years have elapsed</u> since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, knowledge of the incurred loss or damage referred to in paragraph 1.</i> ➤ Japan-Switzerland FTA (2009)
1.d	Exclusion of pre-treaty measures and/or disputes
1.d.i	The treaty excludes disputes which arose prior to the treaty's entry into force. ➤ This formulation is often used when the treaty covers investments made both before and after the treaty's entry into force, in order to clarify that "old" disputes may not be resurrected using the treaty ISDS procedures. ➤ This formulation does not prejudice the protection afforded to existing (pre-treaty) investments. ➤ The formulation refers to disputes rather than to measures. Thus, it does not prevent claims arising out of measures adopted prior to the treaty's entry into force that remain in place after the treaty's entry into force, as long as the relevant measure had not been disputed previously. <i>This Agreement shall apply to investments of investors of one Contracting Party, prior to its entry into force, in accordance with the laws and regulations of the other Contracting Party in its territory. <u>However, it shall not apply to disputes arising before the entry into force of this Agreement.</u></i> ➤ Iceland-Mexico BIT (2005) <i>This Agreement shall apply to any investment by investors of either Contracting Party in the territory of the other Contracting Party admitted in accordance with its laws and regulations, whether made before or after coming into force of this Agreement, <u>but shall not apply to any dispute concerning an investment which arose, or any claim which was settled, before its entry into force.</u></i> ➤ India-Nepal BIT (2011)

1.d.ii	The treaty excludes disputes arising out of earlier acts, facts and situations
	➤ This approach is a reaffirmation of the general rule of the international law of treaties (Article 28 of the Vienna Convention on the Law of Treaties). ➤ It excludes pre-treaty disputes arising out of acts, facts or situations that ceased to exist by the time the treaty entered into force. ➤ It does not exclude claims arising out of continuous breaches (e.g., measures adopted prior to the treaty's entry into force but maintained thereafter).
	<i>For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.</i> ➤ Rwanda-USA BIT (2008)

Other approaches

Counterclaims	The treaty explicitly allows respondent States to file counterclaims against investors in ISDS proceedings. ➤ It clarifies a contentious issue of whether a respondent State may bring counterclaims in arbitration proceedings. ➤ It is most effective if combined with the treaty obligation requiring investors to comply with host State domestic law (see <i>Investor Responsibility</i>). ➤ It strengthens the position of the State as a respondent party. ➤ It permits dealing with all claims connected to the dispute in a single proceeding by the same tribunal, avoiding unnecessary delays and costs related to double or multiple fact-finding, written and oral submissions. ➤ It facilitates prosecution of investors who have ceased business operations and withdrew their assets from the host State. ➤ Given the consensual nature of arbitration, it does not entitle a State to <i>start</i> arbitration proceedings against an investor. ➤ Provision may be deemed unnecessary where relevant arbitral rules permit the filing of counterclaims. <i>A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, <u>counterclaim</u>, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.</i> ➤ COMESA Investment Agreement (2007)
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2. States' consent to arbitration

2	States decide whether and how to give their consent to arbitration of investor claims. This is fundamental aspect of arbitration, which is a voluntary and consent-based method of settling disputes.
2.a	States give a prior explicit consent to arbitration. ➤ States give explicit advance consent with respect to the range of disputes determined by the treaty. ➤ A State may not revoke its consent unilaterally. ➤ This approach offers certainty to investors and makes the ISDS mechanism fully effective, thus strengthening the promotional function of the treaty. ➤ States cannot prevent investors from submitting treaty claims against them. <i>Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.</i> ➤ Kenya-Slovak Republic BIT (2011) <i>[E]ach Contracting Party gives its irrevocable consent that any investment dispute shall be submitted to the above mentioned tribunal or of the arbitration procedures.</i> ➤ Denmark-Morocco BIT (2003)
2.b	States give a prior implicit consent to arbitration. ➤ The provision does not expressly set out the Contracting Parties' consent to arbitration, but the consent is inferred from the treaty language. ➤ The consent requirement is fulfilled if the treaty allows the foreign investor to submit the case to arbitration. ➤ In practical terms, this option is analogous to the prior explicit consent (<u>option 2.a</u>). <i>1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be subject to negotiations between the parties to the dispute.</i> <i>2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within six months of the date when the request for the settlement has been submitted, <u>the investor shall be entitled to submit the case, at his choice, for settlement to...</u></i> ➤ China-Czech Republic BIT (2005) <i>If the dispute cannot be settled within six months of the date when it</i>

	<u>has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration.</u> ➤ Egypt-Germany BIT (2005)
2.c	Limited consent
2.c.i	States promise to provide their consent to arbitration with respect to each particular dispute. ➤ States assume an obligation to provide consent in the future. ➤ In principle, a tribunal shall not have jurisdiction until the Contracting Party involved gives its consent. ➤ Refusal to give the consent with respect to a specific dispute, however, would be a violation of the treaty and may give rise to State-State dispute settlement. ➤ It is also possible that an investor-State tribunal would determine that it has jurisdiction notwithstanding the failure of the State to give explicit consent due to the apparently unequivocal nature of the obligation to provide consent in future. <u>[T]he other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor</u> ➤ Australia-Lithuania BIT (1998)
2.c.ii	States reserve their right to give or to withhold consent with respect to each specific dispute. ➤ An investor cannot initiate arbitral proceedings on the basis of the IIA alone. For it to do so, it has to obtain consent of the host State in relation to the specific dispute concerned. ➤ States preserve full flexibility regarding the ways they wish to settle each dispute and retain full control over their exposure to investor claims. ➤ The approach may be abused by the respondent State, as it would have the incentive to stop the course of a claim once it arises. This may render the ISDS mechanism – and therefore the IIA – ineffective. ➤ However, withholding consent may apply solely with respect to a specific set of rules. If that is the case, the approach would be less restrictive. <u>(3) In the case of international arbitration, unless the parties to the dispute agree otherwise, the dispute shall be submitted to either:</u> <u>(a) The International Centre for the Settlement of Investment Disputes (ICSID) [...]</u>or, <u>(b) If both parties to the dispute agree, arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, as then in force.</u> <u>(4) Paragraph (3) of this Article shall not constitute, by itself, the consent of the Contracting Party required in Article 25(1) of the Convention on the Settlement of Investment Disputes opened for signature in Washington on 18 March 1965.</u> ➤ Argentina-New Zealand BIT (1999)

2.c.iii	State consent is made conditional on the fulfilment by the investor of certain requirements or conditions precedent. ➤ States condition their consent on investor compliance with certain requirements. ➤ These issues normally relate to legal standing, interaction with domestic proceedings, avoidance of parallel proceedings and limitation periods (see <u>sections 1.c and 4</u>). ➤ By making their consent conditional on the investor's meeting the said requirements, States guarantee the effective application of these requirements. Failure by the investor to comply with any listed requirement would render the claim inadmissible. <i>Failure to meet any of the conditions precedent provided for in paragraphs 1 through 3 shall nullify the consent of the Parties given in Article 28 (Consent to Arbitration).</i> ➤ Canada Model BIT (2004) <i>Article 26: Conditions and Limitations on Consent of Each Party</i> <i>1. <u>No claim may be submitted to arbitration</u> under this Section if...</i> ➤ Rwanda-USA BIT (2008)

3. Amicable settlement and alternative dispute resolution (ADR) procedures

3	States provide for amicable procedures and/or allow alternative dispute resolution, reinforcing the function of arbitration as a measure of last resort.
3.a	The treaty provides for consultations and negotiations between the disputing parties prior to the commencement of the arbitration process. ➤ The treaty requires that the disputing parties hold consultations and negotiations in order to settle the dispute amicably. ➤ It is different from the waiting, or "cooling-off" period; here the parties are <i>required</i> to engage in consultations/negotiations whereas during the "cooling-off" period this is not mandatory. ➤ The concept of consultations/negotiations is indeterminate. For example, it is debatable whether an exchange of letters is adequate to constitute a negotiation, or whether something more is required. ➤ The consultations/negotiations period can be useful for the respondent State if it constitutes an opportunity to get further information about the claim and to start preparing itself for the arbitration scenario. <i>The disputing parties shall hold consultations and negotiations in an attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration under subparagraph 2(c), unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures. The place of consultations shall be the capital of the disputing Party, unless the disputing parties</i>

	otherwise agree. ➤ Canada-Colombia FTA (2008) 1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party <u>shall be subject to negotiations between the parties to the dispute.</u> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within <u>six months</u> of the date when the request for the settlement has been submitted, the investor shall be entitled to submit the case, at his choice, for settlement to... ➤ China-Czech Republic BIT (2005)
3.b	States encourage the use of third-party assistance mechanisms prior to the commencement of the arbitration process (or thereafter). ➤ Mediation and conciliation are the two main third-party assistance mechanisms. ➤ The recourse to these procedures is not mandatory, but explicitly mentioning them as part of the ISDS procedure may promote their use. ➤ Mediation involves engaging a neutral third party who helps the disputing parties establish a dialogue and find an amicable solution to the dispute. Informal and flexible, this procedure is essentially an “assisted negotiation”. ➤ Conciliation is more formal procedure that follows certain written rules (e.g. both ICSID and UNCITRAL have sets of conciliation rules). At the end of the procedure, conciliators usually draw up terms of an agreement that, in their view, represents a just compromise to a dispute. The disputing parties are free to accept or reject the terms of such an agreement. ➤ Both mediation and conciliation require engaging a trusted and reputed expert or experts and payment of the corresponding fees. ➤ These methods depend on the active and good faith participation of the disputing parties. Not every dispute is suitable to be subjected to a mediation or conciliation process. <i>In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, <u>which may include the use of non-binding, third-party procedures.</u></i> ➤ Peru-USA FTA (2006) <i>Nothing in this Article [ISDS] shall be construed as to prevent the parties of a dispute from referring their dispute, from the notification of the dispute onwards, to <u>ad hoc or institutional mediation or conciliation</u> before or during the adjudicative procedures.</i> ➤ Belgium and Luxembourg-Colombia BIT (2011)

4. Conditions precedent to arbitration

4	States establish a number of requirements that an investor must fulfil before submitting a claim to arbitration.
4.a	Requirements related to domestic procedures
4.a.i	The treaty includes a “fork-in-the-road” provision. ➤ A “fork-in-the-road” clause requires investors to choose between domestic courts and international arbitration from the outset. Once an investor starts the domestic proceedings, it loses the right to resort to arbitration, and vice versa. ➤ It aims to prevent multiple proceedings arising out of the same facts. ➤ It may provide a disincentive to the investor to use national courts, if it wishes to preserve the right to resort to international arbitration. This, in turn, may not be in the interest of host States; governments normally have a preference to settle the dispute in their own courts. National courts also tend to offer a greater spectrum of remedies, including declaratory and injunctive relief, in addition to monetary damages. ➤ Careful drafting is required in order to make this rule fully effective. In particular, it should apply to claims related to the same underlying measure or subject-matter. A reference to the “same dispute” may not be effective given that some aspects of the dispute may differ (e.g. ISDS claims are based on the treaty breach, while national-court claims usually involve domestic law; ISDS claims are brought by the foreign investor while national-court claims can be brought by the investor’s subsidiary, etc.) <i>If the COMESA investor elects to submit a claim at one of the forums set out in paragraph 1 of this Article [it includes national courts of the host State], <u>that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other forums.</u></i> ➤ COMESA Investment Agreement (2007) <i>Once an investor has submitted <u>the dispute</u> to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, <u>that election shall be final.</u></i> ➤ Chile-Indonesia BIT (1999)
4.a.ii	States require that investors discontinue domestic proceedings and waive their right to initiate them before submitting a claim to arbitration (the “no U-turn” provision). ➤ The waiver prevents the investor, or the legal entity it owns or controls, from pursuing parallel domestic or other proceedings related to the measure which gave rise to the dispute. ➤ Prior recourse to local courts is permitted but once the investor decides to seek relief through international arbitration, it may not shift back to municipal courts, except in cases it seeks “injunctive, declaratory or extraordinary relief” not involving the payment of damages. ➤ Multiple proceedings arising out of the same facts are avoided, without discouraging the use of domestic courts.

