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The Protection of Foreign Investment in Africa.

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INTRODUCTION

During colonial domination, FDI flows towards Africa originated almost entirely from mother-countries. Once African countries gained independence, they were unprepared to manage the increase of FDIs originating from third countries. Newly independent countries had neither been able to contribute to the development of international investment law. Consequently, a strong mistrust against a system they did not have had any part in creating emerged among African states. They were convinced that international investment law was the latest attempt of ex mother-countries to perpetuate their domination over the continent. This diffidence translated in the initial rejection of consolidated international rules. The initial marginal role of African states and the following doctrinal lack of consideration of regional dynamics have motivated my decision to focus on the continent. My purpose is to present the possible scenarios foreign investors can find or could expect when deciding to invest in Africa, specifically in terms of the level of protection and security they are legally entitled to and should realistically expect given the socio-political and economic conditions of host states.

The protection of FDIs is one of the elements on which international investment law is grounded and has always had a primary relevance. Even historically, investment's protection and security has been one of the first standards codified in international investment agreements. In the last years, the focus has shifted to other standards and principles (like the promotion of FDIs, fair and equitable treatment or expropriation), while host states' obligations to ensure full protection and security have not received the attention they deserve yet.

Thus, the objective of the first part of the dissertation will be to define and critically analyse African states' obligations with regard to the full protection and security standard. Particular attention has to be reserved to the recent debate on the exercise of either physical or legal protection required of host states and possible implications in terms of establishing a link between full protection and security and other standards of international investment law, such as fair and equitable treatment. The level of protection host states should grant arises the further question whether one of the factors influencing such evaluation should be the level of development of states. This issue is of particular relevance in relation to Africa, given the relevant number of developing or least-developed countries and their actual ability or willingness of assuring protection to foreign investors and their investment. The question needing an answer is whether full protection and security can be applied considering the social, economic and political framework of a country or it is a standard that has to be evenly applied to all states, independently from their level of development.

The best way to answer these questions is to firstly consider international law's sources, namely bilateral and regional treaties, as well as customary international law. Regional investment agreements will be separately considered from BITs, in order to determine whether states have been adopting different approaches towards the standard at the regional level. Considering the similarities and differences among African IIAs can prove helpful in the final purpose of verifying whether a regional practice has arisen or

African states have conformed to the consolidated general interpretation. The analysis of arbitral jurisprudence (mainly considering investment disputes involving African countries) and doctrine will be the further step. Considering arbitral awards will have the benefit of verifying the existence of a consolidated jurisprudence or the formation of a new one, as well as unveiling host states' definition and approach towards the standard. The analysis of doctrinal debates will be useful to integrate the conclusions deriving from the study of sources of law and jurisprudence, and to verify whether there have been significant contributions to the clarification of any eventual doubtful point. This first part dedicated to the full protection and security standard will be completed with the inclusion of an interpretation of the standard, in accordance with international rules on interpretation. Ultimately, I will present some remarks on few issues characterising the present debate on full protection and security, like the standard of liability, the opportunity of broadening the standard's interpretation, its relationship with other standards and the necessity of applying the standard taking into consideration other factors such as the level of development of host states.

The standard's interpretation, and particularly the debate on the due diligence principle, clearly highlight the necessity of deepening the study and to focus on the issue of state responsibility for host states' failure to protect and secure foreign investment. The purpose of establishing a complete normative framework of full protection and security would be incomplete without considering the connected issues of attribution and, then, the defences invoked by host states to avoid the attribution of responsibility for their conduct. For this reason, the second part of the dissertation will deal with the question of attribution to the host state of acts threatening or affecting the security of foreign investment. ILC Articles on State Responsibility will play a decisive role, since this part has been organised to mirror the structure of the Draft Articles. They will provide the normative framework for the ascertainment of host states' responsibility for internationally wrongful acts and their consequences. I will associate specific circumstances of responsibility, which I consider typical of the African continent, to every ILC Article from 4 to 11. The purpose is to identify in which circumstances the conduct of an organ, an entity or an individual is more likely to be attributed to a host state, as well as the nature and status the entity or individual has to have in order to allow the attribution of its conduct.

The conduct of state organs, entities exercising governmental authority and entities acting under the instructions, direction or control of the state will be closely analysed, mainly because they have been invoked as residual grounds of attribution of conduct in investment disputes. The difficulty of qualifying the entities that cannot clearly be framed in a specific category will be solved through the application of different tests depending on whether the provision of reference is either Articles 4 or 5, or Article 8. In the first case, the "structural and functional test" will play a central role. In the latter circumstance, the objective will be ascertaining which test, between the "overall control test" and the "effective control test", is more suitable to be applied. In relation to Article 4, more attention will be given to the conduct of states' judiciary, police and armed forces. Concerning Article 5, the focus will be mainly on those entities entitled with the exercise of both governmental authority and commercial duties by host states. Then, there will be a separate analysis of the peculiar phenomenon of Private Military and Security Companies (PMSCs) hired by African states, in

order to determine whether and to which ILC Article their conduct can be traced back. Then, attention will shift to the conduct of individuals or groups which can be reconnected to Articles 9 to 11, respectively concerning the conduct carried out in the absence or default of the official authorities, the conduct of an insurrectional or other movement and the conduct acknowledged and adopted by a State as its own. In this part, particular attention will be reserved to the actions of revolutionary movements, terrorist groups and private individuals.

A related scenario needing to be carefully considered while discussing attribution because of its frequency in Africa, concerns state failure and its implications since it represents a serious challenge to the possibility of correctly deploying foreign investment and of attributing responsibility to host states. In the past, episodes of state failure have concerned almost exclusively Sub-Saharan Africa, but after the so called Arab Spring even North African countries have been interested by different degrees of state failure or collapse. The current increase of similar episodes undoubtedly affects stable and secure FDI flows. The partial or entire absence of national authorities could cause states' inability to effectively protect foreign investment, in accordance with international obligations. The purpose is to answer to whether and what extent failed states can be hold responsible for their failure in assuring full protection and security to foreign investment. Once these attribution issues have been considered, I will attempt to define and present alternative protection means on which foreign investors can rely during the worsening of states' national stability as a consequence of war, revolutions, increased episodes of terrorist attacks, economic crisis.

As previously mentioned, the defences typically invoked by African states against claims grounded on their alleged failure to protect and secure foreign investment are the last issue that has to be considered, in order to complete the analysis of the normative framework and the circumstances connected to the full protection and security standard. The study of arbitral jurisprudence has allowed me to organise this last section so to reflect the defences which have been invoked by African countries in the attempt of avoiding the attribution of responsibility. However, as it has been done for the previous part, the attempt has also been to mirror the structure of the part of ILC Articles dealing with circumstances precluding wrongfulness.

Force majeure and state of necessity are the circumstances precluding wrongfulness most frequently invoked. The main issue needing to be extensively examined, is whether these rules can be referred only to circumstances of physical damages occurred to foreign investment, deriving from situations of grave national socio-political instability, or can be extended so to cover also economic crisis. The analysis of arbitral practice is a fundamental step to clarify the issue and attention will be reserved also to disputes involving non-African states, since there has been the development of a considerable jurisprudence of states invoking these circumstances in situation of economic crisis. This is a scenario which could interest the continent, even though at the moment it does not typically characterise African countries, and of which foreign investors should be aware while assessing the risks of investing in the continent. Also in this case, state failure needs to be considered in relation to the possibility of invoking circumstances precluding wrongfulness. The possibility of attributing responsibility to host states for their failure to protect foreign

investment rises the question whether these countries will be able to invoke these circumstances in the attempt of not being held liable.

Any consideration on state of necessity cannot be separated from the analysis of BITs non-precluded measures clauses. These provisions concerning the treatment which should be expected by foreign investor in peculiar circumstances have a peculiar formulation which has led several states and arbitral panels to interpret them as a reference to the necessity customary rule. The frequent attempts made by states of establishing a direct connection between the customary rule on state of necessity and non-precluded measures clauses urge an in-depth study, so to determine whether states do or do not rely on the latter clauses as a means to jeopardise foreign investment by not complying with security obligations. The consideration of BITs clauses will need to be integrated with both states considerations and arbitral panels' conclusions, in order to confirm whether they represent or not a codification of the necessity customary rule.

The last group of defences usually invoked by African states to exclude their international responsibility for the failure in protecting foreign investors, include the right of protecting cultural property, of expelling foreigners and the consequences to the suspension of diplomatic and consular relations. The urgency of addressing these defences also derives from the increasing states' practice of relying on them as a means to further obstacle foreign investors and their investment from operating in their territories. The suspension of diplomatic or consular relations has been progressively dealt with in both bilateral and regional investment treaties, thus states' discretionary margin in affecting the execution of foreign investment has been limited. On the contrary, more attention has to be reserved to states' right of expelling foreigners since it has not been the object of codification in IIAs yet. Concerning the protection of cultural heritage, there have been improvements thanks to the interpretive work of arbitral tribunals. The work of those panels will also allow to address the issue of the application of provisions and principles of international law which are usually applied in relation to human rights or the protection of cultural heritage also to investment law.

Ultimately, since BITs texts will constitute such an essential element of the entire dissertation, a few conclusive remarks seem necessary. Since the end of the decolonisation process, African countries have concluded almost 900 BITs and approximately 500 have entered into force, while over 300 have only been signed and ratifications are pending. Another relevant data concerns the states parties to BITs. The most part of BITs, around 700, have been concluded between an African country and a state from a third continent, while only about 150 treaties have been concluded between African states. For the present analysis, I have been able to consider the provisions of about 500 bilateral agreements concluded by African countries.

The difficulties in finding the texts of the BITs and even the uncertainty of the dates in which they have been either signed or entered into force have been the two main obstacles which have prevented to carry out a complete study of these BITs. These challenges are normally experienced since, in some cases, it is not an easy task to find and collect all the BITs concluded by a country¹. In the last years, international

¹ I mostly relied on the databases of the ICSID, which provided only the dates of the signature and the eventual entry into force of the treaties, the one of the UNCTAD, which includes both relevant dates and the texts of the agreements, the database of Kluwer

organisations and private institutions have perceived the problem and started to create or update databases with more reliable information. Even national governments have actively operated in order to improve their national databases and offer a more up-to-date service to their investors wishing to invest abroad². These national databases are organised to offer legal advises to nationals, like the economic, legislative and political situation of the host country, and they often include a list of the BITs concluded by each country with the dates of entry into force and the text of the agreement. Nevertheless, these databases are not entirely reliable because the data they provide may differ from each other and, in certain cases, the discrepancies are absolutely significant and contribute, in this way, to increase the level of uncertainty towards African BITs and their effectiveness. Even though these sources are not entirely satisfactory, their joint analysis could bring to an approximate identification of the status of BITs ratification.

The research of BITs concluded by African states has proven to be even more challenging. The most part of national governments have never created such databases and, even when they have, the largest part of them either do not provide all sensitive information or have not been updated for a very long time. Moreover, in a lot of cases, it has not been possible to find the texts of the BITs. The uncertainty on the status of BITs ratification and the lack of other relevant information has affected also the creation and update of international databases concerning the African continent. For the above-mentioned reasons, it has not been possible to entirely fulfil the objective of considering all the existing BITs concluded by African states.

The attempt has been to mention only those BITs which have certainly entered into force between states. But, in some cases, I have considered also BITs that have only been signed by contracting parties, in order to highlight certain relevant aspects. These treaties do not bind contracting states, but at the same time, the principle of *bona fide* and states' "obligation not to defeat the object and purpose of a treaty prior to its entry into force", as expressed in Article 18 of the Vienna Convention on the Law of Treaties, can be applied. Thus, the obligation of contracting states to behave in accordance with international agreements which have not already entered into force has allowed the consideration of a wider number of BITs.

Arbitration and Investment Claims, which have been organized in a way similar to UNCTAD's, and the Investment Claims website provided by Oxford University Press. The respective links to the websites are: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main>; [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx); <http://www.kluwarbitration.com/CommonUI/BITs-countries.aspx>; <http://oxia.ouplaw.com>.

² The most reliable national investment databases include: Agence Nationale de Développement de l'Investissement - Algeria (www.andi.dz); Board of Investment - Mauritius (www.investmauritius.com); Bases documentaires du Ministère des affaires étrangères et européennes - France (<http://basedoc.diplomatie.gouv.fr>); Board of Investment - Mauritius (www.investmauritius.com); Federal Ministry of Science, Research and Economy - Austria (www.en.bmwf.gv.at); Foreign Affairs, Trade and Development Canada (www.international.gc.ca); Ministry of Economic Development - Italy (www.sviluppoeconomico.gov.it); Ministry of Finance – Government of India (<http://finmin.nic.in>); Office of the United States Trade Representative (www.ustr.gov/trade-agreements/bilateral-investment-treaties); Overheid.nl – The Guide to Dutch Government Information and Services (<https://treatydatabase.overheid.nl>); UK Treaties Online (<http://treaties.fco.gov.uk>). On the contrary, among the not entirely satisfactory databases it is possible to include, for several reasons: Agence de Promotion de l'Industrie et de l'Innovation - Tunisia (www.tunisieindustrie.nat.tn); Board of Investment - Pakistan (<http://boi.gov.pk>); Caisse des Dépôts et de Développement - Mauritania (www.cdd.gov.mr); Conseil Présidentiel pour l'Investissement - Burkina Faso (www.cp-investburkina.bf); General Authority for Investment - Egypt (www.gafi.gov.eg); Investir au Sénégal (www.investinsenegal.com); Invest Barbados (www.investbarbados.org); Invest in Turkey - Investment Support and Promotion Agency (www.invest.gov.tr).

1. The origins of the full protection and security standard.

1. The emergence of the protection standard.

Since the 17th century, the principle of protection was considered as an element to evaluate the "standard of civilisation" of host states³. The primary objective of every state was to reassure that their subjects and properties abroad would have received a basic level of protection, not inferior to that assured to nationals of host countries. The principle of security could be better defined as protection "against any unjust act" and it did not take in consideration the form of the property needing protection⁴. Thus, not specifying whether protection could be applied exclusively to tangible or also to intangible property, host states were inclined to grant a level of protection which went beyond the simple physical or police protection.

The idea of adapting the principle of protection also to international investment law started to rise after the decolonisation of South America, between the 18th and 19th centuries, when new markets suitable for the export of capitals emerged. After Latin America's decolonisation, European ex-mother countries had to develop new instruments, not implying the use of force, to assure the protection of their citizens and their properties by newly independent host states. The Treaties of Friendship, Commerce and Navigation (FCN Treaties) concluded since the end of the 18th century were the first examples of international legal instruments addressing aliens' protection without the possibility for mother countries to intervene in their citizens' protection by using force. These treaties were mainly focused on commerce and navigation, rather than on foreign investment, but in the parts concerning aliens' protection, they referred to the obligation of the host state to guarantee protection and security by assuring that aliens would have enjoyed the same level of protection granted to national citizens⁵. The FCN Treaties concluded by the United States of America are clear examples of contracting parties' commitment of granting citizens of the other party and their properties the "same protection" or the "special protection" granted to host state's nationals⁶. One of the most recurrent formulation of the obligation to protect aliens states that "both the contracting parties, promise, and engage formally, to give their special protection to the persons and property of the citizens of each other, of all

³ See Weiler T., *The Interpretation of International Investment Law. Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, Martinus Nijhoff Publishers, Leiden – Boston, 2013, p. 59-62.

⁴ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1118 and ff. See also Weiler T., *The Interpretation of International Investment Law. Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, Martinus Nijhoff Publishers, Leiden – Boston, 2013, p. 59-61.