	<u>A disputing investor may submit a claim to arbitration only if:</u> <u>[...]</u> <u>(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Contracting Party that is a legal person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the laws of the disputing Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of Chapter II, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.</u> ➤ Mexico-Singapore BIT (2009)
4.a.iii	The investor is required to pursue local remedies for a specified period of time before submitting its claim to arbitration. ➤ It forces the investor to use local remedies (judicial or administrative), thus fostering the use of the domestic judicial system and/or the system of administrative review. ➤ Treaties using this approach often specify the minimum amount of time for the mandatory recourse to local remedies; it usually varies from 6 to 18 months. After its expiry, the investor may initiate arbitration regardless of the outcome of the domestic proceedings. ➤ The investor is not required to go through all instances of the national judicial system or even await the decision of the court of first instance. ➤ In certain scenarios recourse to domestic courts may be of little use. In these cases domestic proceedings would be a mere formality. ➤ However, the outcome of domestic proceedings may discourage a treaty claim, or provide useful assistance to an ISDS tribunal. ➤ For some tribunals, non-fulfilment of this requirement does not affect jurisdiction, or may be avoided by application of the MFN clause. Therefore, specific language needs to be used in order to achieve the intended effect (see <u>options 2.c.iii and 4.c.ii</u>; see also <u>Most Favoured Nation Treatment clause, number 4</u>). <u>In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the notification, the dispute shall be submitted, at the first instance to a court competent jurisdiction of the latter Contracting Party for a decision. Either party may, six months after the submission of the dispute to a court of competent jurisdiction, refer the dispute to international arbitration.</u> ➤ Belgium and Luxembourg – Botswana BIT (2003) <u>The aforementioned [investor-State dispute may be submitted to international arbitration in the following circumstances:</u> <u>(a) if one of the parties so requests, where, after a period of</u>

	<u>eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute.</u> ➤ Argentina-Republic of Korea BIT (1994) <u>When the disputing investor submits a written request for consultation to the disputing Contracting party under paragraph 2 [a pre-requisite for filing an ISDS claim], the disputing Contract Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration set out in paragraph 3. The domestic administrative review procedure shall not exceed four months from the date on which an application for review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3</u> ➤ China-Japan-Republic of Korea Trilateral Investment Agreement (2012)
4.a.iv	The investor is required to exhaust applicable local remedies before submitting its claim to arbitration. ➤ It is consistent with the customary international law of diplomatic protection, which requires an injured foreign person to exhaust all effective domestic legal remedies before breaches of certain obligations become admissible at the international level. ➤ It is a rare feature in IIAs which typically offer investors a free choice between domestic courts and international arbitration. The approach is highly restrictive and affects the promotional character of the treaty. ➤ It fosters the use of local remedies. However, depending on the country concerned, a long time may need to elapse before the investor becomes entitled to initiate an arbitration. ➤ A treaty may require exhaustion of only administrative (as opposed to judicial) remedies. <u>If such dispute cannot be settled amicably through negotiations, any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall have exhausted the domestic administrative review procedure specified by the laws and regulations of that Contracting Party, before submission of the dispute the aforementioned arbitration procedure.</u> ➤ China-Côte d'Ivoire BIT (2002)
4.b	Requirements related to other procedural aspects
4.b.i	The treaty requires that the investor give its consent in writing when submitting its claim to arbitration.

	➤ Consent of both disputing parties to have their dispute resolved through arbitration is a fundamental procedural prerequisite. ➤ Contracting States tend to give in the treaty their advance consent to arbitration (see <u>section 2</u>). ➤ Investor is deemed to give its consent when it initiates arbitral proceedings, by submitting a request for arbitration (ICSID) or notice of arbitration (UNCITRAL). ➤ However, some treaties require investors to provide a separate consent in writing as a condition precedent. ➤ This aspect is particularly relevant if the IIA allows for the submission of counterclaims. <u>No claim may be submitted to arbitration under this Section unless:</u> <u>(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and (...)</u> ➤ Uruguay-USA BIT (2005) <u>An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:</u> <u>(a) the investor has consented in writing thereto</u> ➤ Canada-Costa Rica BIT (1997)
4.b.ii	Investor must notify the host State of its intent to submit a claim to arbitration before it initiates arbitration proceedings. ➤ It signals the intention of the investor prior to the formal commencement of a claim, enabling the host State to begin its responsive preparations. ➤ It puts on notice that branch of the government that will be defending the State against the claim, so that it can begin investigating the circumstances behind the case and assessing its strength, or lack thereof. ➤ The notice of intent usually serves as the commencement of the consultations/negotiations period (see <u>option 3.a</u>). Some treaties require (1) written notice of dispute, which begins the amicable settlement procedures, and thereafter (2) notice of intent to submit the claim to arbitration. ➤ The minimum amount of time that should pass between the notice of intent and the commencement of the proceedings is often between three and nine months. ➤ Some treaties also set out requirements as to the information that the notice should contain, in order to have sufficient information about the dispute. <u>At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:</u> (a) <u>the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;</u> (b) <u>for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been</u>

	<i>breached and any other relevant provisions;</i> <i>(c) the legal and factual basis for each claim; and</i> <i>(d) the relief sought and the approximate amount of damages claimed.</i> ➤ Uruguay-USA BIT (2005) Article 26 Consultations and Negotiations <i>1. In the event of an investment dispute, the disputing parties shall, as far as possible, settle the dispute amicably through consultations and negotiations which may include the use of non-binding and third-party procedures. <u>The proceeding for consultations and negotiations shall begin with a request in writing delivered to the competent authority of the disputing Party set out in Article 41 [Service of Documents]. The request shall be accompanied by a brief summary of the factual and legal basis of the investment dispute sufficient to present the problem clearly. Such request shall be delivered to the disputing Party before the submission of the “notice of intent” to the disputing Party referred to in paragraph 3 of Article 27.</u></i> <i>2. Consultations and negotiations shall be carried out <u>at least during six months.</u></i> Article 27 Submission of a Claim to Arbitration <i>3. <u>The disputing investor who intends to submit the investment dispute to arbitration pursuant to paragraph 2 shall give to the disputing Party written notice of intent to do so at least forty-five (45) days before the submission. The notice of intent shall specify: [...]</u></i> ➤ Colombia-Japan BIT (2011)
4.c	The treaty specifies the consequences of not meeting the listed conditions precedent.
	➤ Some tribunals have concluded that failure by an investor to comply with any procedural prerequisite renders the claim inadmissible. ➤ Other tribunals have interpreted certain procedural prerequisites set forth in the treaty as “formalities”, “merely procedural requirements” or “procedural and directory in nature” rather than “jurisdictional and mandatory”; they held that a failure of the investor to meet such conditions does not stop the arbitral tribunal from adjudicating the merits of the dispute. ➤ The latter interpretation diminishes the binding force of the said requirements and their practical effect. ➤ Therefore, this approach guarantees the effective application of these requirements, i.e. that they are seen as binding and mandatory. ➤ Failure by the investor to comply with any listed requirement would render the claim inadmissible (see also <u>option 2.c.iii</u>). <i>Failure to meet any of the conditions precedent provided for in paragraphs 1 through 3 shall nullify the consent of the Parties given</i>

	<i>in Article 28 (Consent to Arbitration).</i> ➤ Canada Model BIT (2004)
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5. Arbitration rules

5	States decide on a set or sets of arbitration rules under which the claim may be submitted to arbitration.
5.a	1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). ➤ ICSID Convention is designed specifically for investor-State disputes. It is the most often used set of rules in investment arbitration to date. ➤ It can be used only when both the host State and the home State of the investor are parties to the ICSID Convention. In 2012 the Convention is in force for over 145 States. ➤ Adherence to the ICSID Convention does not in itself qualify as consent to arbitrate a dispute under the Convention. The respondent State must have given its consent separately (see <u>section 2</u>). ➤ ICSID is not a permanent body; arbitrators are appointed by the disputing parties for the resolution of each specific dispute. ➤ It is a delocalized, supranational system, protected from the intervention of domestic courts and insulated from the influence of the national law of the seat of the arbitration. ➤ Domestic courts do not have the power to revise, annul or set aside awards rendered under the ICSID Convention. A special ICSID annulment mechanism exists with very limited grounds for the annulment of the award. ➤ It offers a self-contained enforcement mechanism: an award rendered by an ICSID tribunal is final and binding and must be complied with by the host State in accordance with Article 53 of the Convention. ➤ It benefits from administrative and legal support provided by the ICSID Secretariat based in Washington, DC. ➤ It favours transparency. Thanks to the public registry, all existing disputes are known (this does not mean that ICSID awards are always made public, see <u>option 12.d</u>). ➤ A clause that includes the wording “<i>provided that both Parties are parties to the ICSID Convention</i>” or similar, suggests that a State’s consent to ICSID arbitration will lose its legal effect if this State denounces the ICSID Convention. <i>The dispute may, at the election of the investor concerned, be submitted to arbitration under:</i> <i>(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or...</i> ➤ Canada-Ecuador BIT (1996)

5.b	Other rules. In contrast to the ICSID Convention, all other rules are not de-localized, i.e. remain subject to the local law and subject to possible interference and supervision of local courts.
5.b.i	UNCITRAL Arbitration Rules (United Nations Commission on International Trade Law). ➤ Second most popular set of rules in investment arbitration. ➤ Legal seat (i.e. country) of the arbitration is chosen by the parties. National laws of the seat will apply to the arbitration (see also section 8). ➤ Domestic courts of the seat of arbitration perform supervisory and support functions, including the power to revise, annul or set aside the award and order provisional measures in accordance with the national law. ➤ Awards are enforced through national courts, usually in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hence, a national court may refuse to enforce the award on the grounds enshrined in the said Convention). ➤ It is characterized by a higher level of confidentiality. The very existence of a dispute can be kept secret if both parties so wish. However, the treaty itself may change that by providing for enhanced transparency of the proceedings (see section 12). Transparency of future proceedings under UNCITRAL rules will however increase as in 2013 new rules were finalized¹⁵ that contain, for example, provisions on open hearings, provide for publication of awards and documents, limit available exceptions to the principle of transparency and allow arbitral tribunals to consider submissions by a non-disputing Party to the treaty. The rules will apply only to newly concluded IIAs unless the Contracting States expressly opt-out of the rules. UNCITRAL rules are not backed by institutional support. The arbitral tribunal, together with the disputing parties, has to deal with the logistical arrangements. In practice, many UNCTRAL arbitrations have been administered – upon request of the disputing parties – by the Permanent Court of Arbitration in The Hague, and some by the ICSID Secretariat. ➤ The UNCITRAL Rules were initially adopted in 1976; they were revised in 2010. At present, most IIA arbitration under the UNCITRAL Rules will likely be governed by the 1976 Rules. The 2010 Rules are presumed to apply to arbitration agreements concluded after 15 August 2010.¹⁶ <i>In the event that such a dispute cannot be settled as provided in paragraph 1 of this Article the investor in question may, at his choice, submit the dispute for settlement to:</i> <i>[...]</i> <i>(b) an ad hoc Arbitral Tribunal, in compliance with the arbitration rules of the UN Commission on the International Trade Law</i>

¹⁵ The new UNCITRAL rules on transparency are expected to be formally adopted in July 2013 during the 46th session of the Commission.