⁵ See Vandeveld K. J., *The Bilateral Investment Treaty Program of the United States*, Cornell International Law Journal, Issue 21, 1988, p. 203-204. See also Vandeveld K. J., *The BIT Programme: A Fifteen-Year Appraisal*, American Society of International Law Proceedings, Vol. 86, 1992, p. 533. See also Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005, p. 72. See also Salacuse J. W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, The International Lawyer, Vol. 24, 1990, p. 656. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 109. See also Gudgeon K. S., *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, Berkeley Journal of International Law, Vol. 4, Issue 1, Spring, 1986, p. 107-108. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 83. See also Leal-Arcas R., *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing, Cheltenham – Northampton, 2010, p. 188. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 218.

⁶ See, for instance, the Treaties between the US and Brazil, ratified in 1828, the US and Belgium, ratified in 1875, the US and Bolivia, ratified in 1858, and the US and Venezuela, ratified in 1836.

occupations, who may be in the territories subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the Tribunals of Justice for their judicial recourse on the same terms which are usual and customary with the natives or citizens of the country in which they may be".

The structure of those treaties changed over the years in order to meet new historical and commercial challenges⁷, but their main features were maintained and used as a basis for the agreements concluded in the next century⁸. The obligation to assure protection and security to foreigners and their properties assumed a customary nature during the 19th century⁹ and it has been at the origin of present provisions concerning investment security¹⁰. The contemporary formulation of the full protection and security standard grounds its roots in the FCN Treaties concluded in that period¹¹, even though those agreements still concerned aliens' protection and trade, and the protection of foreign investment was a marginal issue¹².

The exponential increase of trades worldwide between the end of the 19th century and the beginning of the 20th century and the increasing reliance on the obligation of host states of protecting aliens urged states to develop a form of protection able to include aliens' investment-related activities¹³. During that period, treaties' provisions on aliens' security were similar to those included in agreements concluded in previous

⁷ See Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 182.

⁸ See Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 58. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 84. . See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 208. See also Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 180. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 24. See also McLachlan C., Shore L., Weiniger M., *International Investment Arbitration. Substantive Principles*, Oxford University Press, Oxford, 2007, p. 214.

⁹ See Schefer K. N., *International Investment Law, Texts, Cases and Materials*, Edward Elgar Publishing Limited, Cheltenham, 2013, p. 5. See also Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 180. See also Dolzer R., Schreuer C. H., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012. See also Vandevelde K. J., *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, 2005, p. 159-161. See also Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1120-1121. See also Root E., *The Basis of Protection to Citizens Residing Abroad*, American Journal of International Law, Issue 4, 1910, p. 521 and ff. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 186. See also Weiler T., *The Interpretation of International Investment Law. Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, Martinus Nijhoff Publishers, Leiden – Boston, 2013, p. 95.

¹⁰ See Alvarez, *The Once and Future Investment Regime*, in Arsanjani M. H., Cogan J. K., Sloane R. D., Wiessner S. ed., *Looking to the Future: Essays on International Law in Honour of Michael Reisman*, Martinus Nijhoff Publishing, 2010, Chapter 33, p. 610. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 47. See also Subedi S. P., *International Investment Law. Reconciling Police and Principle*, Hart Publishing, Oregon, 2012, p.8. The author affirms that the international law of foreign investment originated from the provision on aliens' protection, thus it could be assumed that even the customary rule on investment protection and security originated from the same provisions.

¹¹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, supra note, p. 307. See also Subedi S. P., *International Investment Law – Reconciling Police and Principle*, Hart Publishing, Oregon, 2012, p. 8. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 84. See also Diehl A., *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, International Arbitration Law Library, Vol. 26, Kluwer Law International, 2012, p. 36. See also Mahmood N., *Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States*, The Journal of World Investment & Trade, Vol. 14, 2013, p. 80.

¹² See Pollan T., *Legal Framework for the admission of Foreign Direct Investment*, Eleven International Publishing, 2006, p. 71. See also Vandevelde K. J., *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, 2005. See also Al Faruque A., *Creating Customary International Law Through Bilateral Investment Treaties: a Critical Appraisal*, Indian Journal of International Law, Vol. 44, Issue 2, April-June, 2004, p. 293. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 218.

¹³ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 11-12. See also Vandevelde K. J., *The Bilateral Investment Treaty Program of the United States*, Cornell International Law Journal, Issue 21, 1988, p. 205. See also Al Faruque A., *Creating Customary International Law Through Bilateral Investment Treaties: a Critical Appraisal*, Indian Journal of International Law, Vol. 44, Issue 2, April-June, 2004, p. 293.

centuries¹⁴. That practice confirmed that that approach was still "well-established"¹⁵, but at the same time, the FDIs and international investment law were evolving into their present shape¹⁶.

According to some commentators, it was during those years that the customary rule on the promotion and protection of foreign investment focused mainly on the physical level of protection¹⁷. The focus on physical protection was mostly due to the need of capital-exporting countries to balance the tendency of host states to mistrust foreign investors (and the possibility that diffidence would translate into acts of violence) and the belief of capital-exporting states that local authorities would have not been able to adequately protect their investment¹⁸.

That trend seemed to have reflected also on arbitral disputes. A relevant part of arbitral disputes judged between the end of the 19th century and the 20th century related to aliens' protection. Generally, arbitral panels referred to host states' obligation of exercising due diligence towards aliens, in other words a "duty of vigilance", as a fundamental part of their obligation of protection. Their analysis on the level of vigilance which should be expected from host states led to the conclusion that at least physical protection was included in the concept of protection. The *Neer* tribunal dealt with the failure of police authorities in protecting aliens and concluded that a reasonable level of protection required to the host state was police protection. *Home Insurance Co.* concerned the alleged failure of Mexican armed forces to protect a cargo of coffee against damages deriving from an attempted coup d'état. The tribunal focused on states' "duty to protect the persons and property" and defined it as states' "duty as sovereign to take all reasonable measures to protect"¹⁹. In the *Spanish Zone of Morocco Claims*, the tribunal pointed out that the most relevant aspect of this duty was that the state had to act both on the "physical level", granting a peaceful and stable domestic framework, and on the assurance of "normal administrative and judicial conditions"²⁰. Accordingly, aliens' protection could concern, not only physical security, but also the administrative and judicial levels.

2. Difficulties of codifying the standard of protection and security at the multilateral level.

Particularly during the 20th century, several attempts were made to codify the protection standard at the multilateral level. The League of Nations was one of the first international organisations pursuing the codification of the customary rule on protection and security of aliens. The League's Covenant attempted to codify the customary rule on protection and security of aliens. Article 23(e) of the Covenant stated the

¹⁴ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 11-12. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, p.21.

¹⁵ See Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, p. 245. See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 23.

¹⁶ See Leal-Arcas R., *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing, Cheltenham – Northampton, 2010, p. 181.

¹⁷ See Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 218. See also Wilson R. R., *The International Law Standard in Treaties of the United States*, Harvard University Press, Massachusetts, 1953, p. 103-104. See also Dugan C. F., Wallace D., Rubins N., Sabahi B., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, p. 533.

¹⁸ See Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, p. 218.

¹⁹ See *The Home Insurance Co. Case (United States of America v. United Mexican States)*, UNRIAA, Vol. 4, March 31, 1926, p. 52.

²⁰ See *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 642.

necessity to "secure and maintain... equitable treatment"²¹, following the same path traced in the previous decades. Protection and security and equitable treatment were believed "as equivalent or at least overlapping"²², as equitable treatment was a means to assure the protection of foreigners. The Covenant was the only multilateral treaty that codified the standard of protection and security in that period. In the end, the debate between industrialised countries, Latin American states and the Soviet Union, as well as the worsening of international relations and the subsequent withdrawal of several Member States, prevented the League from effectively pursuing its objective of codifying international law.

After the end of World War II, during the negotiations of the Havana Charter, which should have brought to the establishment of the ITO, states participating to the negotiations failed to include an effective set of rules on investment protection²³. Article 12 was the only generic provision regarding investment and specifically concerned FDI's role in fostering economic development and reconstruction. The provision included a generic obligation for host states to adequately secure "existing and future investments" and to refrain from 'unreasonable or unjustifiable action'. Anyway, the Havana Charter would have represented a failure even though it would have entered into force. Firstly, it failed to codify the fundamental standards of investment law. Secondly, Article 11 included an encouragement for member states to proceed with the conclusion of "bilateral or multilateral agreements on measures designed", making almost useless the clauses of the Charter.

The OECD partially succeeded in including a provision on due diligence in its draft "Convention on the Protection of Foreign Property", in 1967. However, as for the Havana Charter, this attempt of ruling the issue of the protection of foreign property failed as the Convention never entered into force. Two aspects of the document are note-worthy. Article 1 required states to assure the "most constant protection and security" to aliens' property²⁴, a formulation frequently used in following BITs and borrowed from BITs concluded by the US. The commentary to the Draft Convention spread some light on the way to interpret the standard. According to Comment 5, the standard should have been interpreted as an "obligation... to exercise due diligence as regards actions by public authorities as well as others"²⁵. Also Comment 4, dealing with the fair and equitable treatment standard, had a relevant role²⁶. In the first place, the drafters referred to the theory

²¹ The text of the Covenant of the League of Nations, which was adopted in 1924, can be found at the following link: http://avalon.law.yale.edu/20th_century/leagcov.asp.

²² See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1128.

²³ The Havana Charter can be found at the following link: www.wto.org/english/docs_e/legal_e/havana_e.pdf.

²⁴ Article 1(a) states that "each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter".

²⁵ See Comment 5 to the Draft Convention on the Protection of Foreign Property. It states that "most constant protection and security must be accorded in the territory of each Party to the property of nationals of the other Parties. Couched in language traditionally used in the United States Bilateral Treaties, the rule indicates the obligation of each Party to exercise due diligence as regards actions by public authorities as well as others in relation to such property".

²⁶ See Comment 4 to the Draft Convention on the Protection of Foreign Property. It affirms that "the phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that –subject to essential security interests– protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by

that it was included in the customary rule on the international minimum standard of treatment. Finally, the commentary addressed the issue of the relationship between the standards of full protection and security and fair and equitable treatment. It clarified that the two standards were related and probably overlapping²⁷, in the sense that the level of protection fair and equitable treatment afforded in accordance with the Convention "shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law". The drafters of the Convention used a formulation very similar to the one included in Article 1 of the Abs-Shawcross Draft Convention²⁸. There have been scholars defining the draft Convention as mainly reflecting the position on the international minimum standard elaborated by developed capital exporting countries²⁹, possibly because of the use of expressions typical of US BITs and the reference to the international minimum standard of treatment.

The latest attempt of adopting a multilateral treaty on foreign investment has been that of the MAI (Multilateral Agreement on Investment) within the OECD. By far, the text of the MAI was the most complete, since it ruled the main standards concerning foreign investment, and somehow presented a structure similar to that of BITs. Section IV of the MAI was reserved to investment protection and included the obligation to accord foreign investors "full and constant protection and security". The lack of agreement among negotiating parties on fundamental issues such as human rights and environment protection caused the MAI not to enter into force. The inability of adopting a multilateral investment treaty has jeopardised the much needed achievement of a shared international investment legal framework, as well as the possibility of observing the way states interpret the main standards of international investment law.

3. The principle of due diligence.

States' obligation of protecting aliens has been intertwined with the obligation of exercising due diligence since the early stages of the formation of the customary rule on protection. Grotius had already laid the grounds of the concept of due diligence in the 17th century, while affirming that rulers' liability can derive from the allowance of a crime. He then added that in this specific circumstance it "is required, to produce this liability, not only knowledge, but the power of prevention"³⁰. The jurist pointed out that a subject, not

international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law". The document can be found at the following link: <http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf>.

²⁷ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1140.

²⁸ Article I states that "each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures". The provision has been reported- in Schwarzenberger G., *The Abs-Shawcross Draft Convention on Investment Abroad. A Critical Commentary*, Current Legal Problems, Vol. 14, 1961, p. 217.

²⁹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, supra note, p. 30. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 112.

³⁰ See Grotius Hugo, Whewell W. transl., *De iure belli ac pacis*, Cambridge University Press, Cambridge, 1853, Book II, Chapter XXI, *On the Communication of Punishment*, paras. 1-4, p. 252. Grotius affirmed that "a Civil Community, like any other Community, is not bound by the act of an individual member thereof, without some acts of its own, or some omission... But of the

only can, but is also "bound to prevent... [the] commission of the offence"³¹. The features of due diligence would have developed in the following centuries.

In the 19th century, due diligence started to assume its present articulation, as it has been confirmed also by several arbitral tribunals of that period. In the *Alabama Case*, the tribunal had to determine whether Great Britain had failed to comply with its neutrality duties in the American Civil War, in relation to the sale of ships to the Confederation. The award had the merit of introducing the concept of due diligence³². The rules established by the parties for the dispute's solution mentioned due diligence in relation to states' neutrality obligations. For its part, the tribunal concluded that the UK had omitted to exercise "all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality"³³. The tribunal acknowledged the flexibility of the due diligence concept when it recognised it had to be "exercised... in exact proportion to the risks to which either of the belligerents may be exposed"³⁴.

Initially, due diligence was perceived as a "sectorial rule" as it was introduced with respect to the field of war and specifically state neutrality, but it was soon extended to other areas³⁵. The different backgrounds of arbitral disputes help identifying the areas in which due diligence has been referred to³⁶: the protection of states' national security, like in the *Alabama Case*, or economic interests, like in *US v. Arjona*. The latter dispute concerned the counterfeiting of Colombian currency and bonds in the US. This conduct had already been judged unlawful according to US national laws, but the Supreme Court considered the issue also from the perspective of the obligation of punishing "offenses against the law of nations", which required states to act diligently³⁷. Another group of awards has concerned the protection of states' organs or representatives operating in the host state, like the *Chapman* case regarding the wounding of an US Consul.

The "transition" of due diligence from a neutrality rule into a general principle on the treatment of aliens has also had the consequence of intertwining the concepts of due diligence and protection, posing the grounds for the following obligations of protection included in international investment law. By the end of the 19th century, Justice Moore in his dissenting opinion attached to the *SS Lotus case*, while referring to a decision rendered by the United States Supreme Court in 1887, affirmed there already was a consolidated

ways in which rulers come to share in the crime of others, there are two which are most common, and require diligent consideration: their allowing or their receiving... With regard to allowing... he who knows of the commission of the offence, who can and is bound to prevent it, and who does not, does himself offend... there is required, to produce this liability, not only knowledge, but the power of prevention".

³¹ See Grotius Hugo, Whewell W. transl., *De iure belli ac pacis*, Book II, Chapter XXI, para. 4, p. 252.

³² See *Alabama Claims (United States of America v. Great Britain)*, UNRIAA, Vol. 29, Award, September 14, 1872, p. 129-130.

³³ See *Alabama Claims (United States of America v. Great Britain)*, p. 130-131.

³⁴ See *Alabama Claims (United States of America v. Great Britain)*, p. 129.

³⁵ See Ouedraogo A., *La neutralité et l'émergence du concept de due diligence en droit international. L'affaire de l'Alabama revisitée*, *Journal of the History of International Law*, Vol. 13, 2011, p. 309. See also Zeitler H. E., *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, *Stockholm International Arbitration Review*, Vol. 3, 2005, p. 11.

³⁶ In this sense, it is helpful the categorisation of these areas provided by Pisillo Mazzeschi which I will try to refer to since I believe it concretely helps in further defining the debate on due diligence. See Pisillo Mazzeschi R., *"Due diligence" e responsabilità internazionale degli stati*, Giuffrè Editore, Milano, 1989, p. 2 and ff.