¹⁶ It is expected that the 2010 rules would further be modified in order to integrate, once adopted, the 2013 transparency rules..

	(UNCITRAL); ➤ Austria-Iran BIT (2001)
5.b.ii	ICSID Additional Facility Rules.
	➤ Can be used when either the host State or the home State of the investor, but not both, is a party to the ICSID Convention. ➤ The ICSID Convention does not apply. ➤ It benefits from the administrative and legal support provided by the ICSID Secretariat based in Washington, DC. ➤ For arbitral awards rendered under the Additional Facility rules, there is no recourse to an ICSID annulment procedure; awards can be challenged in domestic courts in the place of arbitration. ➤ Awards are enforced through national courts, usually in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. <i>[...]the disputing investor may submit a claim [...] to one of the following arbitrations:</i> <i>(a) arbitration under the ICSID Convention, provided that both Contracting Parties are parties to the ICSID Convention;</i> <i>(b) <u>arbitration under the ICSID Additional Facility Rules, provided that either Contracting Party, but not both, is a party to the ICSID Convention;</u></i> ➤ Colombia-Japan BIT (2011)
5.b.iii	Other arbitral institutions.
	➤ The array of options is wide. The most known institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC) and the Regional Asian Centres of Cairo, Kuala Lumpur, Hong Kong and Singapore. ➤ Each arbitral institution has its own set of arbitration rules. All of them are backed by institutional and administrative support. ➤ Some arbitral venues make their cost contingent on the value of the claim (e.g. ICC). Regional arbitration institutions can be cheaper, although there is a risk that some of them are inexperienced with claims involving States. ➤ They are generally characterized by a high level of confidentiality akin to that of UNCITRAL Rules. However, the treaty itself may change that by providing for enhanced transparency of the proceedings (see option 12). ➤ Domestic courts of the seat of arbitration perform supervisory and support functions and play a role in enforcement of awards as with UNCITRAL Rules and ICSID Additional Facility Rules. <i>[...] the dispute shall be submitted upon request of the investor of the Contracting Party to:</i> <i>[...]</i> <i>(b) <u>the Court of Arbitration of the International Chamber of Commerce</u></i> ➤ Republic of Korea-Trinidad and Tobago BIT (2000)

	<i>[...] the dispute shall be passed over for consideration to:</i> <i>[...]</i> b) <u>the Arbitration Institute of the Chamber of Commerce in Stockholm,</u> ➤ Russian Federation-Ukraine BIT (1998) <i>the dispute [...] may be submitted upon request of the investor (his choice will be final) either to:</i> <i>[...]</i> c) <u>Regional Center for International Commercial Arbitration in Cairo</u> ➤ Egypt-Pakistan BIT (2000) <i>A disputing investor may submit a claim referred to Art. 32 (Claim by an Investor of a Member State) at the choice of the disputing investor:</i> <i>[...]</i> e) <u>to the Regional Center for Arbitration at Kuala Lumpur or any other regional center for arbitration in ASEAN;</u> ➤ ASEAN Comprehensive Investment Agreement (2009) <i>In case of international arbitration the dispute shall be submitted for settlement by arbitration, at the option of the investor, to one of the following fora:</i> <i>[...]</i> d) <u>An Arbitral tribunal of the Conciliation and Arbitration Center of the Chamber of Commerce of Bogota.</u> ➤ Belgium and Luxembourg-Colombia BIT (2009)
5.b.iv	Other rules agreed to by the disputing parties. ➤ This option may be useful (particularly if the treaty offers a narrow selection of other arbitral fora, e.g. only ICSID Convention and UNCITRAL Rules). ➤ It gives the disputing parties an opportunity to agree on any other set of arbitration rules as they see fit. For instance, local arbitration centres may be used in order to settle small claims at a reasonable cost. <i>A disputing investor might submit the claim to arbitration under:</i> <i>[...]</i> d) <u>any other arbitration rules or to any other arbitration institution, if the disputing parties so agree.</u> ➤ Mexico-Singapore BIT (2009)
5.c	Choice of rules.
5.c.i	The investor freely selects the arbitration rules under which it wishes to submit its claim. ➤ The host State is unable to influence the choice of the rules in a specific dispute. <i>A disputing investor may submit a claim referred to Art. 32 (Claim by an Investor of a Member State) at the choice of the disputing investor:</i> a) <u>to the courts or administrative tribunals of the host State [...]</u>

	b) under the ICSID Convention [...]; c) under the ICSID Additional Facility Rules [...]; d) under the UNCITRAL Arbitration Rules; or; e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional arbitration centre in ASEAN. f) if the disputing parties agree, to any other arbitration institution. ➤ ASEAN Comprehensive Investment Agreement (2009)
5.c.ii	The treaty sets out a list of possible arbitration fora, of which one is a default option.
	➤ The investor may refer the dispute to the default arbitration forum. ➤ To use any other arbitration fora, mentioned in the treaty, the investor needs the consent of the host State. ➤ Thus, the host State retains some control over the selection of the arbitration rules.
	(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute <u>may agree</u> to refer the dispute either to: (a) the [ICSID or ICSID Additional Facility Rules]; or (b) an international arbitrator or ad hoc arbitral tribunal: (i) by an agreement between the parties to the dispute; or (ii) to be established under the Arbitration Rules of the United Nations Commission on International Trade Law. <u>(3) If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.</u> ➤ Vietnam-UK BIT (2002)

6. Presentation of claims

6	States decide on whose behalf claims may be presented.
6.a	An investor may submit a claim to arbitration <i>on its own behalf</i> .
	➤ This is a typical approach of investment treaties and a default position, given the multitude of the types of investment covered by the treaty that may include property, loans, debt securities, intellectual property rights, etc. (see <i>Definition of Investment</i>). ➤ The special case (but also the common practice) of structuring investment through an enterprise established in the host State (local subsidiary) may require special considerations. If an investor is a shareholder in a locally organized company, its claim may result, for example, from an expropriation of its shares or a denial of its right to receive dividend payments. ➤ If the damage arises from <i>mistreatment of the investor's local enterprise</i>, calculating compensation to the investor may become a challenge because the damage to the enterprise and the damage to

	the shareholder are not the same even if it owns 100% of the shares. ➤ An investor may bring a claim whether it is a majority or minority shareholder of a local enterprise. The amount of their actual recovery would be limited in proportion to their shareholding and depend on the amount of damages they show. ➤ Many treaties refer to disputes between investors and host States in connection with an investment, and do not specify on whose behalf an investor may bring a claim. An investor can only bring a claim on its own behalf unless the treaty also authorizes it to bring a claim on behalf of a local enterprise it owns or controls. ➤ Some treaties treat local enterprises, owned or controlled by a covered investor, as “investors” for the purposes of ISDS, and give them the right to bring ISDS claims in their own name. This would render <u>option 6.b</u> unnecessary as it achieves the same objectives. <u>1. If any dispute arises between a Contracting Party and an investor of the other Contracting Party with respect to an investment, the host Contracting Party and the investor shall primarily endeavour to settle the dispute amicably through negotiation and consultation.</u> <u>2. In the event that such a dispute cannot be settled as provided in paragraph 1 of this Article the investor in question may, at his choice, submit the dispute for settlement to [...]</u> ➤ Austria-Iran BIT (2001) <u>The disputing investor, on its own behalf, may submit to arbitration under this Chapter a claim:</u> (i) <u>that the disputing Party has breached an obligation under Chapter II other than paragraphs 2 and 4 of Article 7, Articles 8, 9 and 20; and</u> (ii) <u>that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach;</u> ➤ Colombia-Japan BIT (2011) <u>For the purposes of this Article [on ISDS] and Article 25(2)(b) of the said Washington Convention, any legal person which is constituted in accordance with the laws and regulations of the Contracting Party and which, before the dispute arises, was controlled by an investor of the other Contracting Party, shall be treated as a national of the other Contracting Party.</u> ➤ Lebanon-Slovakia BIT (2009)
6.b	The treaty gives an investor a right to submit a claim <i>on behalf of its local enterprise</i>. ➤ It serves as an additional (not alternative) option to <u>option 6.a</u>. ➤ It creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls. ➤ It may be useful in cases where a challenged State measure directly affects an investment but not necessarily the investor. ➤ It does not enable claims by minority shareholders on behalf of the locally-organized enterprise because they do not own or control it. ➤ It enables enterprises that are even <i>partially</i> foreign-owned (as long

	as they are foreign-controlled) to recover <i>all</i> of the damage that has been caused to the enterprise by the violation (i.e. not limited to the damage that is proportionate to the investor's shareholding in the enterprise). ➤ Relevant treaties usually also provide that monetary award should be payable to the enterprise itself. The investor's recovery would have to be limited to its share in the enterprise, and subject to the fulfilment of the investment's outstanding obligations under domestic law, e.g. in relation to the State (taxes), employees or creditors. ➤ Treaties that adopt this approach do not give local enterprises themselves a right to bring treaty claims. They also usually require that the enterprise to submit a waiver from pursuing parallel domestic or other proceedings related to the measure which gave rise to the dispute (see <u>option 4.a.ii</u>).
	<u>the disputing investor, on behalf of an enterprise of the disputing Party that is a juridical person that the disputing investor owns or controls directly or indirectly, may submit to arbitration under this Chapter a claim:</u> <u>(i) that the disputing Party has breached an obligation under Chapter II other than paragraphs 2 and 4 of Article 7, Articles 8, 9; and</u> <u>(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,</u> <u>[W]hen a claim under subparagraph 2(b) of Article 27 [claim on behalf of an enterprise] is submitted:</u> <u>(a) an award of restitution of property shall provide that <u>restitution be made to the enterprise</u>; and</u> <u>(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.</u> ➤ Colombia-Japan BIT (2011) <u>1. An investor of a Party, on behalf of an enterprise of the other 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 Section B, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.</u> <u>[...]</u> <u>3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 22 (Claim by an Investor of a Party on Its Own Behalf) arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 27 (Submission of a Claim to Arbitration), the claims should be heard together by a Tribunal established under Article 32 (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.</u> <u>4. An investment may not make a claim under this Section.</u> <u>[W]here a claim is made under Article 23(1) (Claim by an Investor of a Party on Behalf of an Enterprise):</u> <u>(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;</u>

	(b) an award of restitution of property shall provide that <u>restitution be made to the enterprise</u>; and (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law. ➤ Canada Model BIT (2004)
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7. Establishment of the tribunal

7	States decide whether to set forth rules regarding the establishment of the arbitral tribunal.
7.a	Appointment of arbitrators
7.a.i	The treaty does not include any rules on the appointment of arbitrators. ➤ Arbitrators will be appointed pursuant to the applicable arbitration rules. ➤ The manner of appointment may differ from one case to another, depending on the arbitration rules selected. In ICSID cases, each disputing party appoints one arbitrator and the parties jointly appoint the chairman. Under the UNCITRAL rules, each party appoints one arbitrator and the two appointed arbitrators appoint the presiding arbitrator. ➤ If the disputing parties (or party-appointed arbitrators) cannot agree on the presiding arbitrator, the latter is selected by an appointing authority (in case of ICSID – the Secretary-General of ICSID; in case of UNCITRAL – the Secretary-General of the Permanent Court of Arbitration at The Hague). ➤ Under the ICSID Rules, a party may not select an arbitrator of the nationality of either party, unless the other party agrees. UNCITRAL Rules place no restrictions on the nationality of arbitrators. No formulation required. Treaty examples: Croatia-Morocco BIT (2004), Netherlands-Suriname BIT (2005)
7.a.ii	The treaty sets forth rules on the appointment of arbitrators. ➤ Under this approach, the Contracting Parties establish a uniform system for the appointment of arbitrators, possibly overriding the applicable arbitration rules. ➤ A treaty may also choose to establish rules about only certain aspects of the appointment procedure, leaving the rest to the applicable arbitration rules. ➤ States exercise greater control over the appointment procedures. For instance, they may prefer the presiding arbitrator to be appointed by the disputing parties and/or nominate an appointing authority that is efficient and trustworthy in their view. 1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties and who shall be a