³⁷ See *United States v. Arjona*, US Supreme Court, Case No. 120 U.S. 479 (7 S. Ct. 628, 30 L. Ed. 728), March 7, 1887. The sentence can be retrieved at the following link: www.law.cornell.edu/supremecourt/text/120/479.

obligation for states to prevent the occurrence of "criminal acts" against third countries and their citizens by relying on the due diligence principle³⁸.

In the 20th century, due diligence acquired a primary role in disputes concerning aliens' protection and arbitral panels seemed to agree on the main features of the concept. These awards have had such a prominent role that they have been frequently recalled by other international arbitral tribunals. Disputes generally dealt with damages perpetrated by state organs, private individuals, revolutionary groups or bandits to aliens or their properties. In the *Spanish Zone of Morocco Claims*, the tribunal focused on the issue of state responsibility for injuries occurred to the life and properties of aliens (British citizens) and on the obligation of the host state's authorities (Spanish authorities) to protect them. *Sambiaggio* and *Neer* respectively concerned the responsibility of the host states for their failure in protecting the lives and properties of foreign citizens located in their territories from the damaging activities of revolutionary groups, in the first case, and bandits, in the second case. The *Janes* case concerned the murder of an US citizen by the hand of a former employee of the mining company they had been working for. In *Youmans v. Mexico*, the tribunal discussed the violent acts perpetrated during a riot and the participation of Mexican armed forces.

Among the main features attributed to the concept of due diligence, those arbitral tribunals referred to the fact that international law did not support the idea of states' strict liability³⁹. The duty of "due diligence" also covered both the actions and omissions of the host government in preventing the occurrence of damages to aliens⁴⁰. In the event the commission of a crime was an unforeseeable event for national institutions, they would have been compelled to punish⁴¹ the individuals or the entities responsible⁴¹. In a similar situation it would have been even possible to talk about "derivative liability", since the host state could be considered as an accomplice of the perpetrator and responsible for the consequences of the crime⁴². Then, the *Neer* tribunal affirmed that governmental actions, and consequently the due diligence concept, "should be put to the test of international standards"⁴³. The *Chapman* tribunal followed a similar path qualifying these characteristics of due diligence as "general principles", normally applied in international jurisprudence⁴⁴.

The *Spanish Zone of Morocco Claims* further helped in determining the content of due diligence. Arbitrator Huber referred to the fundamental principle of *diligentia quam in suis* affirming that states' obligation of vigilance, as established by international law, "may be characterized as *diligentia quam in*

³⁸ See *SS Lotus Case (France v. Turkey)*, PCIJ, Series A, Case No. 10, Dissenting Opinion by Justice Moore, September 7, 1927, p. 88.

³⁹ See *Sambiaggio Case (Italy v. Venezuela)*, Italy-Venezuela Mixed Claims Commission (1903), RIAA, vol. X, 1960, p. 499. For a summary of the case, Grant J. P., Barker J. C., *Parry and Grant Encyclopaedic Dictionary of International Law*, 3rd Edition, Oxford University Press, Oxford, 2009, p. 538.

⁴⁰ See *Chapman W. E. (USA) v. United Mexican States*, UNRIAA, Vol. 4, October 24, 1930, p. 634. See also *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 642. See also *United States v. Arjona*.

⁴¹ See *Janes L. M. B. et al. (USA) v. United Mexican States*, UNRIAA, Vol. 4, November 16, 1925, p. 86-87. See also *Chapman W. E. (USA) v. United Mexican States*, p. 634. See also *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 642. See also *Youmans T. H. Case (United States of America v. United Mexican States)*, UNRIAA, Vol. 4, November 23, 1926, p. 115. In *Neer*, the claimants attempted to convince the tribunal that Mexican authorities had "showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits". See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, UNRIAA, Vol. 4, Decision, October 15, 1926, p. 61. See also *United States v. Arjona*.

⁴² See *Janes L. M. B. et al. (USA) v. United Mexican States*, p. 86.

⁴³ See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, UNRIAA, Vol. 4, Decision, October 15, 1926, p. 61.

⁴⁴ See *Chapman W. E. (USA) v. United Mexican States*, p. 634.

suis"⁴⁵. Originally, the principle set in Roman Law required debtors to perform their obligations with a certain level of diligence in order not to increase their responsibility. Scholars have been arguing the possibility of linking the concepts of due diligence and *diligentia quam in suis*. The latter principle has been qualified as establishing a national treatment, thus binding states to exercise due diligence adapting to the expectable level of specific circumstances⁴⁶. There have also been commentators suggesting that the level of due diligence states should exercise cannot be equated to that normally adopted at the national level, but should be "commensurated to international standards of conduct"⁴⁷. In this way, these commentators seem to support the opinion about the existence of an international minimum standard of treatment which includes also an obligation to act diligently.

The due diligence concept is rather flexible and changes on a case-by-case basis⁴⁸. This changing nature has been addressed in arbitral awards where due diligence has been interpreted as a duty of not building objects within a state's territory that would be used to breach a neutrality obligation⁴⁹, as a duty of prevention⁵⁰ or as a duty of apprehending and punishing perpetrators⁵¹. Due diligence has evolved so to require states to do everything reasonably expectable in their power to avoid that damages occur to foreigners and their properties. In a similar scenario, international tribunals seem to have a significant interpretive freedom in determining what constitute a diligent conduct in each case⁵².

Two recent cases judged by the ICJ, namely the *Corfu Channel Case* and the *Congo Case*, allow to verify how due diligence has recently evolved. The *Corfu Channel Case* concerned the damaging of British warships and the casualties deriving from the explosion of mines positioned in the Albanian waters of the Channel. Albania was aware of the mines present in its territorial waters, but failed to refer their presence to approaching British warships causing their explosion. The ICJ believed that it would have been impossible for Albania not to have direct knowledge that a minefield had been laid down and that, consequently, Albania had an incumbent obligation of notifying the presence of that minefield⁵³. The ICJ, in the *Congo Case*, focused on the occupation of a part of Congo's territory by Uganda and of the conduct of the former's

⁴⁵ See *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 644.

⁴⁶ See Brownlie I., *Principles of Public International Law*, Oxford University Press, Oxford, 2008, p. 504. See also Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 310.

⁴⁷ See Pisillo Mazzeschi R., "Due diligence" e responsabilità internazionale degli stati, p. 398.

⁴⁸ See Pisillo Mazzeschi R., "Due diligence" e responsabilità internazionale degli stati, p. 15 and 400. See also Ouedraogo A., *La neutralité et l'émergence du concept de due diligence en droit international. L'affaire de l'Alabama revisitée*, p. 308.

⁴⁹ See *Alabama Claims (United States of America v. Great Britain)*, p. 130.

⁵⁰ See *Chapman W. E. (USA) v. United Mexican States*, UNRIAA, Vol. 4, October 24, 1930, p. 634. See also *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 642. See also *United States v. Arjona*.

⁵¹ See *Janes L. M. B. et al. (USA) v. United Mexican States*, UNRIAA, Vol. 4, November 16, 1925, p. 86-87. See also *Chapman W. E. (USA) v. United Mexican States*, p. 634. See also *Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924)*, UNRIAA, Vol. 2, 1949, p. 642. See also *Youmans T. H. Case (United States of America v. United Mexican States)*, UNRIAA, Vol. 4, November 23, 1926, p. 115. In *Neer*, the claimants attempted to convince the tribunal that Mexican authorities had "showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits". See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, UNRIAA, Vol. 4, Decision, October 15, 1926, p. 61. See also *United States v. Arjona*.

⁵² See Ouedraogo A., *La neutralité et l'émergence du concept de due diligence en droit international. L'affaire de l'Alabama revisitée*, p. 308-309.

⁵³ See *Corfu Channel Case (United Kingdom v. Albania)*, ICJ Reports, 1949, Judgement, April 9, 1949, p. 20-22.

armed forces⁵⁴. Uganda was expected to restore "public order and safety" as well as to observe international human rights law and international humanitarian law in the occupied Congolese territory.

In both disputes, the focus was on states' obligation to exercise due diligence through prevention. In the *Corfu Channel Case* Albania failed to act diligently because it did nothing "to prevent the disaster", despite its knowledge of the dangerous situation in that area, and consequently the state was held responsible for the explosions⁵⁵. In the *Congo Case*, "Uganda's responsibility [was] engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory"⁵⁶. Accordingly, an occupying state and, even more, the legitimate government of a country have a duty of vigilance on the activities of both public forces and private actors operating in the territory they control.

4. Attempts of codifying the due diligence principle.

The interest of arbitral tribunals for due diligence and the frequent reliance on the principle has not been similarly followed by doctrine that has not contributed in the clarification of the content of due diligence in any relevant way⁵⁷. There have been very few, and eventually unsuccessful, attempts of codifying the principle in international agreements.

The Harvard Law School, for instance, presented in 1929 and 1961 two draft conventions aimed at ruling the circumstance of state responsibility arising as a consequence of damages suffered by aliens. The draft conventions respectively concerned the "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners" and the "International Responsibility of States for Injuries to Aliens". Article 10 of the 1929 Draft Convention stated that state responsibility would have arisen as a consequence of damages occurred to an alien if the state failed "to exercise due diligence to prevent the injury"⁵⁸. The drafters underlined how due diligence should have been exercised to prevent the occurrence of a damage to the foreigner and how the failure to exercise it was a ground of attribution of responsibility. The commentary to the provision added that "due diligence is a standard" with a changeable nature proving difficult the determination of its content⁵⁹. Article 13 of the 1961 Draft, which was continuing the debate for the codification of the rules concerning state responsibility⁶⁰, stated that aliens can be protected in the host state only if its institutions act with due diligence. The provision also referred to some requirements that should be complied with by each country for not being held responsible for having breached the obligations on protection. In this latter text, the Law School added that state would have been expected to adopt both

⁵⁴ See *Armed Activities on the Territory of the Congo Case (Republic of the Congo v. Uganda)*, ICJ Reports 2005, Judgment, December 19, 2005.

⁵⁵ See *Corfu Channel Case (United Kingdom v. Albania)*, p. 23.

⁵⁶ See *Armed Activities on the Territory of the Congo Case*, paras. 178-179.

⁵⁷ See Pisillo Mazzeschi R., "*Due diligence*" e responsabilità internazionale degli stati, p. 15.

⁵⁸ See Yearbook of the International Law Commission, Document No. A/CN.4/96, Vol. 2, 1956, p. 229.

⁵⁹ See Pisillo Mazzeschi R., "*Due diligence*" e responsabilità internazionale degli stati, p. 11.

⁶⁰ See the First report on State responsibility by Mr. Roberto Ago, p. 142.

preventive and deterrent measures "against any act wrongfully committed by any person", including the apprehension of the person who perpetrated the crime or wrongful act⁶¹.

One of the most relevant attempts of codification of international law took place at the Hague Conference in 1930, but failed because of states' lack of agreement on the main themes under discussion. The "substantive principles governing the treatment of foreigners" was one of the focal points of the debate and the "Draft Convention on the Responsibility of States for Injuries Caused in their Territory to the Person or Property of Aliens" was one of the documents presented. It was drafted by the German International Law Association and aliens' protection was a central issue. According to the draft, not only host states had to grant the same level of protection they assured to their citizens, but on a case-by-case approach they also had to exercise "diligent care" towards aliens. Article 6 of the Draft Convention concerned the circumstance of state responsibility arising out of the causation of injuries during "riots, insurrections and civil war or in similar cases"⁶². The provision, not only focused on the status of insurgents, but also established that the "diligent care" host states were expected to exercise would have included an obligation to "prevent or counteract the injuries". The draft article also ruled the circumstance the host state failed to intervene and included an obligation assuring foreigners the same levels of protection and compensation normally granted to its citizens.

The interest towards due diligence further diminished when the UN International Law Commission shifted its attention from state responsibility for injuries occurred to aliens to state responsibility for international wrongful acts. The Commission's new purpose was to prioritise the "definition of the general rules governing the international responsibility of states"⁶³. Even in the new path followed by the ILC, due diligence has represented a marginal issue. In the commentaries to the Draft Articles on State Responsibility the ILC has stressed out that the Articles do not "lay down [any] general rule... [on] other standards, whether they involve some... want of due diligence"⁶⁴.

5. Influences of the juxtaposition of developed and developing countries on the development of international investment law.

The period between the World Wars was characterised by two significant trends. The "second wave" of FCN Treaties signed by the United States, after World War I, defined the standard of full protection and

⁶¹ The provision asserts that the "failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful: (a) if the act is criminal under the law of the State concerned; or (b) the act is generally recognized as criminal by the principal legal systems of the world. Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful; to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act".

⁶² See Bories C., *The Hague Conference of 1930*, within Crawford J. ed., Pellet A. ed., Olleson S. ed., *The Law of International responsibility*, Oxford University Press, Oxford, 2010. See the First report on State responsibility by Mr. Roberto Ago, Special Rapporteur - Review of previous work on codification of the topic of the international responsibility of States, Yearbook of the International Law Commission, Document n. A/CN.4/217 and Corr.1 and Add.1, Vol. II, 1969, p. 132 and 149.

⁶³ See Pellet A., *The ILC's Articles on State Responsibility for International Wrongful Act and Related Texts*, within Crawford J. ed., Pellet A. ed., Olleson S. ed., *The Law of International responsibility*, Oxford University Press, Oxford, 2010, p. 76 and 77.

⁶⁴ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 2, para. 3.

security as an "absolute treatment standard". Differently from "relative standards", like national treatment and the most favoured nation treatment, "absolute standards" do not depend on "specific factors, happenings, or government behaviour"⁶⁵. At the same time, a fierce debate on aliens' protection raised as a consequence of some destabilising global changes, such as the Great Depression, the rising of the Soviet Union and the first expropriations carried out by Latin American and Communist states. Latin American states and the Soviet Union stood for the idea that investment protection had to be assured on the basis of a national treatment, recalling the Calvo Doctrine. Industrialised countries believed in the existence of an international minimum standard of treatment which was the object of a customary rule. At that time, the position supported by Latin American countries and the Soviet Union did not influence either doctrine or arbitral tribunals' decisions concerning investment protection. The debate would have been renewed in the 60s and 70s, after the decolonisation of Africa⁶⁶.

The 60s and 70s represented a period of weakness for international investment law, mainly caused by the end of World War II, the decolonisation of Africa and the more frequent expropriations of foreign investment and properties carried out by capital-importing states. The newly independent African states and their support to the cause of other developing countries, allowed the group of developing countries to increase their influence within international *fora*, like the General Assembly of the United Nations. The state of international trade and developing countries' role, raised great concern among industrialised states. For this reason, developing countries opened an intense debate within the General Assembly that ended with the decision of convening the first of a series of Conferences on Trade and Development, which would have later brought to the establishment of the United Nations Conference on Trade and Development (UNCTAD). In the following decades, Africa's economic development would have become one of the issues of greatest concern for the UNCTAD. The debate within the General Assembly also regarded the prevalence of either the international minimum standard of treatment (supported by industrialised states) or the national treatment (supported by capital-importing countries) to be accorded to foreign investors⁶⁷. Ultimately, the position of developing states prevailed for the first time.

Doctrine has given different interpretations of which events caused the crisis of customary international law: the most relevant repercussion of those events concerned customary investment law. World War II represented the breaking-point which showed the weaknesses of customary international rules.

⁶⁵ See Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 86-206.

⁶⁶ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1121. See also Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 202. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 35-36. See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 24.

⁶⁷ See Schwebel S. M., *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, *Transnational Dispute Management*, Vol. 3, Issue 2, April, 2006, p. 1. See also Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *Harvard International Law Journal*, Vol. 46, 2005, p. 69. See also Salacuse J. W., *The Emerging Global Regime for Investment*, *Harvard International Law Journal*, Vol. 51, Issue 2, Summer, 2010, p. 438. See also Salacuse J. W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, *The International Lawyer*, Vol. 24, 1990, p. 659. See also Ofofodile U. E., *Africa-China Bilateral Investment Treaties: A Critique*, *Michigan Journal of International Law*, Vol. 35, Issue 1, 2013, p. 140. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 43.

International investment law was seen as an "ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law"⁶⁸. The end of the conflict had severe effects on both investment processes and the legal framework, but it could not be considered as the only factor causing the crisis of customary international law. The increasing disagreements between developed states and capital-importing countries, and the success of developing countries' point of view played a crucial role in worsening the deep crisis which was affecting customary international rules⁶⁹.

A part of doctrine refuses to recognise that customary international law was undermined by the raising of opposite opinions between developed and developing countries⁷⁰, but I believe this point of view is not embraceable. The debate between the developed and developing worlds started soon after the end of World War I and regained force after Africa's decolonisation. It was a constant trend which characterised international investment law and it should be given the right relevance, while discussing the events which brought to the crisis of customary international investment law. Even the International Court of Justice, in the *Barcelona Traction Case*, recognised that the "intense conflict of systems and interests" strongly influenced the "evolution of the law" on the field of investment protection and prevented the formation of general rules⁷¹.

Developed countries believed that the crisis of customary investment law undermined also the level of security which should have been assured to foreign investors and their investment. They were still convinced that a shared solution was the best approach to fill in the lacunae of customary international law⁷². Several attempts to codify international investment law were carried out, like the Abs-Shawcross Draft Convention on Investment Abroad and the OECD Convention on the Protection of Foreign Property. Both

⁶⁸ See Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 75. See also Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005, p. 68. See also Dolzer R., Von Walter A., *Fair and equitable Treatment – Lines of Jurisprudence on Customary Law*, in Ortino F. ed., Liberti L. ed., Sheppard A. ed., Warner U. ed., *Investment Treaty Law*, Current Issues II, British Institute of International and Comparative Law, 2007, p. 99.

⁶⁹ See Alvarez J. L., *A BIT on Custom*, New York University Journal of International Law & Policy, Vol. 42, 2009, p. 28. See also Elkin Z., Guzman A. T., Simmons B. A., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, International Organisation, Vol. 60, Issue 4, Fall, 2006, p. 813. See also Alvarez, *The Once and Future Investment Regime*, in Arsanjani M. H., Cogan J. K., Sloane R. D., Wiessner S. ed., *Looking to the Future: Essays on International Law in Honour of Michael Reisman*, Martinus Nijhoff Publishing, 2010, Chapter 33, p. 614-617. The author presented Guzman's theory on how LDCs attempted to *topple* existing customary international rules. See also Sornarajah M., *State Responsibility and Bilateral Investment Treaties*, Journal of World Trade Law, Vol. 20, Issue 1, 1986. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 74. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 46-62 (and ff.). See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 25.

⁷⁰ See Alvarez, *The Once and Future Investment Regime*, in Arsanjani M. H., Cogan J. K., Sloane R. D., Wiessner S. ed., *Looking to the Future: Essays on International Law in Honour of Michael Reisman*, Martinus Nijhoff Publishing, 2010, Chapter 33, p. 617-618. See also Pappas M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, Oxford, 2013, p. 25.

⁷¹ In the International Court of Justice's own words, "considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations... it may at first sight appear surprising that the evolution of law has not one further and that no generally accepted rules in the matter have crystallized on the international plane". See *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 46-47.

⁷² See Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 111. See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 110. See also Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 80. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 85.

the Abs-Shawcross Draft Convention⁷³ and the OECD Draft Convention⁷⁴ have generally been considered as models for the investment agreements which have been adopted in the following decades. Nevertheless, the drafts never entered into force because of the lack of consensus between industrialised and developing countries.

6. The international minimum standard of treatment.

The Calvo doctrine was developed in the beginning of the 20th century and states that a country is expected to grant the same treatment to both its citizens and aliens and could be held responsible only if it fails to assure that national treatment. Developed countries, on the contrary, believed that both national and international standards of treatment had to inform the discipline on aliens' protection⁷⁵. The theory on the existence of a so called "international minimum standard of treatment" was discussed about the same period of the Calvo doctrine by former U.S. Secretary of State Elihu Root. He affirmed aliens could have enjoyed the same protection of nationals of the host state provided that treatment "conform[ed] to the established standard of civilisation"⁷⁶. Root believed the general acceptance of the treatment "by all civilized countries" as a fundamental "standard of justice" formed a "part of the international law"⁷⁷. Root referred to "civilised countries" since he believed in the existence of different levels of state civilisation. Such distinction allows the conclusion that only non-entirely civilised countries would have had to apply an international minimum standard of treatment. This level of treatment would have corresponded to the national treatment typically granted in civilised states⁷⁸. The formulation of the standard clearly favoured foreigners and seemed a practice almost exclusively originating from the US (which has been including the standard in their investment treaties⁷⁹) and subsequently adopted by other industrialised countries, since it appeared mostly "based on US domestic law standards"⁸⁰.

⁷³ See Salacuse J. W., *The Emerging Global Regime for Investment*, Harvard International Law Journal, Vol. 51, Issue 2, Summer, 2010. P. 465. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 90. See also Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, Oxford, 2008, p. 48. See also Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1138. See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 110. See also Voss J. O., *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff Publishers, Leiden – Boston, 2011, p. 198. See also McLachlan C., Shore L., Weiniger M., *International Investment Arbitration. Substantive Principles*, Oxford University Press, Oxford, 2007, p. 213.

⁷⁴ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, *supra* note, p. 30. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 113. See also Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969, p. 154. See also Leal-Arcas R., *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing, Cheltenham – Northampton, 2010, p. 186. See also Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague, 1995, p. 61. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 90.

⁷⁵ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1121.

⁷⁶ See Root E., *The Basis of Protection to Citizens Residing Abroad*, American Journal of International Law, Issue 4, 1910, p. 521.

⁷⁷ See Root E., *The Basis of Protection to Citizens Residing Abroad*, p. 521.

⁷⁸ See Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, Transnational Dispute Management, Vol. 10, Issue 4, 2013, p. 2.

⁷⁹ See Sornarajah M., *The International Law on Foreign Investment*, p. 348.

⁸⁰ See Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 36.

In the 40s, the international minimum standard was interpreted as originating from similar "general principles" of the domestic legal systems of civilised countries, thus distinguishing between civilised and less civilised states⁸¹. The standard's foundations have been identified in some "rights to life and the elementary liberties connected with the earning of a living"⁸². However, the flexible nature, the fact that any evaluation on alleged breaches had to be carried out on a case-by-case basis and the lack of clarity in the standard's content have been raising concern. The only certain element characterising the international minimum standard over time has been the so called Hull formula: the obligation to pay "adequate, effective and prompt" compensation for any expropriation to foreigners' property⁸³.

Another issue is whether arbitral tribunals can contribute in further defining the minimum standard and adapting it to modern international investment law⁸⁴. Indeed arbitral awards exercise certain influence on future arbitral practice, even though the rule of precedent does not apply to investment arbitration. In relation to a couple of NAFTA arbitrations, there have been authors suggesting that arbitral tribunals have claimed for themselves a sort of "near-legislative function" in the interpretation of the international minimum standard⁸⁵. The tribunals in *ADF* and *Mondev* referred to the minimum standard as articulated in *Neer* and affirmed the standard necessarily had to evolve from that initial articulation, somehow suggesting their possible active role in the modification of the standard's content⁸⁶. Despite such affirmation, arbitral tribunals cannot influence the evolution of international law. At the most, they could influence states' practice and opinions, indirectly contributing to the evolution of international investment law.

The disputes where arbitral tribunals have been referring to the existence of a minimum standard have generally concerned episodes of expropriations (*Chorzow Factory*, *Norwegian Shipowners* and *Polish Upper Silesia*), violence exercised by private individuals towards aliens (*Neer*), failure to guarantee contractual rights (*Mavrommatis*) and denial of justice (*Roberts and Salem*). These awards have contributed to favour the establishment of "pro-investment and investor-friendly principles"⁸⁷, as well as in defining the areas where the international minimum standard has generally been applied.

Neer has been frequently recalled also in recent disputes as a statement of the international minimum standard of treatment. The tribunal mentioned the circumstances where aliens' treatment amounts to an internationally wrongful conduct: "outrage, bad faith, wilful neglect of duty or an insufficiency of governmental action so far short of international standards"⁸⁸. The most part of the disputes interpreting *Neer*

⁸¹ See Borchard E., *The "Minimum Standard" of the Treatment of Aliens*, Michigan Law Review, Vol. 38, Issue 4, February, 1940, p. 458. Schwarzenberger G., *The Most-Favoured-Nation Standard in British State Practice*, British Yearbook of International Law, Vol. 22, 1945, p. 99.

⁸² See Borchard E., *The "Minimum Standard" of the Treatment of Aliens*, p. 458.

⁸³ See Sornarajah M., *The International Law on Foreign Investment*, p. 128.

⁸⁴ See Sornarajah M., *The International Law on Foreign Investment*, p. 345.

⁸⁵ See Sornarajah M., *The International Law on Foreign Investment*, p. 345-346.

⁸⁶ See *ADF Group Inc. v. United States of America*, ICSID (NAFTA), Case No. ARB(AF)/00/1, Award, January 9, 2003, para. 180. See also *Mondev International LTD. v. United States of America*, ICSID (NAFTA), Case No. ARB(AF)/99/2, Award, October 11, 2002, paras. 114-116.

⁸⁷ See Mahmood N., *Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States*, Journal of World Investment & Trade, Vol. 14, 2013, p. 82.

⁸⁸ See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, p. 61-62.

as reflecting the international minimum standard have concerned NAFTA cases and, thus, relate to a framework where the existence of an international minimum standard of treatment has been recognised as a customary rule. Such interpretation has been fostered particularly by respondent states which believed the minimum standard was an already crystallised customary rule at the time of the release of the *Neer* award⁸⁹. The *Neer* tribunal's affirmation could well be interpreted as a restatement of the minimum standard consolidated at the time of the dispute.

The dispute concerned the conduct of Mexican authorities following the killing of an US citizen allegedly perpetrated by a group of private citizens. It did not concern the treatment reserved to aliens or their property and the tribunal's purpose was not to define the minimum standard⁹⁰. There have been commentators arguing that the dispute has had scant influence in the process defining the international minimum standard of treatment⁹¹. In few NAFTA-related disputes (namely *Mondev*, *ADF* and *Waste Management*) where respondents associated the minimum standard with the above-mentioned statement of the *Neer* tribunal arbitral panels expressed a similar point of view. Those tribunals doubted that the conclusions of *Neer* could be extended beyond the circumstance of injuries caused by privates, so to encompass "the contemporary context of treatment of foreign investors and their investments by a host or recipient State"⁹². *Neer* concerned aliens' physical security, rather than "the treatment of foreign investment as such"⁹³. Nevertheless, the international minimum standard of treatment would not be the only standard extended from the area of aliens' protection to that of foreign investment. The same protection standard or the due diligence principle have been firstly articulated with the purpose of guaranteeing a certain level of protection to individuals abroad. Furthermore, all the elements included in the definition of the *Neer* tribunal, such as "bad faith [or] wilful neglect of duty", have already been extended to the field of foreign investment.

Besides *Neer*, some scholars have been convinced that the international minimum standard of treatment has been at the core of other awards released in the same years by arbitral tribunals and the ICPJ⁹⁴. In *Harry Roberts*, Mexican authorities stated that the claimant had been imprisoned with the same conditions of Mexican nationals, which were deemed insufficient by US authorities. The tribunal affirmed that national treatment should not have been the applicable test, but it should have relied on a test assessing whether aliens had been treated "in accordance with ordinary standards of civilisation"⁹⁵. In *Salem*, the tribunal remarked the existence of a direct link between national legislations (in that case criminal codes) and the "standard of

⁸⁹ See *Mondev International LTD. v. United States of America*, ICSID (NAFTA), Case No. ARB(AF)/99/2, Award, October 11, 2002, para. 114. See also *ADF Group Inc. v. United States of America*, ICSID (NAFTA), Case No. ARB(AF)/00/1, Award, January 9, 2003, para. 180. See also *Pope & Talbot Inc. V. Canada*, Ad Hoc Tribunal, UNCITRAL, Case No. IIC 195, Award on Damages, May 31, 2002, para. 57 and ff.

⁹⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 236.

⁹¹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 237.

⁹² See *Mondev International LTD. v. United States of America*, para. 115. See also *ADF Group Inc. v. United States of America*, para. 181. See also *Waste Management Inc. v. United Mexican States*, ICSID (NAFTA), Case No. ARB(AF)/00/3, Award, April 30, 2004, para. 93.

⁹³ See *Mondev International LTD. v. United States of America*, para. 115.

⁹⁴ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 15.

⁹⁵ See *Harry Roberts (USA) v. United Mexican States*, UNRIAA, Vol. 4, Decision, November 2, 1926, p. 80.

international law"⁹⁶. In *Norwegian Shipowners*, the tribunal referred to "the international public law of all civilised countries"⁹⁷. In *Polish Upper Silesia*, the tribunal referred to the existence of generally accepted principles of international law concerning expropriation⁹⁸. In *Mavrommatis*, the tribunal affirmed that states' right to exercise diplomatic protection represented an "elementary principle of international law"⁹⁹. Then, in *Norwegian Shipowners* and *Chorzow Factory*, the tribunals also focused on the issue of compensation for the damages experienced by the claimants, stating that the payment of compensation was a necessary consequence of an illegal expropriation¹⁰⁰. In *Chorzow Factory*, the ICJ stated that compensation was a principle well consolidated by both international practice and arbitral panels' judgements¹⁰¹.

The initial lack of international agreements specifically ruling the protection of foreign investment urged the consideration of customary international law in the attempt of identifying the standards dealing with investment protection and their characteristics¹⁰². The international minimum standard of treatment represented an attempt made by industrialised countries to foster the development of a generally accepted rule on investment protection. Despite the initial strong opposition, the standard would have become a customary international rule and, according to a part of doctrine, it would have represented "the foundation of modern international investment law"¹⁰³.

⁹⁶ See *Salem Case (Egypt v. USA)*, UNRIAA, Vol. 2, Decision, June 8, 1932, p. 1197.

⁹⁷ See *Norwegian Shipowners' Claims (Norway v. USA)*, UNRIAA, Vol.1, October 13, 1922, p. 332.

⁹⁸ See *Case Concerning Certain German Interests in Polish Upper Silesia*, ICJ, Series A, Case No. 7, Merits, May 25, 1926, p. 22 and 42.

⁹⁹ See *The Mavrommatis Palestine Concessions*, ICJ, Series A, Case No. 2, Judgement, August 30, 1924, p. 12.

¹⁰⁰ See *Norwegian Shipowners' Claims (Norway v. USA)*, p. 332. See also *Case Concerning the Factory at Chorzow (Germany v. Poland)*, p. 31.

¹⁰¹ See *Case Concerning the Factory at Chorzow (Germany v. Poland)*, ICJ, Series A, Case No. 17, Merits, September 13, 1928, p. 47-48.

¹⁰² See Subedi S. P., *International Investment Law. Reconciling Policy and Principle*, Hart Publishing, Oregon, 2012, p. 10.

¹⁰³ See Subedi S. P., *International Investment Law. Reconciling Policy and Principle*, p. 13.