	<i>national of a third country.</i> [...] 3. The Secretary-General [of ICSID] shall serve as appointing authority for an arbitration under this Section. 4. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. ➤ Australia-Chile FTA (2008) <u>(c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:</u> <u>(i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.</u> <u>(ii) The parties shall appoint their respective arbitrators within two months.</u> ➤ Ghana-India BIT (2002)
7.b	The treaty includes requirements regarding qualifications of arbitrators. ➤ Most treaties do not specify the desired characteristics of an arbitrator. Article 14(1) of the ICSID Convention requires that arbitrators to be “<i>persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment</i>”. ➤ Given that investment arbitrations frequently involve matters relating to the public interest and public international law, some treaties have included relevant qualifications alongside requirements of impartiality and independence. <i>Any person appointed as an arbitrator shall have expertise or experience in public international law, international trade or international investment rules. An arbitrator shall be chosen strictly on the basis of objectivity, reliability, sound judgment and independence and shall conduct himself or herself on the same basis throughout the course of the arbitral proceedings.</i> ➤ ASEAN Comprehensive Investment Agreement (2009) <i>Arbitrators shall:</i> <u>(a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;</u> <u>(b) be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor; and</u> <u>(c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission [set up by the treaty].</u> 3. Where a disputing investor claims that a dispute involves measures adopted or maintained by a Party relating to financial

	<u>institutions of the other Party, or investors of the other Party and investments of such investors, in financial institutions in a Party's territory, then</u> <u>(a) where the disputing parties are in agreement, the arbitrators shall, in addition to the criteria set out in paragraph 2, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions [...]</u> ➤ Canada-Peru BIT (2006) <u>In the appointment of all arbitrators [in disputes related to <u>financial services</u>] each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.</u> ➤ US Model BIT (2012)
7.c	The treaty includes a provision on arbitrators' remuneration. ➤ Under this approach, States retain greater control over one of the aspects that determine the ultimate cost of arbitration: arbitrator fees. ➤ In the absence of this provision, the fees are determined in accordance with arbitration rules. E.g., in ICSID arbitrations, the fees are set according to the ICSID schedule – currently US\$3,000 per day. In UNCITRAL cases, arbitrators generally set their own fees which tend to be higher than in ICSID. ➤ Some treaties set forth a rule whereby the disputing parties shall agree on the arbitrator's remuneration or impose a cap like that of the ICSID Schedule. <u>4. The disputing parties should agree upon the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.</u> <u>5. The Commission may establish rules relating to expenses incurred by the Tribunal.</u> ➤ Canada-Peru BIT (2006) <u>The disputing parties may agree on the fees to be paid to the arbitrators. If the disputing parties do not reach an agreement on the fees to be paid to the arbitrators before the establishment of the Tribunal, the fees and expenses established from time to time in the ICSID and effective at the time of the establishment of the Tribunal shall apply.</u> ➤ Colombia-Japan BIT (2011)

8. Place (legal seat) of arbitration

8	States decide whether to regulate the seat of the arbitration. The seat is important as the national laws of the seat will apply to the arbitration (if it is non-ICSID Convention), and the national courts of the seat may
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	perform supervisory and support functions (e.g., may order provisional measures and review/set-aside the arbitral award). Actual hearings do not have to take place at the legal seat of arbitration.
8.a	The treaty does not give guidance regarding the seat of the arbitration. ➤ Seat of arbitration is irrelevant in the context of arbitrations under the ICSID Convention because ICSID arbitration is de-localized and not subject to the laws of the State of the seat of arbitration. ➤ In non-ICSID Convention cases, the place of arbitration would be determined pursuant to the applicable arbitration rules. For example, under the UNCITRAL Rules, the seat is chosen by the disputing parties. If the parties do not agree, the tribunal exercises its discretion to determine the seat. ➤ Most arbitrations tend to be conducted in arbitration-friendly countries (e.g. whose courts adopt a deferential standard of review of arbitral awards) which are also parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. No formulation required. Treaty examples: Angola-United Kingdom BIT (2000), Chile-Indonesia BIT (1999)
8.b	The treaty provides that the seat of the arbitral process must be a country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. ➤ An arbitration process conducted in a country which is a party to the New York Convention allows enforcement under the terms of this Convention in more than 145 States parties to the Convention. A domestic court of a particular jurisdiction can refuse enforcement only on the narrow grounds specified in the Convention itself. ➤ This clause would be irrelevant for the disputes arbitrated under the ICSID Convention given that their de-localized nature. However, it is relevant in the ICSID Additional Facility cases (see section 5). <i>Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.</i> ➤ ASEAN Comprehensive Investment Agreement (2009)

9. Consolidation of claims

9	States establish rules on consolidation of claims that have legal of factual issues in common. Consolidation means that several separate, but related, cases are joined together and resolved by one tribunal. This contributes to efficient resolution of multiple claims and helps to avoid potentially inconsistent results of multiple proceedings arising out of the same measure.
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	Most IIAs do not include provisions on consolidation of claims.
9.a	<i>Upon request of a disputing party, a consolidation tribunal can be established to determine the manner in which the related claims should be resolved.</i> ➤ The agreement of all disputing parties is not necessary; a request of one party is sufficient to trigger the consolidation process. ➤ An independent tribunal is established to decide whether to consolidate the proceedings. Such decision is based on a cost-benefit assessment in the interest of the fair and efficient resolution of the related claims. ➤ Only those proceedings challenging the same or similar government measures can be consolidated, i.e. the facts which gave rise to the disputes must be sufficiently similar. ➤ Consolidation pre-supposes that the relevant proceedings are ongoing (not yet completed) and are at a relatively early stage. ➤ The effect of the consolidation provision is limited as it applies to claims based on the same underlying treaty. Consolidating related claims based on different IIAs is difficult because different treaties may contain differing substantive obligations as well as diverging time limits, procedural obligations and dispute settlement rules. ➤ The consolidation tribunal may: (1) assume jurisdiction over and decide all or any part of the claims submitted to arbitration; or (2) assume jurisdiction over and decide one or more claims, the determination of which it believes would assist in the resolution of the others; or (3) instruct a previously established tribunal to assume all or any part of the claims. <i>Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, <u>any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10 [these paras set out in detail the process of consolidation].</u></i> ➤ US Model BIT (2012)
9.b	<i>Upon agreement of the disputing parties, a consolidation tribunal can be established in order to settle all consolidated claims.</i> ➤ It is a restatement of the general rule found in arbitration that consolidation is possible if all of the parties concerned agree. ➤ The approach does not add much value – with the agreement of all the disputing parties concerned, multiple claims may be consolidated without an explicit treaty provision to that effect. <i>Where two or more investors notify an intention to submit claims, or have submitted claims, separately to arbitration under Article 10.21 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, <u>all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate,</u></i>

	including with respect to the forum chosen. ➤ Malaysia-New Zealand FTA (2009)
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10. Objections to frivolous claims

10	States establish special rules for considering State's objections to allegedly frivolous claims.
10.a	The treaty sets forth a special mechanism for dealing with frivolous claims. ➤ It allows dismissal of frivolous claims (i.e. patently unmeritorious claims that evidently lack a sound legal basis) in an expedited and cost-effective manner, before proceeding to the merits of the dispute. ➤ At the early stage in the proceedings, a respondent State may raise objections to claims that it considers to be manifestly without legal merit. ➤ In deciding an objection, the tribunal assumes that the claimant's factual allegations in support of the claims are true. ➤ In 2006, ICSID Arbitration Rules and ICSID Additional Facility Rules were amended to provide for an expedited decision that a claim is "<i>manifestly without legal merit</i>". Thus, in arbitrations governed by these rules, the respondent State will be able to employ this mechanism regardless of whether the operative IIA contains it. Article 28. Conduct of the Arbitration [...] 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, <u>a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 34 ["Awards"]</u>. (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment). (b) <u>On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefore.</u> (c) <u>In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.</u>

	(d) <i>The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.</i> <i>5. In the event that the respondent so requests within 45 days after the tribunal is constituted, <u>the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.</u> The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.</i> ➤ Uruguay-USA BIT (2005)
10.b	The treaty includes a special rule on cost allocation with respect to frivolous claims proceedings. ➤ Generally, few investment treaties address costs of the arbitration, leaving this matter for tribunals to decide on a case-by-case basis, subject to any directives contained in the applicable arbitral rules. ➤ Some treaties provide guidance on the allocation of fees and costs in the context of frivolous claims allegations. ➤ Such rules may aim to discipline investors who bring patently unmeritorious claims. They may also serve as a disincentive to States from routinely invoking preliminary objections or from filing meritless objections to delay proceedings. <i>In the event of a frivolous claim the Tribunal shall award costs against the claimant.</i> ➤ Colombia Model BIT (2008) <i>When it decides a respondent's objection under paragraph 4 or 5 [provisions regarding objections to frivolous claims], <u>the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous</u> and shall provide the disputing parties a reasonable opportunity to comment.</i> ➤ US Model BIT (2012)

11. Applicable substantive law

11	States determine the normative sources which the tribunal shall apply in order to resolve the dispute.
11.a	The treaty itself and applicable international law. ➤ This approach is more suitable for those treaties that limit investor

	claims to alleged violations of the treaty (see option 1.a.ii). ➤ General international law is used to clarify or elaborate the meaning of treaty provisions and to fill the gaps left by the treaty. It includes international conventions, international custom and general principles of law as primary sources, and judicial decisions and the teachings of the most highly qualified publicists as subsidiary sources. ➤ In the context of investment arbitration, the customary international rules of treaty interpretation and international law of State responsibility are relevant. ➤ Previous ISDS awards can have persuasive authority, particularly if there is an interpretative pattern on some provision or rule (despite the fact they stem from different IIAs). ➤ Even when domestic law is not expressly mentioned in the treaty, it may very well play a role in the decision of a tribunal. For instance, some IIA substantive provisions themselves refer to domestic law of the host State. For instance, treaties often contain a requirement for covered investments to be made in accordance with the law of the host State, an obligation of States to admit investments in accordance with its laws and regulations, a requirement for an expropriation to be carried out in accordance with the domestic legal procedure and others. In those cases, domestic law will have to be considered to decide whether the relevant treaty obligation has been complied with. ➤ This type of clause is not conducive to State's counterclaims arising out of alleged violations by investor of the host State's domestic law or investment contract. <i>A tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.</i> ➤ Energy Charter Treaty (1994) <i>The tribunal shall reach its award by a majority of votes in accordance with the provisions of this Agreement and the principles of international law recognized by both Contracting Parties. Such award shall be final and binding on both Contracting Parties</i> ➤ Ethiopia -Sudan BIT (2000)
11.b	Treaty, international law and the law of the host State. ➤ This approach is more suitable for those treaties that have a broad ISDS scope (see option 1.a.iii). ➤ It suggests the tribunal may decide matters arising not only out of the treaty, but also out of domestic law, including for instance investment contracts. In those cases domestic law of the host State will likely be the basis for the tribunal's decision as investment contracts often nominate it as the law governing the contract. ➤ Where they arise, it also could facilitate the resolution of the tribunal on any State counterclaims concerning violations of the host State's domestic law by the investor. ➤ Regarding treaty claims international law will be in most probability the main normative source applied to the dispute, domestic law playing a subsidiary function (for instance when the treaty refers to

	it). ➤ Tribunals have tended to use international law as a “supplementary” and “corrective” source. The supplementary function means that in the event of a gap in the applicable domestic law, arbitrators might turn to international law to fill the gap. The corrective function authorises arbitrators, in their application of international law, to set aside the applicable domestic law when it, or an action taken under it, violates international law. <u>Dispute[s] shall be resolved in accordance with law, applying the terms of this Agreement, national legislation of the Contracting Party to the dispute, and principles of public international law.</u> ➤ Azerbaijan-Croatia BIT (2007) <u>The arbitration tribunal shall take its decisions in accordance with the provisions of this Agreement, the laws and regulations of the Contracting Party involved in the dispute on which territory the investment is made (including its rules on the conflict of laws) and the relevant principles of international law as accepted by both Contracting Parties.</u> ➤ Nigeria-Turkey BIT (2011) <u>The arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of the Contracting Party, which is a party to the dispute, the provisions of the present Agreement, as well as applicable rules of international law.</u> ➤ Thailand-Bulgaria BIT (2003)
11.c	Law agreed by the disputing parties. ➤ This approach reflects the frequent practice in international transactions between private parties in which they choose a law to govern their relations. ➤ The same principle of party autonomy manifests itself in contracts concluded between investors and host States. Such contracts may designate the governing law. ➤ This option gives the parties flexibility to choose the law they consider should apply in the context of a specific dispute, whether international law, domestic law or otherwise. ➤ It is important that there remains an automatic default solution in case the parties do not agree on an appropriate normative source. This is particularly helpful in cases where there is no underlying contract between the investor and the host State. <u>The ad hoc tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the provisions of this Agreement and such rules of international law as may be applicable</u> ➤ China-Netherlands BIT (2004)
11.d	No provision on applicable law.