2. The full protection and security standard in African IIAs.

SECTION I. The full protection and security standard in BITs.

1. The reactions of newly independent African states to the first foreign investment flows.

When European countries extended their sovereignty over new African colonies, those territories became the recipients of investments mostly originating from mother-countries¹⁰⁴. At the very beginning of colonisation, European states believed that the continent could be exploited to produce supplies for mother countries and the first wave of investments concerned the agricultural sector (the extended production of goods like cotton, tea, cocoa and sugar). Later, colonies were seen as end markets for metropolitan industry's products and, when colonists found out the existence of large deposits of precious minerals, a second wave of investments focused on the development of the mining sector (the extraction of oil, metals, minerals and precious stones). European investors soon intervened in two complementary fields in order to maximise their profits: the building of facilities to partially process those goods (e.g. factories and power plants for the production of energy) and of infrastructures to transport them. They created an integrated system of production that reduced waste of invested capitals and exponentially increased profits. Another positive outcome for European states was the creation of new monopolist markets where to place their capitals and products.

The exclusive jurisdiction over investment flows in colonial territories belonged to European countries, which adopted specific colonial legislation. Even the protection and security of foreign citizens and their properties was regulated by colonial powers. Pre-colonial local authorities were mostly dismantled or when maintained alive, like in the British colonial regime, they did not have any power in regulating aliens' protection since it had become an exclusive competence of the mother country. Moreover, being a matter of domestic jurisdiction, colonial powers could use all the means deemed necessary to re-establish the circumstances existing prior to the damage to aliens' properties or their physical endangerment. The use of force was among the means that mother countries normally used to stabilise order in the colonies.

The centralisation of legislative power operated by European powers caused the inability of pre-colonial local authorities of contributing to the evolution of existing customary international law, the formation of new rules or the conclusion of trade and investment agreements, since they had lost the sovereignty over their territories¹⁰⁵. It was only between the 60s and 70s, when African colonies gained independence from European domination that the newly independent states directly related with international

¹⁰⁴ See François G., Mariol H., *Législation Coloniale*, Librairie La Rose, Paris, 1929, p. 24. The relevance of investments in the infrastructure sector, specifically on the construction of railroads, have been successfully presented in an article by Jedwab R. and Moradi A., *Colonial Investments and Long-Term Development in Africa: Evidence from Ghanaian Railroads* which can be found at the following link: www.aeaweb.org/aea/2013conference/program/retrieve.php%3Fpdfid%3D93+&cd=1&hl=it&ct=clnk&gl=it.

¹⁰⁵ Elias T. O., *Africa and the Development of International Law*, Kluwer Academic Publishers, Martinus Nijhoff Editor, Dordrecht, 1988, p. 19-20.

investment law and could participate in the formation of customary rules. Their inability to contribute to the development of international investment law would have negatively affected their approach towards foreign investment causing them to distrust FDIs, once they became independent.

2. The "Age of BITs" and the changing approach of African states.

The unstable investment environment and the inability of concluding a multilateral investment agreement, in the years after the end of World War II, pushed industrialised states to pursue the only way left: the conclusion of bilateral investment agreements¹⁰⁶. BITs would have allowed developed countries to include the obligations they deemed necessary for the protection of investment abroad. By the end of the 50s, developed countries started to conclude bilateral investment treaties, following the example of Germany that signed its first BIT with Pakistan in 1959¹⁰⁷. The new practice of concluding investment agreements had the consequence of starting a process of standardisation of state's obligations on investment which interested also the standard of full protection and security. The most frequent formulation of the standard was quite similar to the one included in FCN Treaties: states used to refer to the "most constant protection and security"¹⁰⁸. In the end, customary international law was displaced as the main source of international investment law thanks to the codification of principles in BITs¹⁰⁹. The protection these treaties offered to foreign investors was believed to be more effective and prevailing over the guarantees coming from customary rules.

The 70s and a part of the 80s were characterised by the refusal of African developing states to conclude investment agreements. African countries saw those treaties as a new attempt of industrialised states to impose their point of view, after customary international rules were contested and ultimately rejected during the previous decades. Nevertheless, the acceptance of economic liberalism and the reduction of lending and aids from industrialised countries, caused by the economic recession which stroke developed states¹¹⁰, forced developing countries to accept both FDIs and BITs. The fall of the Soviet Union and the general abandoning of planned economies, also by some of the African states which after decolonisation

¹⁰⁶ See Vandevelde K. J., *The Bilateral Investment Treaty Program of the United States*, Cornell International Law Journal, Issue 21, 1988, p. 209. See also Vandevelde K. J., *The BIT Programme: A Fifteen-Year Appraisal*, American Society of International Law Proceedings, Vol. 86, 1992, p. 534. See also Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005, p. 76. See also Ofodile U. E., *Africa-China Bilateral Investment Treaties: A Critique*, Michigan Journal of International Law, Vol. 35, Issue 1, 2013, p. 138. See also Bernardini P., *Investment Protection under Bilateral Investment Treaties and Investment Contracts*, Journal of World Investment, Vol. 2, 2001, p. 238. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 56. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 77. See also Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 41

¹⁰⁷ The Germany-Pakistan BIT was signed on November 25, 1959, and entered into force on April, 28, 1962.

¹⁰⁸ See Wilson R. R., *United States Commercial Treaties and International Law*, The Hauser Press, New Orleans, Louisiana, 1960, p. 119.

¹⁰⁹ See Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005, p. 70. See also Elkin Z., Guzman A. T., Simmons B. A., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, International Organisation, Vol. 60, Issue 4, Fall, 2006, p. 813. See also Subedi S. P., *International Investment Law. Reconciling Police and Principle*, Hart Publishing, Oregon, 2012, p. 85-88.

¹¹⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 46-48. See also Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 185-186.

chose that economic system, contributed to reduce the reluctance towards the new treatification process. The symbol of the migration to liberalism has been the abrupt increase in the conclusion of BITs, even by and between those developing states¹¹¹ that used to define BITs as a new means of developed countries to exercise their economic hegemony¹¹².

Among the reasons which drove developing states to conclude BITs it is possible to notice the belief that market ideology ultimately prevailed¹¹³, the transformation of some developing states in capital-exporting states¹¹⁴ and the objective of increasing their appeal in order to attract foreign capitals perceived as beneficial for their economies¹¹⁵. In the case of the African continent, many states concluded BITs without being fully aware of what kind of agreements they were accepting¹¹⁶ and of the consequences of the provisions included in those treaties, since they did not participate in the development of the main principles and standard characterising international investment law. Thus, they could not have a clear perception of those obligations and the effect was an underestimation of bilateral treaties' obligations.

According to a different point of view, states were more willing to conclude BITs because they believed that the treaties' provisions included customary international rules which were already consolidated¹¹⁷. Nevertheless, this opinion should be discarded. In fact, having accepted the hypothesis that customary international law ended after the decolonisation of the African continent opposes the above-

¹¹¹ See Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005, p. 74-75. See also Salacuse J. W., *The Emerging Global Regime for Investment*, Harvard International Law Journal, Vol. 51, Issue 2, Summer, 2010, p. 433. See also Salacuse J. W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, The International Lawyer, Vol. 24, 1990, p. 656-658. See also Ofodile U. E., *Africa-China Bilateral Investment Treaties: A Critique*, Michigan Journal of International Law, Vol. 35, Issue 1, 2013, p. 133. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 119. See also Gudgeon K. S., *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, Berkeley Journal of International Law, Vol. 4, Issue 1, Spring, 1986, p. 129. See also Vandeveld K. J., *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, 2005, p. 183. See also Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 42-59. In this part, the author mentioned the belief of developing states that foreign investment were a new form of colonialism. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 91.

¹¹² See also Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 42-59. In this part, the author mentioned the belief of developing states that foreign investment were a new form of colonialism. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 91. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 68. See also Leal-Arcas R., *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing, Cheltenham – Northampton, 2010, p. 184.

¹¹³ See Alvarez, *The Once and Future Investment Regime*, in Arsanjani M. H., Cogan J. K., Sloane R. D., Wiessner S. ed., *Looking to the Future: Essays on International Law in Honour of Michael Reisman*, Martinus Nijhoff Publishing, 2010, Chapter 33, p. 622. See also Alvarez J. L., *A BIT on Custom*, New York University Journal of International Law & Policy, Vol. 42, 2009, p. 42.

¹¹⁴ See also Vandeveld K. J., *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, 2005, p. 169. See also Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p.8-67.

¹¹⁵ See Alvarez J. L., *A BIT on Custom*, New York University Journal of International Law & Policy, Vol. 42, 2009, p. 41-42. See also Vandeveld K. J., *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, 2005, p. 178. See also Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 56-63. See also Subedi S. P., *International Investment Law. Reconciling Policy and Principle*, Hart Publishing, Oregon, 2012, p. 81. See also Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 90. See also Voss J. O., *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff Publishers, Leiden – Boston, 2011, p. 53.

¹¹⁶ See also Voss J. O., *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff Publishers, Leiden – Boston, 2011, p. 53.

¹¹⁷ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1154.

mentioned hypothesis. It seems more plausible that the progressive conclusion of BITs has been an attempt to rebuild a framework of shared rules and principles.

The progressive conclusion of BITs, in which the standard of full protection and security had a primary role¹¹⁸, constituted a victory for developed states. They were able to realise their objective of establishing a "high-level investor protection" system, making it acceptable to developing states, without the inconveniences deriving from contrasting opinions like it would happen at the multilateral level¹¹⁹.

3. Different wording of the rules concerning investment's protection: the "simple" and the "qualified" standard of protection and security.

African BITs are proof of the central role attributed by contracting states to investment protection. It could be argued that it depends from the fact that developed states have imposed their models and their point of view on investment protection to African countries. A similar consideration could have been true at the initial stages of BITs adoption. The passing of time has shown that African states have recognised the importance of investment protection, since they have introduced references to investment protection and security also in the BITs concluded among themselves.

During various decades, African states have adopted different approaches towards the full protection and security standard. Between the 70s and 2000s, some African countries have concluded BITs where the protection and security standard has been mentioned in a more generic way, simply to guarantee that the investment made in the territory of the host state will be protected, without mentioning any qualified degree of protection¹²⁰. In this limited group of treaties there are BITs mainly concluded by Switzerland and China. In the case of China, Article 2 of the Chinese Model BIT states that contracting parties are bound to assure "constant protection and security" to foreign investment¹²¹. On the contrary, some of the BITs concluded

¹¹⁸ See Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 247.

¹¹⁹ See Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013, p. 90. See also Van Harten G., *Investment Treaty Arbitration*, Oxford University Press, Oxford, 2007, p. 23. See also Salacuse J. W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, *The International Lawyer*, Vol. 24, 1990, p. 656. See also Bergman M. S., *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, *New York University Journal of International Law and Politics*, Vol. 16, Issue 1, Fall, 1983, p. 3-11.

¹²⁰ See Article 3 of the Morocco-Switzerland BIT signed on December 17, 1985, and entered into force on April 12, 1991. See also Article 3 of the Uganda-Switzerland BIT signed on August 23, 1971, and entered into force on May 8, 1972. See also Article 11 of the Gabon -Switzerland BIT signed on January 28, 1972 and entered into force on October 18, 1972. See also Article 3 of the Mali-Switzerland BIT signed on March 8, 1978, and entered into force on December 8, 1978. See also Article 3 of the Gambia-Switzerland BIT signed on November 22, 1993, and entered into force on March 30, 1994. See also Article 3 of the Ghana-Switzerland BIT signed on October 8, 1991, and entered into force on June 16, 1993. See also Article 4(1) of the Mauritius-Barbados BIT signed on September 28, 2004, and entered into force on June 18, 2005. See also Article 2 of the Algeria-Romania BIT signed on June 28, 1994, and entered into force on December 30, 1995. See also Article 2(2) of the Uganda-Denmark BIT signed on November 26, 2011, and entered into force on October 10, 2005. See also Article 3 of the Gabon-Spain BIT signed on March 2, 1995. See also Article 3(1) of the Algeria-China BIT signed on October 20, 1996, and entered into force on November 25, 2002. See also Article 3 of the Tunisia-Spain BIT signed on May 28, 1991, and entered into force on June 20, 1994. See also Article 5(1) of the Burkina Faso-Comoros BIT signed on May 18, 2001, and entered into force on August 18, 2003. See also Article 4(1) of the Chad-Benin BIT signed on May 18, 2001, but not entered into force yet.

¹²¹ See Article 2(2) of the Chinese Model BIT of 1997. The document can be found within Douglas Z., *The International Law of Investment Claims*, Cambridge University Press, Cambridge University, 2009, Appendix 5.

with African states merely grant foreign investors that their investment "shall enjoy protection in the territory of the other Contracting State"¹²².

The most part of BITs concluded by African states mention the standard of full protection and security by using various qualifying formulations. Since the first BITs concluded in the 60s, states have preferred to qualify the protection and security standard with specific adjectives. Contracting parties have referred to the protection and security standard using expressions such as "full protection and security"¹²³, "protection et sécurité pleines et entières" (the French alternative to full protection and security)¹²⁴, "constant protection and security"¹²⁵, "adequate protection and security"¹²⁶, "total protection and security"¹²⁷, "integral protection and security"¹²⁸, "continuous protection and security"¹²⁹ and "full and constant protection and security"¹³⁰.

¹²² See Article 3(1) of the Zimbabwe-China BIT signed on May 21, 1996. See also Article 3(1) of the Zambia-China BIT signed on June 21, 1996. See also Article 3(1) of the Ethiopia-China BIT signed in 1998. See also Article 3(1) of the Ghana-China BIT signed on October 12, 1989, and entered into force on November 22, 1991.

¹²³ See Article 2(2) of the Cuba-Ghana BIT signed in 1999. See also Article 2(2) of the United Kingdom-Sierra Leone BIT signed on January 13, 2000, and entered into force on November 20, 2001. See also Article 4(1) of the Germany-Somalia BIT signed on November 27, 1981, and entered into force in 1983. See also Article 3(1) of the Germany-Tanzania BIT signed on January 30, 1965, and entered into force 1968. See also Article 2(2) of the Uganda-France BIT signed on January 3 2003 and entered into force on December 20, 2004. See also Article 2(2) of the Tanzania-Denmark BIT signed on April 22, 1996, and entered into force in 2002. See also Article 2(2) of the United Kingdom-Zimbabwe BIT signed on March 1, 1995. See also Article 2(2) of the Mauritius-Portugal BIT signed on December 12, 1997, and entered into force on January 3, 1999. See also Article 2(2) of the Tunisia-Hungary BIT on May 13, 2003, but not entered into yet. See also Article 2(2) of the Tunisia-Czech Republic BIT signed on January 6, 1997, and entered into force on July 8, 1998. See also Article 2(2) of the Benin-United Kingdom BIT signed and entered into force on November 27, 1987. See also Article 2(2) of the Burkina Faso-South Korea Bit signed on October 26, 2004.

¹²⁴ See Article 4(1) of the Cameroon-China BIT signed on September 10, 1997, but not entered into yet. See also Article 4(1) of the Chad-Lebanon BIT signed on June 15, 2004, but not entered into yet. See also Article of the Madagascar-Mauritius BIT signed on April 6, 2004, and entered into force on December 29, 2005. See also Article 4(3) of the Mauritius-Cameroon BIT signed on August 3, 2001, but not entered into force yet. See also Article 5(1) of the Mozambique-France BIT signed on November 15, 2002, and entered into force on July 6, 2006. See also Article 3(1) of the Nigeria-Switzerland BIT signed on November 30, 2000, and entered into force on April 1, 2003. See also Algeria-Austria BIT signed on June 17, 2003, and entered into force on January 1, 2006.

¹²⁵ See Article 3(2) of the Burundi-Belgium BIT signed on April 13, 1989, and entered into force on September 12, 1993. See also Article 4(2) of the Burundi-Comoros BIT signed in 2001. See also Article 2(2) of the Gabon-Belgium BIT signed on May 27, 1998. See also Article 3(2) of the Tunisia-Belgium BIT signed on January 8, 1997, and entered into force on October 18, 2002. See also Article 2(2) of the Djibouti-China BIT signed on August 18, 2003. See also Article 3(1) of the Ethiopia-Austria BIT signed on November 12, 2004 and entered into force in 2005. See also Article 2(2) of the Nigeria-Finland BIT signed on June 22, 2005, and entered into force on March 20, 2007. See also Article 2(2) of the Ivory Coast-China BIT signed on September 2, 2002.

¹²⁶ See Article 2(2) of the Morocco-India BIT signed on February 13, 1999, and entered into force on February 22, 2001. See also Article 2(2) of the Morocco-Indonesia BIT signed on March 14, 1997, but not entered into force yet. See also Article 2(2) of the Egypt-Zambia BIT signed on April 28, 2000. See also Article 2(2) of the Tunisia-Pakistan BIT signed on April 18, 1996, but not entered into force yet. See also Article 2(2) of the Tunisia-Jordan BIT signed on April 27, 1995, and entered into force on November 23, 1997. See also Article 2(2) of the Algeria-Indonesia BIT signed on March 21, 2000, and entered into force on June 22, 2002. See also Article 2(2) of the Ethiopia-Malaysia BIT signed on October 2, 1998. See also Article 2(2) of the Ghana-Egypt BIT signed on March 11, 1998, but not entered into yet. See Article 2(2) of the Sudan-Jordan BIT signed on March 30, 2000, and entered into force on February 3, 2001.

¹²⁷ See Article 2(2) of the Algeria-Bahrain BIT signed on June 11, 2000, and entered into force on May 16, 2008. See also Article 5(1) of the Algeria-Ethiopia BIT signed on May 27, 2002, and entered into force on March 17, 2005. See also Article 4(1) of the Algeria-Nigeria BIT signed on January 14, 2002 and entered into force on March 3, 2003. See also Article of the Algeria-South Africa BIT signed on September 24, 2000, and entered into force on July 23, 2001. See also Article 2(2) of the Libya-Italy BIT signed on November 21, 2000, and entered into force in 2005.

¹²⁸ See Article 4(1) of the Algeria-Germany BIT signed on March 11, 1996, and entered into force on October 7, 2002. See also the Additional Protocol of the Tunisia-Germany BIT signed on December 20, 1963, and entered into force on February 6, 1966. See also Article 3(1) of the Togo-Germany BIT signed on May 16, 1961, and entered into force on December 21, 1964. See also Article 5(1) of the Guinea-Germany BIT signed on November 8, 2006.

¹²⁹ See Article 3(2) of the Zambia- Belgium BIT signed on May 28, 2001. See also Article 3(2) of the Sudan-Belgium BIT signed on November 7, 2005, but not entered into force yet.

¹³⁰ See Article 2(2) of the Ethiopia-Finland BIT signed on February 23, 2006, and entered into force on May 3, 2007. See also Article 3(1) of the Namibia-Austria BIT signed on May 28, 2003, and entered into force on September 1, 2008. See also Article 2(2) of the Algeria-Greece BIT signed on February 20, 2000, and entered into force on July 23, 2001.

During the last 20 years, in parallel with the general practice of African states of drafting the protection and security standard in the BITs they concluded, there have been some states adopting more innovative definitions. In these cases, full protection and security is linked to other standards or principles addressing the treatment of foreign investment. For instance, a quite large group of BITs concluded by Mauritius formulates the standard of full protection and security by using the expression "fair and equitable protection"¹³¹. All the BITs including this formulation also include a provision on fair and equitable treatment. Thus, it should be asked whether the standard of full protection and security is believed to be a part of fair and equitable treatment, as the combination of the words characterising the two standards seems to allow to conclude. Other BITs further qualify full protection and security by subjecting its application to the implementation of various requirements, like the respect of other BITs provisions¹³², the accordance with domestic legislations¹³³ or the application of a treatment not less favourable than the most favoured nation treatment or national treatment¹³⁴.

The most part of the BITs concluded by African states follow the general practice of referring to the full protection and security standard and, in some cases, BITs include two different provisions on investment security. Nevertheless, there is a group of BITs, mainly concluded during the first phase of the treatification process, not including any provision dealing with investment protection and security.

¹³¹ See Article 3(3) of the Mauritius-Pakistan BIT signed on April 3, 1997, and entered into force on the same day. See also Article 3(3) of the Mauritius-Nepal BIT signed on August 3, 1999, but not entered into force yet. See also Article 3(3) of the Mauritius-Mozambique BIT signed on February 14, 1997, and entered into force on May 26, 2003. See also Article 3(3) of the Mauritius-Indonesia BIT signed on March 5, 1997, and entered into force on March 28, 2000. See also Article 3(3) of the Mauritius-Swaziland BIT signed on May 15, 2000. See also Article 3(3) of the Mauritius-Zimbabwe BIT signed on May 17, 2000, but not entered into force yet. See also Article 3(3) of the Mauritius-Rwanda BIT signed on July 30, 2001, but not entered into force yet. See also Article 3(3) of the Mauritius-Tanzania BIT signed on Mat 4, 2009, and entered into force on March 2, 2013. See also Article 3(3) of the Mauritius-Botswana BIT signed on August 17, 2005, but not entered into yet. See also Article 3(3) of the Mauritius-Egypt BIT signed on July 2, 2003. See also Article 3(3) of the Mauritius-Ghana BIT signed on May 18, 2001, but not entered into yet. For examples from other African states, see Article 3(3) of the Egypt-Botswana BIT signed in 2003.

¹³² This clause has usually been expressed in the following way: "investments approved under Article x shall be accorded fair and equitable treatment and protection in accordance with this Agreement". See Article 3(2) of the Mauritius-Singapore BIT signed on March 4, 2000, and entered into force on April 19, 2000. See also Article 3(3) of the Mauritius-Senegal BIT signed on March 14, 2002, and entered into force on October 14, 2009. See also Article 2(2) of the Tunisia-Romania BIT signed on October 16, 1995, and ratified the next year. See also Article 2(2) of the Algeria-Czech Republic BIT signed on September 22, 2000, and entered into force on April 7, 2002. See also Article 2(1) of the Algeria-Oman BIT signed on April 9, 2000, and entered into force on June 22, 2002. See also Article 2(2) of the Algeria-Romania BIT. See also Article 3(2) of the Mauritius-China BIT signed on May 4, 1996, and entered into force on June 8, 1997. See also Article 2(1) of the Algeria-Bulgaria BIT signed on October 25, 1998, and entered into force on April 7, 2002.

¹³³ The formulation used by BITs precisely recalls this fundamental concept: "chaque Partie Contractante protégera sur son territoire les investissements effectués conformément à ses lois et règlements par des investisseurs de l'autre Partie Contractante". See Article 3 of the Mauritius-Romania BIT signed on January 20, 2000, and entered into force on December 12, 2000. See also Article 3(1) of the Algeria-Spain BIT signed on December 23, 1994, and entered into force on January 17, 1996. See also Article 2(1) of the Algeria-Oman BIT signed on April 9, 2000, and entered into force on June 22, 2002. See also Article 3(1) of the Cape Verde-Switzerland BIT signed on October 28, 1991, and entered into force on May 6, 1992. See also Article 3(2) of the South Africa-Chile BIT signed on November 12, 1998. See also Article 2(41) of the Senegal-USA BIT signed on October December 6, 1983, and entered into force on October 25, 1990.

¹³⁴ The typical formulation used in the BITs states that "chaque Partie Contractante accordera ces investissements, biens, droits, et intérêts au moins la même sécurité et protection qu'elle assure ceux de ses nationaux ou aux investissements de ressortissants et de sociétés d'Etats tiers". See Article 2(2) of the Tunisia-South Korea BIT signed on May 23, 1975, and entered into force on November 28, 1975. See also Article 3(2) of the Algeria-China BIT signed on October 20, 1996, and entered into force on November 25, 2002. See also Article 2(2) of the Mauritius-France BIT signed on March 22, 1973, and entered into force on April 1, 1974; the new BIT, negotiated in 2010, has not entered into force yet. See also Article 3(4) of the Rwanda-Belgium BIT signed on November 2, 1983, and entered into force on September 25, 1985. See also Article 1(2) of the Morocco-Belgium BIT signed on April 14, 1999. See also Article 2(2) of the France-Zaire BIT signed on October 5, 1972, and entered into force in 1975. See also Article 3(2) of the Cape Verde-Netherlands BIT signed on November 11, 1991, and entered into force on November 25, 1992.

During the 60s and 70s, Switzerland has been the country which ratified the largest number of BITs without including any reference to the full protection and security standard. Those BITs are "agreements on trade, investment protection and technical cooperation"¹³⁵ and not treaties on the "encouragement and reciprocal protection of foreign investment", like the generality of investment agreements. Despite their titles refer also to investment protection, the provisions dealing with foreign investment do not include any explicit reference to full protection and security. On the contrary, they mention only the standard of fair and equitable treatment linked to the most favourable nation treatment. The typical formulation of the provision on investment protection states that "les investissements, ainsi que les biens, droits et intérêts appartenant à des ressortissants, fondations, associations ou sociétés d'une des Hautes Parties Contractantes dans le territoire de l'autre bénéficieront d'un traitement juste et équitable, au moins égal à celui qui est reconnu par chaque Partie à ses nationaux, ou, s'il est plus favorable, du traitement accordé aux ressortissants, fondations, associations ou sociétés de la nation la plus favorisée"¹³⁶. The Tunisia-Switzerland BIT represents an exception to this trend: it is the only BIT, concluded in that period, where contracting parties made a generic reference to the purpose of protecting private foreign investment¹³⁷.

Sudan¹³⁸ and Senegal¹³⁹ are among the African countries which, between the 60s and the 70s, have concluded more BITs not mentioning either the standard of full protection and security or the security principle. Similarly to the BITs concluded by Switzerland, these treaties mention investment protection only in the titles of some provisions. Nevertheless, the content of these provisions is mostly dedicated to the standard of fair and equitable treatment, to national treatment or to the prohibition of adopting unreasonable or discriminatory measures.

The practice of some states of not mentioning the full protection and security standard has characterised also the texts of some BITs concluded in the 90s and 2000s. It would have been reasonable to expect the end of this practice in conjunction with the development of international investment law and of the guarantees assured to foreign investors. Even though these BITs do not refer to the full protection and security standard, they mention investment protection, at least, in their preambles. The most emblematic

¹³⁵ For a few examples, see Article 7 of the Madagascar-Switzerland BIT signed on March 17, 1964, and entered into force on March 31, 1966 (the two countries have signed a new agreement which is not into force yet). See also Article 4 of the Zaire-Switzerland BIT entered into force on March 31, 1966 (it was later substituted by a newer agreement). See also Article 7 of the Niger-Switzerland BIT entered into force on November 17, 1962. See also Article 6 of the Central African Republic-Switzerland BIT entered into force on July 4, 1973. See also Article 7 of the Burkina Faso-Switzerland BIT signed on May 6, 1969, and entered into force on September 15, 1969. See also Article 7 of the Ivory Coast-Switzerland BIT signed on June 26, 1962, and entered into force on November 18, 1962. See also Article 8 of the Chad-Switzerland BIT signed on February 21, 1967, and entered into force on October 31, 1967.

¹³⁶ See, in this case, Article 7 of the Ivory Coast-Switzerland BIT.

¹³⁷ See Article 5 of the Tunisia-Switzerland BIT signed on December 2, 1961, and entered into force on January 19, 1964. According to the provision: "les Hautes Parties Contractantes conviennent de conclure dès que possible un accord visant à créer les conditions favorables aux investissements privés dans les deux Etats et à établir des modalités d'encouragement et de protection de ces investissements".

¹³⁸ See the Sudan-France BIT signed on July 31, 1978, and entered into force on July 5, 1980. See also the Sudan-Switzerland BIT signed on February 17, 1974, and entered into force on December 14, 1974.

¹³⁹ See Article 7 of the Senegal-Switzerland BIT signed on August 16, 1962, and entered into force on August 13, 1964. See also Article 2(2) of the Senegal-South Korea BIT signed on July 12, 1984 and entered into force on September 2, 1985. See also Article 1 of the Senegal-Sweden BIT signed on February 24, 1967, and entered into force on February 23, 1968.

cases have been the BITs concluded by Algeria¹⁴⁰, Sudan¹⁴¹ and Italy¹⁴². The BITs concluded by Italy are peculiar because they do not mention the full protection and security standard, despite their inclusion of provisions dedicated to investment protection and their reference to the principle of protection in the preambles. The provisions on investment security deal with the fair and equitable treatment standard, thus, the question arising is whether this practice is due to a different way of pursuing investment protection which is grounded on an interpretation of the fair and equitable treatment standard as a standard that *per se* already includes a certain degree of protection.

4. The physical protection of foreign investment.

The period between the 90s and the 2000s represented a turning point in the way full protection and security was perceived. States started to question whether it could be applied to protect foreign investment only from the physical point of view or the possibility of extending protection so to include also legal security, once a shared definition of the standard consolidated. BITs generically mention the necessity of assuring protection and security, but do not contribute to spread some light on the level of protection which should be expected from host states. The very recent practice of including specific references to physical security in the texts of BITs rises as a reaction to the generic formulation of the standard and to the trend of some arbitral tribunals to extend the level of protection including also legal protection.

In the last years, this practice has been quite scarce and not univocal, especially in Africa. Physical security has been the first level of security to be referred to in African BITs. Moreover, it seems likely that the practice of mentioning physical security has either been imposed upon African states from the outside or these countries have conformed to it.

The only consolidated practice of limiting the sphere of application of the standard to the assurance of physical protection to foreign investment has been introduced among African countries by the Netherlands¹⁴³. The vast majority of the BITs concluded by the Netherlands after the 90s include a reference

¹⁴⁰ See Article 3 of the Algeria-Yemen BIT signed on November 11, 1999, and entered into force on July 23, 2001. See also Article 3(3) of the Algeria-Syria BIT signed on September 14, 1997, and entered into force on December 27, 1998. See also Article 2 of the Algeria-Turkey BIT signed on June 3, 1998, but not entered into force yet.

¹⁴¹ See the Sudan-India BIT signed on October 22, 2003, and entered into force on October 18, 2010. See also the Turkey-Sudan BIT signed on December 19, 1999, but not entered into force yet.

¹⁴² For some examples, see Article 2 of the Morocco-Italy BIT entered into force on April 7, 2000. See also Article 2 of the South Africa-Italy BIT signed on June 9, 1997, and entered into force on March 16, 1999. See also Article 2 of the Mozambique-Italy BIT signed on December 14, 1998, and entered into force on November 17, 2003. See also Article 2 of the Angola-Italy BIT signed on July 16, 2002, and entered into force on May 21, 2007. See also Article 2 of the Gabon-Italy BIT signed on June 28, 1999, and entered into force on July 7, 2007. See also Article 2 of the Cape Verde-Italy BIT signed on June 12, 1997, but not entered into force yet. See also Article 2 of the Republic of Congo-Italy BIT signed on March 17, 1994, but not entered into force yet. The only exception is Article 2 of the Ethiopia-Italy BIT entered into force on May 8, 1997.