	➤ In the absence of an applicable-law provision, the relevant arbitration rules apply. ➤ The ICSID Convention refers, in the absence of the law agreed upon by the parties, to “<i>the laws of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable</i>”. ➤ UNCITRAL rules refer to “<i>the law determined by the conflict of law rules which [the tribunal] considers applicable</i>”. ICC rules refer to “<i>the rules of law which [the tribunal] determines to be appropriate</i>”. Although on the surface these rules give more discretion to the tribunal to determine applicable law, it is unlikely that any significant change in result would occur. ➤ In relation to the claims based on the treaty, the treaty itself will constitute the main source of applicable law, while international law and domestic law will apply within their respective spheres of application, with international law prevailing in case of conflict.
	No formulation required. Treaty examples: Austria-Hong Kong, China BIT (1996), Costa Rica-Republic of Korea BIT (2000).

12. Transparency and openness

12	States ensure the transparency of the ISDS process, with a view to enhancing its legitimacy and accountability.
12.a	Public access to arbitral hearings. ➤ Opening hearing to the public responds to legitimate concerns of the civil society: as opposed to private commercial arbitration, investment arbitration cases often deal with issues of public interest; furthermore, arbitral awards are paid from public funds. ➤ Portions of the hearings could be closed in order to protect confidential and sensitive information. Tribunals’ deliberations remain closed in all circumstances. ➤ Open hearings may imply certain additional costs and the need for special logistical arrangements. ➤ ICSID Arbitration Rules allow a tribunal to hold open hearings if neither party objects (Rule 32.2) while ensuring the protection of privileged or proprietary information. Several hearings have been open to the public, often via closed-circuit television and sometimes via web-streaming. 1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera. 2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties. ➤ Canada-Peru BIT (2006)

12.b	Disclosure of documents related to the arbitral process. ➤ Public access to arbitration-related documents fosters awareness, accountability and furthers the study and development of international investment law. ➤ Documents subject to disclosure may include: investor's notice of intent and notice of arbitration; disputing parties' briefs, memorials and pleadings; transcripts of hearings; submissions by third parties; procedural orders, decisions and awards of the tribunal. ➤ Special provision is commonly made for the exclusion of confidential or sensitive information from the documents. ➤ Parties are not required to make public any negotiations about the settlement of the dispute. ➤ Domestic laws on transparency and public access to information may also require disclosure of the public version of these documents. Some treaties provide that in the event of a conflict between the tribunal's confidentiality order and the State's access-to-information laws, the latter should prevail. ➤ States that have made the relevant documents public have ordinarily done so by publishing them on official websites. <i>Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:</i> <i>(a) the notice of intent;</i> <i>(b) the notice of arbitration;</i> <i>(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) and (3) and Article 33;</i> <i>(d) minutes or transcripts of hearings of the tribunal, where available; and</i> <i>(e) orders, awards, and decisions of the tribunal.</i> <i>[...]</i> <i>3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 or Article 19.</i> <i>4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures [...].</i> ➤ Uruguay-USA BIT (2005)
12.c	<i>Amicus curiae</i> submissions. ➤ This approach recognises the right of interested parties to participate in arbitrations that deal with issues of public interest by submitting briefs to the arbitral tribunal. It fosters involvement of the civil society. ➤ In 2006, ICSID rules were amended to make explicit a tribunals' authority to permit <i>amicus</i> participation. The 2013 UNCITRAL rules

	on transparency will also allow arbitral tribunals to consider submissions by a third person.¹⁷ Relevant treaties sometimes set out the rules guiding <i>amicus curiae</i> participation (regarding both admissibility of submissions and the weight to be given to them) in order to minimize costs and maximize benefits. ➤ The relevant criteria often include the extent to which the <i>amicus</i> submission would assist the tribunal in the determination of a factual or legal issue by bringing a perspective, knowledge or insight that is different from that of the disputing parties; the intervener has a significant interest in the arbitration; and there is a public interest in the subject-matter of the arbitration. ➤ The treaty may consider granting access to relevant information and evidence for those entities which have been given an opportunity to make an <i>amicus</i> submission.
	<u>2. Any non-disputing party that is a person of a Contracting Party that wishes to file a written submission with the Tribunal (the “applicant”) shall apply for leave from the Tribunal to file such a submission [...]</u> <u>5. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:</u> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is substantially different from that of the disputing parties and up to then had not been known by the Tribunal; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration. 6. The Tribunal shall ensure that: (a) any non-disputing party submission avoids disrupting the proceedings; and (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions. [...] 8. A Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration. ➤ Canada-Czech Republic BIT (2009)
12.d	Publication of arbitral awards.
12.d.i	The treaty ensures that arbitral awards are made public.

¹⁷ The new UNCITRAL rules on transparency are expected to be formally adopted in July 2013 during the 46th session of the Commission.

	➤ It facilitates the communication of the State to the public on the result and consequences of the case and allows scrutiny of the decision by interested parties. ➤ Confidential or sensitive information can be redacted. ➤ The prospect of the award being made public may serve as an additional incentive for arbitrators to be diligent in performing their duties and produce better-reasoned awards. ➤ Review of awards by academia and other stakeholders furthers the study and development of international investment law. <u>Any Tribunal award under this Agreement shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the redaction of confidential information.</u> ➤ Canada-Czech Republic BIT (2009) <u>1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal.</u> ➤ ASEAN-Australia-New Zealand FTA (2009)
12.d.ii	The award rendered by the arbitral tribunal shall be confidential, unless the parties agree otherwise. ➤ This is the default approach in commercial arbitration, and also in investment arbitration in the absence of any special provisions in the treaty. ➤ Confidentiality of awards is against the basic requirements of transparency, accountability and legitimacy. Secrecy may nurture mistrust and suspicion. ➤ Confidentiality of awards prevents the study and development of international investment law. ➤ Keeping awards confidential may help to keep politically-sensitive issues away from the public eye as well as minimise reputational damage to respondent States. <u>The decision of an arbitral tribunal shall only be published if there is agreement by the parties to the dispute.</u> ➤ Australia-Mexico BIT (2005)

13. Participation of States in treaty interpretation

13	States establish formal mechanisms to guide the interpretation and application of the treaty.
13.a	Joint interpretations of treaty provisions, binding upon arbitral tribunals. ➤ It allows the Contracting Parties to clarify the meaning of provisions to address misinterpretations adopted by arbitral tribunals that are inconsistent with the Contracting Parties' original intentions. ➤ It can help remedy the problem of inconsistent and contradictory interpretations of the same treaty provision by different arbitral

	tribunals. ➤ The Contracting Parties reinforce their role as the “masters” of the treaty and to ensure that its interpretation is in line with the desired policy objectives. ➤ The Contracting Parties are free to provide a joint interpretation regardless of whether the treaty expressly authorizes them to do so. However, an express provision to that effect can serve as a useful reminder and ensure that tribunals pay due attention to such interpretations. ➤ The relevant interpretation can be issued at any time and will have binding force on tribunals for all pending and future disputes. ➤ The treaty may also authorize a joint commission or committee, established under the treaty, to issue binding interpretations. ➤ The treaty may also authorize the arbitral tribunal to <i>request</i> interpretations from the Contracting Parties. <u>An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section.</u> ➤ Mexico-Singapore BIT (2009) <u>2. A decision of the Joint FTA Committee issuing its interpretation of a provision of this Agreement under Article 20.1.3(f) (Joint FTA Committee – Institutional Arrangements Chapter) shall be binding on a tribunal established under this Section, and any award must be consistent with that decision.</u> ➤ Australia-Chile FTA (2008) <u>The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.</u> <u>A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.</u> ➤ ASEAN-Australia-New Zealand FTA (2009)
13.b	Mandatory referral of certain types of claims for the initial consideration by the Contracting Parties. ➤ This mechanism is designed to afford the Contracting Parties additional control over resolution of investor-State disputes in certain policy areas such as taxation and regulation of financial services. ➤ It requires that the challenged State measure is first submitted for consideration of the Parties’ competent authorities (or sometimes, to the Commission established by the treaty). If the latter reach an agreement that the measure is consistent with the treaty, the joint determination is binding on the arbitral tribunal. If the competent

	authorities fail to reach an agreement within the specific time period, the issues left unresolved are referred to the tribunal for decision. ➤ This mechanism goes beyond interpretation of treaty provisions <i>in abstracto</i> and allows the Parties to determine the outcome of a particular claim by examining the measure challenged by the investor. <i>Where a claimant submits a claim to arbitration under Section B [ISDS], and the respondent invokes paragraph 1 or 2 [exceptions related to <u>financial services and monetary and related policies</u>] as a defense, the following provisions shall apply:</i> (a) <i><u>The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. [...]</u></i> (b) <i>The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. <u>The determination shall be binding on the tribunal.</u></i> (c) <i>If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, <u>the tribunal shall decide the issue or issues left unresolved by the competent financial authorities.</u></i> ➤ US Model BIT (2012) <i>Article 6 [Expropriation] shall apply to all <u>taxation measures</u>, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B [ISDS] only if:</i> (a) <i><u>the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and</u></i> (b) <i><u>within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.</u></i> ➤ US Model BIT (2012) <i>1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, <u>on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue.</u> The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.</i> <i>2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be <u>binding on the Tribunal.</u> If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.</i> ➤ NAFTA (1992)
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13.c	Non-disputing Party submissions to the arbitral tribunal.
	➤ Some treaties provide a non-disputing contracting Party (i.e., a State party that is not a respondent in that particular dispute) with the discretion to submit a unilateral intervention in the arbitral proceedings. ➤ It allows the non-disputing State to express its opinion on specific matters of law that are likely to have a systemic impact on future cases. ➤ Where an intervention by a non-disputing Party supports respondent State's interpretation, this can be seen as an expression of common intent and is likely to be given considerable weight by a tribunal. ➤ For this mechanism to work, the non-disputing Party must understand the context of the dispute and the issues it raises. Therefore, a treaty may additionally entitle the non-disputing Party to receive the dispute-related documents and to attend the arbitral hearings. ➤ The right of a non-disputing Party to make a written submission is implied, even when a treaty does not explicitly provide for it.
	<u>On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.</u> ➤ NAFTA (1992) Article 831: Documents <u>1. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of:</u> a) the evidence that has been tendered to the Tribunal; b) copies of all pleadings filed in the arbitration; and c) the written argument of the disputing parties. <u>2. The Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.</u> Article 832: Participation by the Non-Disputing Party <u>1. On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement.</u> <u>2. The non-disputing Party shall have the right to attend any hearings held under this Section, whether or not it makes submissions to the Tribunal.</u> ➤ Canada-Peru FTA (2008)