¹⁴³ See Article 3(1) of the Mozambique-Netherlands BIT signed on December 18, 2001, and entered into force on September 1, 2004. See also Article 3(1) of the Zambia-Netherlands BIT signed on April 30, 2003, and entered into force on March 1, 2014. See also Article 3(1) of the South Africa-Netherlands BIT signed on May 9, 1995, and entered into force on May 1, 1999. See also Article 3(2) of the Nigeria-Netherlands BIT signed on November 2, 1992, and entered into force on February 1, 1994. See also Article 3(1) of the Tanzania-Netherlands BIT signed on July 31, 2001, and entered into force on April 1, 2004. See also Article 3(1) of the Mali-Netherlands BIT. See also Article 3(1) of the Malawi-Netherlands BIT signed on December 11, 2003, and entered into force on November 11, 2007. See also Article 3(1) of the Burundi-Netherlands BIT signed on May 24, 2007, and entered into force on August 1, 2009. See also Article 3(1) of the Eritrea-Netherlands BIT signed on December 2, 2003, but not entered into force yet. See also

to investment physical security and show that the European state has been able to make African countries accept its interpretation of the full protection and security standard. On the other hand, the approach of the Netherlands towards the standard would not have been accepted by so many African states if they did not share that interpretation. The texts of those BITs essentially mirror the 1997 Netherlands Model BIT which states that "each Contracting Party shall accord to such investments full physical security and protection"¹⁴⁴. Full protection and security has been qualified by the addition of the word "physical" which sensitively limits the applicability of the standard. This consolidated practice has been preceded by the conclusion of two BITs, with Nigeria¹⁴⁵ and Zimbabwe¹⁴⁶ including the very same formulation of the 1997 Model BIT. These treaties have contributed to the rising of a new practice and have also operated as a basis for the establishment of a definitive state practice which would have been included also in the state's general Model usually presented for negotiation.

There are a couple of other examples, not involving the Netherlands, where African countries have accepted to restrictively interpret the standard. These BITs use different expressions, but I believe their meaning should be equated to the more common "physical protection". In the Algeria-Indonesia BIT, contracting parties refer to the "material security" of foreign investment¹⁴⁷. The Rwanda-US BIT, recalling the formulation of the US Model BIT, asks both parties to "provide the level of police protection required under customary international law"¹⁴⁸. The latter BIT is indicative of the peculiarity of the 2004 and 2012 US Model BITs which, not only qualify the full protection and security standard by referring to physical security, but also define this level of protection as having a customary nature. The BITs concluded by the US are the only cases where the idea of physical protection has been explicitly linked to the existence of a customary rule supporting a protection and security standard oriented to the physical level. The US-Rwanda BIT is the only agreement concluded between the US and an African state mirroring the formulation of the US Model BIT¹⁴⁹. The other agreements concluded with African countries were concluded when the United States defined the standard more generically.

Article 3(1) of the Gambia-Netherlands BIT. See also Article 3(1) of the Burkina Faso-Netherlands BIT signed on November 10, 2000, and entered into force on January 1, 2004. See also Article 3(2) of the Benin-Netherlands BIT signed on December 13, 2001, and entered into force on December 15, 2007. See also Article 3(1) of the Zimbabwe-Netherlands BIT. See also Article 3(1) of the Uganda-Netherlands BIT signed on May 30, 2000, and entered into force on June 1, 2003.

¹⁴⁴ See Article 3(1) of the Netherlands Model BIT. The document can be found within Douglas Z., *The International Law of Investment Claims*, Appendix 8.

¹⁴⁵ See Article 3(2) of the Netherlands-Nigeria BIT signed on November 2, 1992, and entered into force on February 1, 1994.

¹⁴⁶ See Article 3(1) of the Netherlands-Zimbabwe BIT signed on December 11, 1996, and entered into force in May 1, 1998.

¹⁴⁷ See Article 3(1) of the Algeria-Indonesia BIT signed on March 21, 2000, and entered into force on June 22, 2002.

¹⁴⁸ See Article 5 of the Rwanda-US BIT and, more generally, Article 5(2)(b) of the 2004 and 2012 US Model BIT when it states that "the obligation in paragraph 1 to provide: "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and "full protection and security" requires each Party to provide the level of police protection required under customary international law". The Models can respectively be found at the following links: www.state.gov/documents/organization/117601.pdf and www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

¹⁴⁹ See Article 5(2)(b) of the Rwanda-United States BIT signed on February 19, 2008, and entered into force on January 1, 2012. The provision states that "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... "full protection and security" requires each Party to provide the level of police protection required under customary international law".

5. The legal protection of foreign investment.

Recently, states have started a debate on the possibility of limiting the applicability of the full protection and security standard. On the one hand, there are countries supporting a more limited interpretation of the standard, based on the idea of physical security. On the other hand, there are states endorsing the necessity of interpreting more broadly the standard in order to include also the legal protection of foreign investment. It has not been possible to report the existence of arbitral awards where a claimant has been compensated for non-physical damages yet, on the unique basis of a breach of the full protection and security standard¹⁵⁰. Furthermore, it is still not possible to establish whether arbitral tribunals are more inclined to accept a traditional or extended interpretation of the full protection and security standard¹⁵¹.

The practice of referring to the legal protection of foreign investment in African BITs has characterised the last decade, but the examples are even scarcer than BITs explicitly supporting physical protection. The relevant cases are the BITs concluded by South Africa and Algeria with Argentina and Iran¹⁵², as well as the Libya-Croatia BIT¹⁵³. In these treaties, contracting parties have agreed to grant foreign investment "full legal protection". Likely, contracting states deemed implicit the physical protection of foreign investment and wanted to stress out that legal protection shall be added to the "basic" level of physical protection.

There have also been several BITs referring to the stability of the legal framework of the host state. Several BITs concluded between Italy and African states mention the importance of a stable "legal framework" within host states¹⁵⁴. These treaties do not mention legal protection, but the fact that they refer to the domestic legal framework could lead back to the concept of legal security. It will depend on whether this obligation is believed as being a part of full protection and security or of fair and equitable treatment. In the first case, a stable legal framework will be linked to the need to assure the legal protection of foreign investment. In the second case, the stability of a state's legal framework is traditionally considered as a fundamental component of fair and equitable treatment.

¹⁵⁰ See Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 255.

¹⁵¹ See Klager R., *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, Cambridge, 2011, p. 294.

¹⁵² For South Africa, see Article 3(2) of the South Africa-Argentina BIT signed on November 1, 2000, and entered into force on November 29, 2000. See also Article 4(1) of the South Africa-Iran BIT signed on 31 October 2000. For Algeria, see Article 3(2) of the Algeria-Argentina BIT signed on October 4, 2000, and entered into force on January 28, 2002. See also Article 4(1) of the Algeria-Iran BIT signed on October 19, 2003 and entered into force on February 26, 2005. All the provisions have been formulated in the same way, stating that "investments and proceeds of investors of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its own investors or to investors of any third state who are in a comparable situation".

¹⁵³ See Article 2(3) the Libya-Croatia BIT signed on December 20, 2002, but not entered into yet. The provision affirms that "investments made by investors of either Contracting Party shall enjoy full legal protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments of investors of the other Contracting party in its territory".

¹⁵⁴ See Article 2(4) of the DRC-Italy BIT signed on September 13, 2006, but not entered into force yet. See also Article 2(3) of the Ethiopia-Italy BIT signed on December 23, 1994, and entered into force on May 8, 1997. See also Article 2(4) of the Angola-Italy BIT. See also Article 2(3) of the Kenya-Italy BIT signed on September 16, 1996, and entered into force on August 4, 1999. See also Article of the 2(4) of the Mozambique-Italy BIT. These provisions state that "each Contracting Party shall create and maintain, in its territory a legal framework apt to assure to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor".

6. Relating full protection and security with other standards of treatment and principles of international law.

Several BITs have related full protection and security with international law¹⁵⁵. Generally, these provisions guarantee that foreign investment will enjoy full protection and security further assuring that in no case host states will be able to accord a "treatment less favourable than that required by international law"¹⁵⁶. According to another formulation, host states are expected to grant foreign investment full protection and security "in a manner consistent with international law"¹⁵⁷.

The reference to the principles of international law has characterised a large group of BITs, concluded since the 80s¹⁵⁸. The reference to the international minimum standard of treatment represents a quite recent addition to BITs concluded by African states and concerns only a few examples, mainly BITs negotiated with the United States and Turkey during the last decade¹⁵⁹. The provisions included in the BITs concluded by the US with African countries mirror the US Model BIT. Both 2004 and 2012 Models include a specific provision dedicated to both full protection and security and the international minimum standard of treatment¹⁶⁰. The formulation of the provision partially mirrors that of Article 1105 of the NAFTA Treaty dedicated to the international minimum standard of treatment and recalls the Article's interpretation released by the Free Trade Commission in 2001.

For its part, the Turkish Model BIT refers to the necessity that foreign investment and investors "shall enjoy full protection"¹⁶¹, while BITs state that foreign investment "shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security"¹⁶². These BITs clearly consider full protection and security and

¹⁵⁵ See also Article 3(5) of the Mauritius-Sweden BIT signed on February 23, 2004, and entered into force on June 1, 2005. See also Article 2(4) of the Tanzania-Sweden BIT signed on September 1, 1999, and entered into force in 2002. See also Article 3(1) of the Morocco-Spain BIT signed on December 11, 1998, and currently into force. See also Article 3(1) of the Equatorial Guinea-Spain BIT signed on November 25, 2003. See also Article 2(7) of the Mozambique-Sweden BIT signed on October 23, 2001, and entered into force in 2007. See also Article 2(2) of the Tanzania-Finland BIT signed on June 19, 2001, and entered into force on October 30, 2002. See also Article 3(1) of the Namibia-Spain BIT signed on February 2003 and entered into force the next year. See Article 2(4) of the DRC-US BIT signed on August 3 1984, and entered into force on July 28, 1989. See also Article 2(2) of the Congo Brazzaville-US BIT signed on February 12, 1990, and entered into force on August 13, 1994. See also Article 2(3) of the Morocco-US BIT signed on July 22, 1985, and entered into force on May 29, 1991. See also Article 2(4) of the Senegal-US BIT.

¹⁵⁶ See, in this case, Article 3(5) of the Mauritius-Sweden BIT.

¹⁵⁷ See, in this case, Article 2(3) of the Morocco-US BIT.

¹⁵⁸ See Article 3(1) of the Algeria-Kuwait BIT signed on September 30, 2001, and entered into force on October 23, 2003. See also Article 3(1) of the Algeria-United Arab Emirates BIT signed on April 24, 2001, and entered into force on June 22, 2002.

¹⁵⁹ See Article 5 of the Rwanda-US BIT signed on February 19, 2008, and entered into force on January 1, 2012.

¹⁶⁰ See Article 5(1) of both Models. The provisions affirm that "Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 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".

¹⁶¹ See Article 2(2) of the Turkey Model BIT. According to the provision, "investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments". The document can be found within Douglas Z., *The International Law of Investment Claims*, Appendix 9.

¹⁶² See Article 3(3) of the Cameroon-Turkey BIT signed on April 24, 2012. See also Article 2(2) of the Tanzania-Turkey BIT signed on March 11, 2011.

fair and equitable treatment as being complementing parties of the international minimum standard of treatment.

The accordance of full protection and security with either recognised principles of international law or the international minimum standard of treatment can be interpreted as an attempt of contracting states to relate full protection and security with customary international rules. The question arising out of these provisions is whether states wanted to include a reference only to the international minimum standard of treatment or, more in general, to customary international law.

Another debate which has been developing in the last years concerns the relationship between the standards of full protection and security and fair and equitable treatment. International investment agreements concluded by African states follow a double approach in treating the two standards. A great part of these BITs separates the standards in different provisions and full protection and security is usually included in provisions dealing with expropriation. More than a half of African BITs mention the full protection and security standard in the same provision as the fair and equitable treatment where they are usually linked by conjunctions. The practice of including the two standards in the same provision can be traced back to the OECD Draft Convention on the Protection of Foreign Property¹⁶³. In addition, the World Bank's Guidelines on the Treatment of Foreign Direct Investment have contributed to modify the perception of the standard of full protection and security. In the third guideline, concerning the treatment to be accorded to FDIs, the reference to full protection and security has been subordinated to the fair and equitable treatment¹⁶⁴. The relationship between the two standards, as perceived by African countries, has been brought even further when some BITs concluded by Mauritius have tried to merge the standards by using the expression "fair and equitable protection"¹⁶⁵. All the BITs having adopted this formulation also include a provision on fair and equitable treatment.

7. Additional provisions on investment protection included in African BITs.

Some African BITs concluded in the last two decades mention the necessity of protecting foreign investment in more than one provision. The typical structure of BITs including these "double provisions"

¹⁶³ See Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague, 1995, p. 61. Article 1(a) of the Draft Convention states that "each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property".

¹⁶⁴ The text reads as follow: "the protection and security... and other legal matters relevant to the treatment of foreign investors... such treatment will, subject to the requirement of fair and equitable treatment". The Guidelines can be found at the following link: <http://italaw.com/documents/WorldBank.pdf>. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, within *International Economic Law Critical Concepts in Law*, ed. by Xuan G., Vol. IV, Routledge, New York, p. 185. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 118-119.

¹⁶⁵ See Article 3(3) of the Mauritius-Pakistan BIT. See also Article 3(3) of the Mauritius-Nepal BIT. See also Article 3(3) of the Mauritius-Mozambique BIT. See also Article 3(3) of the Mauritius-Indonesia BIT. See also Article 3(3) of the Mauritius-Swaziland BIT signed on May 15, 2000. See also Article 3(3) of the Mauritius-Zimbabwe BIT. See also Article 3(3) of the Mauritius-Rwanda BIT. See also Article 3(3) of the Mauritius-Tanzania BIT. See also Article 3(3) of the Mauritius-Botswana BIT signed on August 17, 2005, and currently into force. See also Article 3(3) of the Mauritius-Egypt BIT signed on July 2, 2003. See also Article 3(3) of the Mauritius-Ghana BIT. For examples from other African states, see Article 3(3) of the Egypt-Botswana BIT.

consists of a first provision generally referring to the importance of investment security and of a second one referring to the protection and security standard.

Usually, the first general provision deals with the encouragement, promotion and protection of foreign investment, and it mentions the obligation of host states to protect foreign investment in their territories¹⁶⁶. Some agreements reinforce the idea of protection by underlying that foreign investment shall enjoy either "full protection"¹⁶⁷ or "adequate protection"¹⁶⁸, "in accordance with [state] laws and regulations". These provisions work as a further introduction to the objectives and the main guarantees assured by BITs contracting parties, and resemble provisions concerning the objectives of a treaty normally included in international agreements, clarifying even more the contents of treaties' preambles. The Chad-Benin BIT is the only example I have retrieved where the first general provision on investment protection is considered in a clause dealing with the object of the treaty and where investment protection has been defined as expressing the object of the treaty¹⁶⁹.

The second provision generally concerns the standard of full protection and security, which is usually mentioned in clauses already dealing with other issues, like the treatment to be accorded to foreign investment¹⁷⁰ or with the issue of expropriation¹⁷¹.