14. Provisional measures

14	States explicitly recognize the power of arbitral tribunals to order interim measures of protection.
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	➤ A provisional measure (interim measure of protection) is an interim remedy aimed at safeguarding the rights of the parties to a dispute pending its final resolution. They encompass: (i) measures related to the preservation of evidence; (ii) measures related to the conduct of the arbitration and the relations between the parties; and (iii) measures designed to facilitate the enforcement of any eventual award. ➤ The treaty may explicitly recognise the power of the arbitral tribunal to order provisional measures irrespective of how this issue is regulated by the applicable arbitration rules. It may also confirm the binding character of such measures, strengthening the powers of the tribunal in this area. ➤ Interim measures may not include the suspension of the challenged measure, as this falls within the domain of domestic courts. ➤ Tribunals tend to have limited coercive powers and lack the ability to compel compliance with any order given, save for their ability to draw adverse inferences against a party that has failed to abide by tribunal orders or to take into account that party's acts when deciding on the allocation of costs. ➤ Disputing parties may also use national courts to obtain orders of provisional measures, which is recognised in some treaties' provisions on waivers (<u>option 4.a.ii</u>).
	<u>1. An arbitral tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the arbitral tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the arbitral tribunal's jurisdiction.</u> <u>2. An arbitral tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 11. For purposes of this paragraph, an order includes a recommendation.</u> <u>[...] the investor [...] waives its right to initiate or continue before any administrative tribunal or court under the laws of the disputing Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Chapter II, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the disputing Contracting Party.</u> ➤ Mexico-Singapore BIT (2009) <u>A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of a disputing party. The Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in paragraph 2 of Article 27.</u> <u>[...]</u> <u>Notwithstanding subparagraph 5(b) [waiver of a right to institute proceedings before host-State courts], the disputing investor [...] may initiate or continue an action that seeks interim injunctive relief that does not involve the payment of monetary damages before a judicial</u>

	<u>or administrative tribunal of the disputing Party.</u> ➤ Colombia-Japan BIT (2011)
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15. Available remedies

15	States decide whether to limit the types of remedies that a tribunal may award.
15.a	The treaty does not specify which legal remedies the tribunal may order against the responsible State. ➤ Typical remedies in ISDS may be pecuniary (monetary compensation) and non-pecuniary. Non-pecuniary remedies, and in particular restitution, may involve an order to the respondent to return certain property to the claimant (e.g., in the case of expropriation) as well as an order to revoke, annul or amend legislative, administrative or judicial acts. ➤ Absence of a provision that would limit available remedies gives a certain degree of discretion to the arbitral tribunal. Some arbitral tribunals have affirmed their power to grant any remedy they consider appropriate including non-pecuniary remedies. ➤ However, in practice, investors rarely request non-pecuniary remedies and tribunals do not tend to award them, often because of the difficulties with their enforcement against a sovereign State. Practically in all cases the relief takes the form of monetary compensation. ➤ This approach is predominant in traditional IIAs. No formulation required. Treaty examples: Hong Kong, China-Switzerland BIT (1994), India-Republic of Korea BIT (1996), Chile-Indonesia BIT (1999)
15.b	The treaty limits the range of available remedies. ➤ The growing trend in recent treaties has been to limit available remedies to two forms – monetary damages and restitution of property, with the latter often subject to the condition that a respondent State can choose to pay compensation instead of returning the property. (Some treaties limit available remedies to monetary compensation only). ➤ This type of clause prevents a tribunal from ordering the respondent State to annul, amend or abstain from applying a certain State measure. However, the State itself may choose to do so in order to mitigate possible future liability. ➤ It follows from arbitral practice that pecuniary compensation mainly covers material losses. ➤ A number of IIAs explicitly prohibit awards of “punitive damages”. This is a precautionary measure as it is widely accepted that punitive damages are generally not available under international law, regardless of whether this is explicitly prohibited in the treaty. <i>The award rendered by the arbitral tribunal shall include:</i>

	(a) <i>a judgment whether or not there has been a breach by the disputing Party of any obligation under this Agreement with respect to the disputing investor and its investments; and</i> (b) <i>a remedy if there has been such breach. The remedy shall be <u>limited to one or both of the following</u>:</i> (i) <i>payment of monetary damages and applicable interest; and</i> (ii) <i>restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.</i> <i>Costs may also be awarded in accordance with the applicable arbitration rules.</i> ➤ Cambodia-Japan BIT (2007) <i>A tribunal ruling a final award against a respondent <u>may only award monetary damages and any applicable interests [sic]; and may award costs and fees of attorneys in accordance with this Article and the applicable arbitration rules. The Tribunal shall not be competent to rule on the legality of the measure as a matter of domestic law.</u></i> ➤ Colombia Model BIT (2008) <i>A tribunal may not award <u>punitive damages</u>.</i> ➤ Uruguay-USA BIT (2005)
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16. Finality and enforcement of arbitral awards

16	States regulate the nature and enforcement of arbitral awards.
16.a	The treaty reaffirms that the award is binding upon the parties and obliges States to ensure enforcement. ➤ Compliance with an arbitral decision rendered against a State under an investment treaty becomes an international obligation of the State under the treaty. ➤ Some treaties state that arbitral awards “<i>have no binding force except between the disputing parties</i>”, thereby reinforcing the international law principle that, absent express language to the contrary, awards by other tribunals do not create binding precedent in subsequent disputes between different parties. ➤ Some treaties require States to ensure enforcement of awards within their territory. This means that (1) the necessary laws and institutions must be in place and (2) the host State should not put obstacles in the way of enforcement. This obligation applies without prejudice to the procedural formalities of national legal systems that apply to enforcement of arbitral awards. ➤ Enforcement is also governed by rules outside the IIA. The ICSID Convention provides that awards rendered under it shall be treated as if it were a final judgement of a national court in accordance with Article 53. Awards rendered under other arbitration rules such as UNCITRAL are enforced pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (if the arbitration was seated in a State party to the Convention, see section 8).

	<i>The arbitral decisions shall be final and binding for the parties in the dispute. Each Contracting Party shall execute them in accordance with its laws.</i> ➤ Argentina-Armenia BIT (1993) <i>The award shall be final and binding on the parties to the dispute. Each Party undertakes to enforce the awards.</i> ➤ Belize-China BIT (1999) <i>The award shall be final and binding on the parties to the dispute and shall be executed in accordance with procedural law of the Contracting Party in whose territory the award is executed.</i> ➤ Belarus-Finland BIT (2006) <i>4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.</i> <i>5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.</i> <i>7. Each Party shall provide for the enforcement of an award in its territory.</i> ➤ Australia-Chile FTA (2008)
16.b	The treaty clarifies that enforcement of the award may not be sought until a specified period of time has elapsed. ➤ The purpose of this provision is to make sure that the losing disputing party can challenge the arbitral award without being subject to simultaneous enforcement pressure. ➤ An award can be challenged using either the annulment mechanism under the ICSID Convention or the procedures for setting aside or annulment of the award in the courts of the country of the seat of arbitration (in non-ICSID Convention cases). ➤ Enforcement may be pursued once the relevant annulment or set-aside proceedings are completed or after the expiry of the specified period of time, which indicates that no party intends to challenge the award. ➤ In respect of the ICSID Convention awards, 120 days represents a period of time long enough for a party's right to seek revision or annulment to expire. In respect of UNCITRAL and other arbitration rules, 90 days is a common time period for bringing a request for revision, setting aside or annulment of the award in the domestic courts. <u>A disputing party may not seek enforcement of a final award until:</u> <i>(a) in the case of a final award made under the ICSID Convention:</i> <i>(i) <u>120 days have elapsed</u> from the date the award was rendered and no disputing party has requested revision or annulment of the award; or</i> <i>(ii) revision or annulment proceedings have been completed; and</i> <i>(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 10.16.5(d):</i>

	(i) <i>90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or</i> (ii) <i>a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.</i> ➤ Australia-Chile FTA (2008)
16.c	The treaty sets out the consequences of a failure to abide by the award. ➤ If the debtor State fails to comply, the treaty may provide for inter-State proceedings and/or diplomatic protection to help investors to enforce the award. ➤ Generally, in the event a State does not comply with the award voluntarily, investors can seek enforcement through national courts in jurisdictions where the debtor State has assets. They can also seek the assistance of their home government. ➤ States' assets enjoy immunity from execution which is usually not waived in the treaty. The amenability to execution of a State's assets will depend on the national immunity law in the jurisdiction where the assets are located. <i>8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:</i> <i>(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and</i> <i>(b) a recommendation that the respondent abide by or comply with the final award.</i> <i>9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.</i> ➤ US Model BIT (2012) <u>Neither Contracting Party shall give diplomatic protection, or bring an international claim, in respect of an investment dispute which the other Contracting Party and an investor of the former Contracting Party have consented to submit or submitted to arbitration set forth in paragraph 4, unless the other Contracting Party shall have failed to abide by and comply with the award rendered in such investment dispute.</u> ➤ Japan-Lao PDR BIT (2008)

No ISDS option

- This approach would diminish to a great extent the exposure of States to international responsibility, but also the promotional role of the treaty as the ISDS mechanism is often considered to be one of the key pillars of investment protection offered in IIAs.
- This option implies that the Contracting Parties have sufficient trust in each other's domestic judicial systems and their ability to provide effective enforcement of investors' rights as set out in the treaty.
- Under certain legal systems treaty rights may still be enforced through the action of national courts. Such option, however, is normally not feasible under common law.
- In most probability treaty disputes would have to be settled on the State-State level. However, States may not wish to engage in such dynamic.

Treaty examples: Australia-USA FTA (2004), Australia-Malaysia FTA (2012), Japan-Philippines EPA (2006)

6. Investor Obligations and Responsibilities

6.1 Investor Responsibility

Traditional IIAs provide for State obligations but do not specify investor obligations, leaving this matter to national laws. Provisions on investor responsibility may help achieve a result in which both actors in the investor-State relationship have rights and obligations. In doing so, States send a policy message that investors carry certain responsibilities in the countries they operate and that failure to live up to these responsibilities may be detrimental for benefiting from the protection afforded by the treaty.

Existing treaty practice lacks well-established common approaches to investor responsibility, although some countries have taken steps in this direction. This is an evolving area of IIA rulemaking where a variety of measures have been explored. Three sets of rules have emerged as potentially relevant for regulating investor conduct through an IIA: (1) host State laws and regulations; (2) universally recognized standards of business conduct; and (3) corporate social responsibility (CSR) standards.

Common elements

1. **Responsibility for violations of host State laws**
 - a. Obligation to comply with host State laws and regulations
 - b. Sanctions for non-compliance with host State laws and regulations
 - i. *Right of host States to bring counterclaims*
 - ii. *No sanctions set out in the treaty*
2. **Obligation (binding or non-binding) to comply with universally recognized standards of business conduct**
 - a. Obligation directed at States
 - b. Obligation directed at investors
3. **Obligation (binding or non-binding) to comply with CSR standards**
 - a. Obligation directed at States
 - b. Obligation directed at investors

This provision interacts with: *Definition of Investor of a Party*
 Definition of Investment
 Investor-State Dispute Settlement
 Investor responsibility elements in Transparency

1	States decide whether the treaty should include investors' obligation to comply with host State's domestic law.
1.a	The treaty includes an obligation for investors to comply with host State laws and regulations. ➤ It goes beyond a requirement that an investment should be <i>made</i> in accordance with host State laws and regulations (see <i>Definition of Investment</i>) and applies to both the entry and post-entry stage of investment (including the post-operation stage, e.g. environmental clean-up). ➤ It is rarely found in traditional IIAs.

	➤ It does not affect the content of relevant domestic laws and regulations but rather, by re-iterating investors' duty to comply, it sends a policy message that investors, alongside States, carry certain obligations under the IIA. ➤ This approach does not affect the general principle that domestic laws must be in line with the country's international obligations, including those found in the IIA. ➤ It can improve investor compliance because it gives the State additional means to enforce domestic laws on the international level, i.e. in the context of ISDS. ➤ The relevance of domestic law is enhanced when it comes to exceptions (jurisdictional or on the merits) filed by the Contracting Party against which the claim has been brought. <i>Foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State.</i> ➤ Southern African Development Community Protocol on Finance and Investment (2006) <i>COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.</i> ➤ Agreement for the COMESA Common Investment Area (2007)
1.b.i	The treaty gives the host State a right to bring counterclaims. ➤ It allows a host State, against which an investor initiated international arbitration proceedings, to bring counterclaims based on investor's non-compliance with domestic laws and regulations. ➤ It resolves some procedural problems which otherwise prevent respondent States from successfully bringing counterclaims. ➤ In some circumstances it may deter investors from bringing claims against the host State in the first place. ➤ This mechanism may give rise only to <i>counterclaims</i> (i.e. claims brought by States after the commencement of arbitration proceedings against them by investors), and not to separate claims. This is because IIAs do not contain investors' consent to arbitration; such consent is given only when an investor itself starts arbitration proceedings against the host State. <i>A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.</i> ➤ Agreement for the COMESA Common Investment Area (2007)
1.b.ii	The treaty does not set out sanctions for investors' non-compliance with domestic laws and regulations. ➤ It provides less clarity and predictability and leaves this matter to the determination of arbitral tribunals.

	➤ It is likely that an arbitral tribunal will take into account an investor's non-compliance, whether for jurisdictional purposes or in respect of the final decision on the merits. For instance, a claim brought by an investor may fail because it relates to an interest not clearly defined by domestic law, or an allegation of breach to the Fair and Equitable Treatment standard may fail because the investor acted recklessly or with bad faith. ➤ Although unlikely, a tribunal may allow a host State's counterclaim even if not explicitly provided for.
2	States decide whether the treaty should encourage investor compliance with universally recognized standards of business conduct.
2.a	The treaty imposes an obligation <i>on States</i> to take measures to ensure investor compliance with universally recognized standards of business conduct such as the ILO Tripartite MNE Declaration or the UN Guiding Principles on Business and Human Rights.
	➤ It is in line with traditional international-law approach which is historically seen as regulating relations between, and imposing obligations on, States rather than private parties (investors). ➤ It usually implies (1) incorporation of relevant norms into the State's domestic legislation, (2) further monitoring that businesses respect these norms, (3) cooperation of the Contracting Parties in these matters. ➤ It can employ differing normative intensity: from encouragement, to best-efforts provision to a binding obligation. ➤ If properly implemented by States, it can increase investor compliance with the relevant standards. ➤ In the context of investor-State arbitration, it may be difficult for the respondent State to use this clause against the non-complying investor because under this clause the investor does not bear any direct obligation. ➤ Depending on the formulation used, this provision could be a subject of State-State dispute settlement proceedings.
	<i>The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia through domestic legislation, to ensure that:</i> <i>(a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment.</i> <i>(b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.</i>

	(c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties. (d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment. ➤ EC-CARIFORUM Economic Partnership Agreement (2008)
2.b	The treaty includes a direct obligation <i>on investors</i> to comply with universally recognized standards of business conduct such as the ILO Tripartite MNE Declaration or the UN Guiding Principles on Business and Human Rights. ➤ It goes beyond a traditional approach to IIA rulemaking and sends a policy message that not only host States, but also investors carry obligations under the IIA. ➤ In their business practices, investors must conform to the minimum universally recognized standards. ➤ It expects investors to conform to the relevant standards regardless of whether they have been incorporated in the host State's domestic law. ➤ In certain cases it may require carrying out corporate due diligence relating to social and environmental risks. ➤ It implies (or may stipulate so expressly) that non-compliance may be considered by a tribunal when interpreting and applying treaty protections or determining the amount of compensation due to the investor. <u>Investors of one Contracting Party in the Territory of the other Contracting Party shall abide by its national laws and act in accordance with internationally accepted standards applicable to foreign investors.</u> ➤ Botswana Draft Model BIT
3.	States decide whether the treaty should encourage investor compliance with CSR standards. CSR stands for voluntary adherence by companies to good business practices in the areas such as the environment, labour rights, anti-bribery, disclosure, consumer interests and competition. The relevant rules and standards are codified in a number of non-binding international instruments, e.g. the UN Global Compact, the OECD Guidelines for Multinational Enterprises, ICC Guidelines for International Investment or the ISO 26000 standard "Guidance on Social Responsibility" as well as many industry association codes.
3.a	The treaty imposes an obligation on the Contracting States to respect CSR standards
	➤ It is in line with traditional international-law approach which historically is seen as regulating relations between, and imposing

	obligations on, States rather than private parties (investors). ➤ It may or may not name a particular set or sets of CSR standards. ➤ Relevant State action in IIAs has included encouraging compliance with relevant CSR instruments. ➤ Under this clause, the investor does not bear any direct obligation. In addition, CSR standards are voluntary and thus not readily enforceable.
	<u>The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.</u> ➤ Norway Draft Model BIT (2007) <u>Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.</u> ➤ Canada-Colombia FTA (2008)
3.b	The treaty includes an obligation on investors to respect CSR standards
	➤ It goes beyond a traditional approach to IIA rulemaking and sends a policy message that not only host States, but also investors bear certain responsibilities under the IIA. ➤ It may improve compliance with relevant CSR standards, especially if the provision names a particular set of standards with which compliance is sought (e.g. the OECD Guidelines for Multinational Enterprises) or incorporated specific CSR norms into the text of the treaty. ➤ It may foster a more balanced interpretation of the treaty and affect a tribunal's decision on a claim filed by an investor who has engaged in conduct manifestly inconsistent with relevant CSR standards. ➤ However, given the voluntary nature of CSR standards, the obligation can only be of soft-law in nature and thus not readily enforceable.
	<u>Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.</u> ➤ Ghana Model BIT (2008)

No Investor Responsibility clause

Implications	➤ Implementation of CSR guidelines is largely a function of domestic policy. Therefore, the lack of the provision in an IIA may not be in actual prejudice of a CRS policy. ➤ However, inclusion of a CSR clause establishes within an IIA the notion that investors carry responsibilities in the countries they operate. This also may guide tribunals in treaty interpretation.
	Treaty examples: Australia-Thailand FTA (2004), Chile-Peru FTA (2006), Republic of Korea-Dominican Republic BIT (2006).

7. Not Lowering of Standards Clause

7.1 Not Lowering of Standards Clause

This provision discourages the Contracting States from attracting investment through the relaxation of their environmental, labour and/or health and safety standards.

Common elements

1. Obligation to not lower standards
 - a. Domestic standards
 - b. Environmental standards
 - c. Labour standards
 - d. Health and safety standards

This provision interacts with: *Preamble*
 Exclusions from Treaty Scope
 General Exceptions
 Investor-State Dispute Settlement

1	States include a provision on not lowering of standards in respect of certain areas of policy making.
1.a	States undertake to avoid the relaxation of domestic standards as a means to attract investment. These standards generally refer to the environment, labour, health and safety. ➤ It conveys the message that attracting FDI should not result in a “race to the bottom” of countries’ regulatory standards. ➤ It records the Parties’ shared understanding that it is inappropriate to create a more investment-friendly environment by relaxing domestic laws and regulations pertaining to societal well-being. ➤ It can help alleviate concerns that IIAs and investment promotion/attraction policies can hamper environmental, labour, health or other public interest policies. ➤ It constitutes one (although limited) way to give expression to valid policy objectives other than investment protection, in particular environmental protection, decent labour conditions and health and safety standards (on other ways to integrate these and other policy objectives into the treaty, see <i>Preamble</i>, <i>Exclusions from Treaty Scope</i> and <i>General Exceptions</i>). ➤ The normative intensity of the provision may range from encouragement (“should”) to a binding obligation (“shall”). ➤ It does not prevent the Parties from raising standards. <i>The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment from an investor. If a Party considers that the other Party</i>

	<i>has offered such an encouragement, it may request consultations with the other Party. The Parties shall make every attempt through consultations and exchange of information to address the matter.</i> ➤ Canada-Colombia FTA (2008)
1.b	The treaty discourages the lowering of environmental standards. <u>For implications see 1.a above.</u> <i>Each Country shall not encourage investments by investors of the other Country by relaxing its <u>environmental</u> measures.</i> ➤ Japan-Malaysia Economic Partnership Agreement (2006)
1.c	The treaty discourages the lowering of labour standards. <u>For implications see 1.a above.</u> <i>The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in <u>domestic labor laws</u>. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.</i> ➤ US Model BIT (2004)
1.d	The treaty discourages the lowering of health and safety standards. <u>For implications see 1.a above.</u> <i>The Parties recognize that it is inappropriate to encourage investment by relaxing their <u>health, safety,</u> or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such encouragement, the Parties shall consult, upon request, with a view to avoiding any such encouragement.</i> ➤ Korea-Peru FTA (2011)

No Not Lowering of Standards Clause

Implications	➤ States do not include provisions whose content may be considered extraneous to a treaty focusing on the protection/liberalization of foreign investment. ➤ The IIA risks being perceived as harmful to the regulatory frameworks put in place by the Contracting Parties in the pursuit of the public interest. ➤ States lose an opportunity to send a policy message that the IIA will not compromise domestic environmental, labour, health, safety or other public interest policies. Treaty examples: Austria-Bangladesh BIT (2000), China-Djibouti BIT (2003), Chile-South Africa BIT (1998).
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8. Investment Promotion

8.1 Investment Promotion¹⁸

Provisions of investment cooperation and promotion require or encourage the Contracting Parties to undertake activities aimed at fostering reciprocal investment flows.

The objective of these provisions is to strengthen the promotional character of the treaty by directly engaging the Contracting Parties into various cooperation and promotion activities, beyond their passive role of abiding by a number of standards and rules on investment protection.

Common elements

1. General obligation to promote and encourage investment
2. Co-operation activities
3. Assistance & support
4. Improvement of the investment climate
5. Institutional overseeing mechanisms

1	The Contracting Parties undertake a general obligation to “promote investments”.
	➤ A general obligation to promote investments emphasizes the promotional character of the treaty but, on its own, hardly helps to attract investment or to otherwise facilitate the implementation of the treaty. ➤ It can be formulated as a best-efforts clause or in a legally binding manner; however, even if formulated as legally binding, it can hardly be enforced due to its extreme vagueness. ➤ It is a statement of intent that lacks operational content. It may end up as an “empty shell”, with no material effects in practice. Its usefulness depends on the will and action of States. ➤ It may lend support for investor-friendly interpretation of substantive treaty standards and protections.
	<u>Each Contracting Party shall in its territory <i>promote as far as possible investments</i> by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.</u> ➤ China-Switzerland BIT (2009) <u>Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its right to exercise powers</u>

¹⁸ For a literature and case law review see *Investment Promotion Provisions in International Investment Agreements*, UNCTAD/ITE/IIT/2007/7, 119 pages, Sales No: E.08.II.D.5 available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=419>

	<i>conferred by its laws and regulations regarding the specific approval in writing (where applicable) of the investments, shall admit such investments.</i> ➤ Hong Kong, China-Thailand BIT (2005)
2	The Contracting Parties endeavour to take concrete steps in order to promote investments, such as the exchange of information, including on investment opportunities, and the organisation of seminars. ➤ The Contracting Parties reinforce the promotional function of the treaty. ➤ The Contracting Parties agree to take positive actions after the treaty enters into force. ➤ The supply of qualitative and strategic information may be helpful to increase investment opportunities. ➤ It lacks specific operational content. It may end up as an “empty shell”, with no material effects in practice. Its usefulness depends on the will and action of States. ➤ It can be formulated as a best-efforts clause or in a legally binding manner; however, even if formulated as legally binding, it can hardly be enforced due to the lack of specific commitments and deadlines. ➤ The production of information or the organization of seminars may be costly. Improperly organized, they would not generate any meaningful result. ➤ To be implemented, these activities do not necessarily need to be included in the treaty. However, their inclusion may give an impetus for relevant actions by each Contracting Party. <i>1. Each Party, with the intention to significantly increase flows of investments of investors of the other Party, <u>may facilitate detailed information</u>, both to the other Party and investors of the other Party, regarding:</i> <i>a) investment opportunities in its territory;</i> <i>b) national legislation which, directly or indirectly, affects foreign investment including, among others, exchange regimes and those of fiscal nature.</i> <i>2. Each Party may provide to the other Party aggregated information on foreign investment in its country with respect to its origin, economic activities benefited, investment modalities and other which may be available.</i> <i>3. Upon request of any investor of one Party who will make an investment in the territory of the other Party, the latter shall provide the information legally available to fully assess the legal situation of the assets comprised by the investment in question.</i> ➤ Cuba-Mexico BIT (2001) (unofficial translation) <i>The Parties <u>shall cooperate</u> in promoting and increasing awareness of China-ASEAN as an investment area through, amongst others:</i> <i>(a) increasing China-ASEAN investments;</i>

	<i>(b) <u>organizing investment promotion activities</u></i>; <i>(c) <u>promoting business matching events</u></i>; <i>(d) <u>organizing and supporting the organization of various briefings and seminars on investment opportunities</u> and on investment laws, regulations and policies; and</i> <i>(e) conducting <u>information exchanges</u> on other issues of mutual concern relating to investment promotion and facilitation.</i> ➤ ASEAN-China Investment Agreement (2009)
3	The Contracting Parties endeavour to provide mutual assistance and support. As an option, this provision may be undertaken by a more developed State for the benefit of a less developed State. ➤ It may be helpful particularly in agreements where a developing country may benefit from the assistance and support of the developed country. ➤ When integral to the treaty, it can send a message that the treaty, apart from granting protection, pursues economic growth and development objectives. This may be useful for interpretation purposes. ➤ It functions as a statement of intent, without specific commitments or deadlines. Its usefulness depends on the will and action of the Contracting Parties. <i>The objectives of this cooperation and technical assistance are to:</i> <i>(1) facilitate implementation of Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) of the Agreement;</i> <i>(2) provide support for the private sector in Morocco in understanding business opportunities regarding investment and cross-border trade in services in the United States; and</i> <i>(3) assist the private sector in Morocco in understanding how U.S. state measures may affect these opportunities.</i> <i>The Governments of the United States and Morocco will cooperate in the future, subject to their respective funding procedures, in:</i> <i>(1) identifying specific investment and cross-border services sectors in the United States of interest to the private sector in Morocco;</i> <i>(2) identifying specific states in the United States of interest to the private sector in Morocco;</i> <i>(3) educating Moroccan enterprises about business opportunities in the United States in the identified sectors and states; and</i> <i>(4) educating Moroccan enterprises about U.S. state measures in the identified sectors and states that affect investment and cross-border trade in services.</i> ➤ Morocco-USA FTA, Side Letter (2004)

4	The Contracting Parties endeavour to improve their respective investment climates in order to promote reciprocal investment flows. ➤ It may create an incentive for sound regulatory reform. ➤ Some of the measures to be taken may be costly and difficult to implement. ➤ It can be formulated as a best-efforts clause or in a legally binding manner; however, even if formulated as legally binding, it can hardly be enforced due to the lack of specific commitments and deadlines. ➤ An improvement of the investment climate cannot be generated by the treaty itself. It is a statement of intent; its usefulness depends on the will and action of States. ➤ To be implemented, these activities do not necessarily need to be included in the treaty. However, their inclusion may give an impetus for relevant actions by each Contracting Party. ➤ It may lend support for investor-friendly interpretation of substantive treaty standards and protections.
	<u>Member States shall endeavour to cooperate in the facilitation of investments into and within ASEAN through among others:</u> (a) <u>creating the necessary environment for all forms of investments;</u> (b) <u>streamlining and simplifying procedures for investment applications and approvals;</u> (c) <u>promoting dissemination of investment information, including investment rules, regulations, policies and procedures;</u> (d) <u>establishing one-stop investment centres;</u> (e) <u>strengthening databases on all forms of investment for policy formulation to improve ASEAN's investment environment;</u> (f) <u>undertaking consultation with the business community on investment matters; and</u> (g) <u>providing advisory services to the business community of the other Member States.</u> ➤ ASEAN Comprehensive Investment Agreement (2009) <u>Subject to their laws and regulations, the Parties shall cooperate to facilitate investments amongst China and ASEAN through, amongst others:</u> (a) <u>creating the necessary environment for all forms of investment;</u> (b) <u>simplifying procedures for investment applications and approvals;</u> (c) <u>promoting dissemination of investment information, including investment rules, regulations, policies and procedures; and</u> (d) <u>establishing one-stop investment centres in the respective host Parties to provide assistance and advisory services to the business sectors including facilitation of operating licences and permits.</u> ➤ ASEAN-China Investment Agreement (2009)
5	The Contracting Parties set up an institutional mechanism charged, among other things, with facilitating and monitoring the implementation of treaty obligations relating to mutual assistance, cooperation and investment promotion. ➤ It may help to operationalize the treaty provisions on investment

	promotion and cooperation. States may monitor if the agreed investment activities have actually taken place and take corrective measures if necessary. ➤ It can serve as a platform for exchanging information, joint consultations, requesting technical assistance or other support. ➤ States do not need a provision in order to hold meetings or review the implementation of a treaty. However, providing for a standing institutional mechanism in the treaty may serve as a mandate and give an impetus for relevant actions by the Contracting Parties. 1. The Parties hereby <u>establish a Committee on Investment</u>, comprising representatives of each Party. 2. The Committee shall provide a forum for the Parties to consult on issues related to this Chapter that are referred to it by a Party. 3. The Committee shall meet at such times as agreed by the Parties and should work to promote cooperation and facilitate joint initiatives, which may address issues such as: (a) <u>capacity building</u>, to the extent resources are available, in legal expertise on investor-State dispute settlement, investment negotiations and related advisory matters; (b) <u>promoting corporate social responsibility</u>; and (c) <u>other investment-related issues identified as a priority by the Parties.</u> ➤ Canada-Colombia FTA (2008) 1. The Parties hereby establish a <u>Committee on Investment</u> (Investment Committee) consisting of representatives of the Parties. 2. The Investment Committee shall meet within one year from the date of entry into force of this Agreement and thereafter as mutually determined by the Parties. Meetings may be conducted in person, or by any other means as mutually determined by the Parties. 3. The Investment Committee's functions shall be: (a) to oversee the discussions referred to in Article 16.1 and 16.2 (Work Programme); (b) to <u>review the implementation of this Chapter</u>; (c) <u>to consider any other matters related to this Chapter identified by the Parties</u>; and (d) to report to the FTA Joint Committee as required. ➤ ASEAN-Australia-New Zealand FTA (2009)
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No investment promotion clauses

Implications	➤ States focus on investment protection as the main objective of the treaty. ➤ States use investment protection an indirect tool to foster investment (noting the difficulty of establishing a causal relationship between the two). ➤ States do not incorporate provisions which, given their nature, are difficult to operate or materialize. ➤ States lose an opportunity to (i) send messages regarding the object and purpose of the treaty, and (ii) set an institutional basis for collaboration and promotion activities. Treaty examples: Australia-USA FTA (2004), Canada-Peru FTA (2008), Chile-Mexico FTA (1998)
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9. Final Provisions

9.1 Treaty Duration and Termination

This provision sets out the period of treaty duration, and may also include a mechanism for treaty extension and specifications as regards the consequences of the treaty's termination.

Common elements

1. Duration

- a. Initial binding period with automatic renewal
- b. Indefinite duration

2. Protection after termination ("survival clause")

1	States decide for how long the treaty shall remain in force. In the absence of a treaty rule, general provisions of the 1969 Vienna Convention on the Law of Treaties will apply. Although in principle a State may denounce the treaty by giving at least twelve month's prior notice, interpretation problems could arise, as under Art. 56 of the 1969 Vienna Convention on the Law of Treaties the possibility of termination must have been intended or can otherwise be inferred from the treaty. Termination may be therefore difficult to be effected.
1.a	The treaty shall remain in force for a fixed period of time. Thereafter, it shall remain in force indefinitely albeit either Contracting Party may freely terminate it by giving a prior written notice. ➤ It offers certainty as regards the minimum time during which the treaty will be in place. The initial fixed period of treaty duration prevents a State from denouncing the treaty before its expiration without breaching the treaty. ➤ Automatic extension of the treaty duration signals the general intention of the States to protect investments on a long-term basis. ➤ It also allows for the continuation of the treaty without the need of engaging into new negotiations. In any case, the Contracting Parties, at the end of the initial term, may renegotiate or terminate the treaty if they are not comfortable with its content or the way it is applied. <i>(2) This Agreement shall remain in force for a period of ten years, and shall continue in force, unless terminated in accordance with paragraph (3) of this Article.</i> <i>(3) Either Contracting Party may, by giving one year's written notice to the other Contracting Party, terminate this agreement at the end of the initial ten (10) year period or anytime thereafter.</i> ➤ Chile-Vietnam BIT (2000)
1.b	The treaty shall remain in force indefinitely until either Contracting Party terminates it by giving prior written notice.

	➤ It signals a long-term commitment but at the same time allows a Contracting Party to terminate the treaty if, at any point in time, it becomes inconsistent with the policy objectives of the State. ➤ It may result in an early termination due to opportunistic or political considerations. ➤ It does not provide investors with certainty as to the minimum duration of the treaty although this can be remedied by a “survival clause” which keeps the treaty protections in place for a number of years after it is terminated. ➤ A notice period (usually one year) allows time to the other Contracting State and investors concerned to consider their options and the optimal course of action. <i>This Agreement shall remain in force unless either Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Party.</i> ➤ Canada-Peru BIT (2006)
2	States decide whether investments already made continue to enjoy protection after the treaty has been terminated.
2.a	The treaty shall remain in force for a stated period after its termination, albeit solely with respect to investments established by the time of the treaty termination (“survival clause”). ➤ It mitigates to some extent the adverse effect on investors of a possible treaty termination by prolonging the protective effect of the treaty on existing investors, including their right to file investor-State claims. ➤ It prolongs the exposure of the State to international responsibility even after the treaty’s termination. ➤ It may create distortions amongst foreign investors, as established investors would enjoy the treaty protection whereas newcomers would not. ➤ It is important to consider the exact duration of the “survival” period, balancing the guarantee of continuity with the need to fully extinguish the operation of the treaty within a reasonable time after its termination. <i>In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 2 to 12 shall remain in force for a further period of ten years from the date of termination of this Agreement.</i> ➤ Ethiopia-Spain BIT (2006)