The Netherlands has been the only country to ratify a significant number of BITs with African states which include two provisions on investment protection¹⁷². They exactly mirror the formulation of the provisions included in the Netherlands' Model BIT¹⁷³. The first provision concerns the general commitment of contracting parties to promote foreign investment through their protection in the host state's territory. The only limitation to protection concerns the "right [of the host state] to exercise powers conferred by its laws or regulations". This formulation is similar to the one adopted in the above-mentioned BITs, but it also differs from them because it explicitly affirms that acting in accordance with national legislation is a right of host

¹⁶⁶ See Article 2(1) of the Algeria-Oman BIT, signed on April 9, 2000, and entered into force on June 22, 2002. See also Article 2(2) of the Bulgaria-Ghana BIT signed on October 20, 1989, but not entered into force yet. See also Article 2(3) of the Morocco-El Salvador BIT signed on April 21, 1999 and entered into force on April 11, 2002. See also Article 2(3) of the Morocco-Dominican Republic BIT signed on May 23, 2002, and entered into force on January 4, 2007. See also Article 3(3) of the Mauritius-Guinea BIT signed on May 18, 2000, and not entered into force yet.

¹⁶⁷ See Article 2(2) of the Ethiopia-Germany BIT signed on January 19, 2004, and entered into force in 2005.

¹⁶⁸ See Article 2(2) of the Algeria-Indonesia BIT, signed on March 21, 2000, and entered into force in 2002. See also Article 2(2) of the Mozambique-Indonesia BIT signed on March 26, 1999 and entered into force in 2000.

¹⁶⁹ See Article 2 of the Chad-Benin BIT. The provision states that "le present Accord vise a arreter les principes généraux de coopération entre les deux pays dans le domaine de la promotion et de la protection des investissements".

¹⁷⁰ See Article 3(1) of the Bulgaria-Ghana BIT. See also Article 3(1) of the Mozambique-Indonesia BIT. See also Article 3(1) of the Algeria-Indonesia BIT. See also Article 4(1) of the Mauritius-Guinea BIT.

¹⁷¹ See Article 4(1) of the Morocco-Dominican Republic BIT. See also Article 5(1) of the Morocco-El Salvador BIT. See also Article 5(1) of the Algeria-Oman BIT. See also Article 4(1) of the Ethiopia-Germany BIT.

¹⁷² See Article 2 of the Burkina Faso-Netherlands BIT signed on November 10, 2000, and entered into force on August 23, 2003. See also the Netherlands-Algeria BIT signed on March 20, 2003, and entered into force on August 1, 2008. See also Article 2 of the Gambia-Netherlands BIT signed on September 25, 2002, and entered into force on April 1, 2007. See also Article 2 of the Mali-Netherlands BIT signed on July 13, 2003, and entered into force on March 1, 2005. See also Article 2 of the Namibia-Netherlands BIT entered into force on October 1, 2004. See Article 2 of the Algeria-Netherlands BIT signed on March 20, 2007 and entered into force on August 1, 2008. See also Article 2 of the Zimbabwe-Netherlands BIT concluded on December 11, 1996, and entered into force on May 1, 1998.

¹⁷³ See Article 2 of the Netherlands' Model BIT which states that "either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments".

states. The second provision refers to the "full physical security and protection" of foreign investment and is included in a clause concerning the treatment to be granted to foreign investors¹⁷⁴.

8. Investment protection in the preambles of African BITs.

The increasing relevance of BITs preambles in investment disputes, also in cases concerning African countries, calls for a deeper analysis of BITs preambles which shall also highlight whether and how the preambles of African BITs approach the issue of investment protection.

After decolonisation, when African countries started to conclude IIAs, there were some cases where contracting parties did not refer to investment protection in the preambles. These treaties were mainly concluded by SSA states between the 60s and 70s and mainly concerned trades¹⁷⁵, cooperation¹⁷⁶ or economic and technical cooperation¹⁷⁷. Investment and investment security represented a sort of "complementary" matter in those agreements.

Differently from this initial practice, the most part of the preambles of the BITs concluded by African states highlights the relevance of the protection of foreign investment. It is a widespread trend that applies independently from the period in which a treaty has been ratified, the level of development or the region of provenience of contracting parties. The common element of these preambles is that they generically refer to investment protection. A group of BITs concluded by Germany with African countries, between the 60s and the 80s, has represented the only partial diversion to the general practice concerning the formulation of the preamble¹⁷⁸, since they refer to "contractual protection". This can be considered as an exclusive German practice, adopted during a specific timeline and not continued in the following years, which has only interested the qualification of the principle of protection.

Despite some differences on the definition of "protection", African BITs have been linking the importance of reciprocally protecting investment with other positive effects for both the parties to the

¹⁷⁴ See Article 3(1) of the Netherlands' Model BITs that affirms that "each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection".

¹⁷⁵ See the Senegal-Sweden BIT.

¹⁷⁶ See the Cameroon-Switzerland BIT signed on January 28, 1963, and entered into force on April 6, 1964.

¹⁷⁷ See the Sudan-Netherlands BIT signed on August 22, 1970, and entered into force on March 23, 1972.

¹⁷⁸ See the Togo-Germany BIT. See also the Ivory Coast-Germany BIT signed on October 27, 1966, and entered into force on June 10, 1968. See also the Benin-Germany BIT signed on June 29, 1978, and entered into force on July 18, 1985. See also the Burundi-Germany BIT signed on September 10, 1984, and entered into force on December 9, 1987. See also the Cameroon-Germany BIT signed on June 29, 1962, and entered into force on November 21, 1963. See also the CAR-Germany BIT signed on August 23, 1965, and entered into force on January 21, 1968. See also the Chad-Germany BIT signed on April 11, 1967, and entered into force on November 23, 1968. See also the DRC-Germany BIT signed on March 18, 1969, and entered into force on July 21, 1971. See also the Ethiopia-Germany BIT signed on April 21, 1964, and now terminated because of the entry into force of the new BIT. See also the Mali-Germany BIT signed on June 28, 1977, and entered into force on May 16, 1980. See also the Mauritius-Germany BIT signed on May 25, 1971, and entered into force on August 27, 1973. See also the Niger-Germany BIT signed on October 29, 1964, and entered into force on January 10, 1966. See also the Sierra Leone-Germany BIT signed on April 8, 1965, and entered into force on December 10, 1966. See also the Somalia-Germany BIT signed on November 11, 1981, and entered into force on February 15, 1985. See also the Sudan-Germany BIT signed on February 7, 1963, and entered into force on January 24, 1967. See also the Tanzania-Germany BIT signed on January 30, 1965, and entered into force on July 12, 1968. See also the Tunisia-Germany BIT. See also the Uganda-Germany BIT signed on November 29, 1966, and entered into force on August 19, 1968. See also the Zambia-Germany BIT signed on December 10, 1966, and entered into force on August 25, 1972.

treaties. Generally the preambles, like in the Lesotho-UK BIT, focus on the consequences which the reciprocal protection of foreign investment will have in terms of "[stimulating] individual business initiative and [increasing] prosperity in both states"¹⁷⁹. A few BITs concluded between Morocco and Central American countries have also highlighted the positive effects that investment protection can have on other areas of interest for contracting parties, like economic development¹⁸⁰ or national welfare¹⁸¹. Another benefit which has been recognised as deriving from a secure investment environment is the stimulation of either capital¹⁸² or investment flows¹⁸³.

BITs concluded by African states recognise that investment protection is a fundamental precondition for the realisation of relevant objectives for host states, like development, the increase of capitals' flows or prosperity. But, it has been extremely rare to find BITs explicitly recognising the relevance of the preambles of BITs, recalling the general rule mentioned in Article 31 VCLT, that any preamble is a fundamental component of a treaty. The only case involving an African country I have retrieved is the Algeria-Syria BIT stating that "the preamble is an essential part of the... agreement"¹⁸⁴.

Investment protection is such an essential objective of investment treaties that almost every preamble includes a reference to this purpose. Usually, they generically refer to investment protection and do not provide any further element to qualify it. In the past, states did not use to attribute large relevance to the formulation of BITs preambles because they were seen as very generic declarations of principles. But, more recently, in the light of the fundamental role recognised to BITs preambles by arbitral tribunals, states have perceived the urgency to carefully evaluate the words and the concepts included in these preambles¹⁸⁵.

It has been to avoid any possible unfavourable interpretation in arbitral disputes that also African countries have started to consider BITs preambles with due attention. Similarly to the restrictions on the applicability of the full protection and security standard, states have started to include some limitations also in the preambles of BITs. A few of the preambles of African BITs refer to circumstances which could limit the application of the BITs provisions, like the protection of security interests or public health or the environment. There are only a few cases where BITs preambles rely on this practice. The preamble of the Mauritius-Sweden BIT states that contracting states agree "that these objectives can be achieved without relaxing essential security interests, health and safety and environmental measures of general application"¹⁸⁶.

¹⁷⁹ See the Preamble of the UK-Lesotho BIT signed and entered into force the same day, on February 18, 1981. See also see the Germany-Tanzania BIT signed on January 30, 1965, and entered into force on July 12, 1968. See also the China-Cameroon BIT signed on May 10, 1997, but not entered into force yet.

¹⁸⁰ See the Switzerland-Nigeria BIT signed on November 30, 2000, and entered into force on September 14, 2004. See also the Algeria-Nigeria BIT signed on January 14, 2002, but not entered into force yet. See also the Ethiopia-Algeria BIT signed on June 4, 2002, and entered into force on November 1, 2005. See also the CAR-Morocco BIT signed on September 26, 2006, but not entered into force yet.

¹⁸¹ See the Morocco-El Salvador BIT. See also the Morocco-Dominican Republic BIT.

¹⁸² See the Sudan-Jordan BIT. See also the Tunisia-Jordan BIT. See also the Niger-Algeria BIT signed on March 16, 1998, and entered into force on August 22, 2000.

¹⁸³ See the Libya-Algeria BIT signed on August 6, 2001, but not entered into force yet. See also the Morocco-Finland BIT signed on October 1, 2001, and entered into force on April 6, 2003.

¹⁸⁴ See Article 1 of the Algeria-Syria BIT signed on September 14, 1997, but not entered into force yet.

¹⁸⁵ See the UNCTAD Report on *Bilateral Investment Treaties (1995-2006)*, p. 3.

¹⁸⁶ See the Mauritius-Sweden BIT signed on February 23, 2004, and entered into force on June 1, 2005.

The preamble of the Cameroon-Turkey BIT has been formulated in the same way of the previous BIT, with the only difference that contracting states added a reference to the necessity of preserving also "internationally recognized labour rights"¹⁸⁷.

SECTION II. The full protection and security standard in regional investment agreements.

1. African regional treaties and investment protection.

An analysis focused only on bilateral agreements would not be sufficient to fully understand the approach of African states towards investment's protection and security. The second part of the analysis of the provisions relating to the full protection and security standard extends the research to the study of the obligations included in African regional treaties, with a specific focus on the agreements and protocols explicitly concerning investment. The limited applicability of these documents should always be remembered: they bind only Member States and they are explicitly reserved to cross-border investment among states parties. The relevance of these treaties is undisputable because of their more innovative approach to investment-related issues. The objective is to assess how Member States of these organisations have approached the standard of full protection and security and to verify whether there are differences with respect to the trends established in BITs.

Usually, treaties establishing African regional organisations do not refer to either investment or investment protection, because of their general nature. These organisations believed that the most effective solution would have been the adoption of specific protocols dealing with investment. Despite some differences, almost all of these additional protocols are structured like BITs and include provisions on investment security. The protocols refer to the obligation to protect foreign investment by either recalling the standard of full protection and security or the international minimum standard of treatment. In either case, it has been proved that African states have not deviated from the general approach towards the protection of investment even in the treaties establishing regional organisations or their additional protocols on investment. The distinction between physical and legal protection has been raising some concerns even at the regional level and some organisations have solved it by including in the agreements specific provisions dealing with either physical or legal protection. The fact that the debate over the level of protection which should be assured to foreign investment has been brought also to the regional level, is a sign of the relevance that African countries have been attributing to it.

The increasing relevance of regional organisations also in the field of foreign investment and the recognition that they can assure investors even more favourable treatment than existing BITs has influenced the opinion of a few states. In fact, in some BITs, states have established a direct link between bilateral and

¹⁸⁷ See the Turkey-Cameroon BIT signed on April 24, 2012, but not entered into force yet.

regional agreements. This trend has characterised three BITs concluded by Algeria with other Arab countries. Each of these treaties includes a provision focusing on "multilateral Arab conventions" on investment signed by BITs Contracting Parties, specifying that the benefits assured by these agreements will be added to those already recognised by BITs¹⁸⁸. Moreover, in the case Arab treaties' provisions include more favourable treatments, their "provisions will prevail" over those set in the BITs¹⁸⁹. Even though these BITs are not enough to recognise the rising of a new state practice, they could be anticipatory of a future trend, especially if we consider that they have been concluded since the beginning of the 2000s.

2. Investment protection in the preambles of regional treaties.

African regional organisations normally recognise the importance of investment promotion as means for enhancing regional cooperation and economic development. Differently from BITs, the preambles of the treaties establishing African regional organisations do not mention either investment or their protection¹⁹⁰. The only two exceptions are the Treaty establishing the Eastern African Community (EAC) and the Convention establishing the Inter-Arab Investment and Export Credit Guarantee Corporation (IAIECGC). The Preamble of the EAC Treaty briefly introduces foreign investment and the necessity of promoting a favourable environment in order to attract them¹⁹¹. The Preamble of the IAIECGC Treaty presents more

¹⁸⁸ See also Article 9 of the Algeria-Syria BIT. See also Article 7 of the Algeria-Sudan BIT signed on February 16, 2001, and entered into force on March 17, 2003. These articles states that "les investissements et leurs revenus mentionnés à l'article (4) de cette convention, bénéficient des avantages prévus par les conventions multilatérales arabes et internationales, relatives à l'investissement et dont chacune des parties contractantes est membre et à ratifié ces conventions".

¹⁸⁹ See Article 11 of the Algeria-UAE BIT. According to the provision, "si la législation d'un des Etats contractants ou les obligations en vertu du droit international, actuelles ou futures, entre les deux Etats contractants en plus de cette convention, y compris la convention unifiée pour l'investissement des capitaux arabes dans les pays arabes de l'année 1980, contiennent une disposition, soit générale soit particulière, qui octroie aux investissements ou aux activités connexes réalisés par un investisseur de l'autre Etat contractant un traitement plus favorable que celui prévu par cette convention, cette disposition prévaudra sur cette convention dans la mesure où elle procure un traitement plus favorable".

¹⁹⁰ See the Treaty establishing the Arab Maghreb Union (AMU) which was signed on February 17, 1989. It can be found at the following link: www.maghrebarabe.org/images/traite_de_marrakech.pdf. See also the Treaty establishing the Economic Community of Central African States (ECCAS) which was signed on October 18, 1993. It can be found at the following link: www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20IV/Annexe%20IV-10.pdf. See also the Preamble of the Treaty establishing the Economic and Monetary Community of Central Africa (CEMAC). The Treaty was signed on March 16, 1994, and later amended on June 25, 2008. Both the texts can be found at the following links: www.cemac.int/sites/default/files/documents/files/Traite_CEMAC.pdf and www.cemac.int/sites/default/files/documents/files/traite_revise_cemac.pdf. See also the Preamble of the Agreement Establishing the Inter-Governmental Authority on Development (IGAD) which was signed on March 21, 1996 and it can be found at the following link: www.ifrc.org/Docs/idrl/N527EN.pdf. See also the Preambles of the Treaty establishing the South African Development Community (SADC), signed on August 17, 1992, and of the Amended Treaty, signed on November 11, 2006. They can be found at the following links: www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf and www.sadc.int/files/3413/5410/3897/Agreement_Amending_the_Treaty_-_2001.pdf. See also the Preamble of the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA), which was ratified on December 8, 1994. It can be found at the following link: www.comesa.int/attachments/article/28/COMESA_Treaty.pdf. See also the Preamble of the Treaty establishing the Economic Community of West African States (ECOWAS) signed on July 24, 1993. It can be found at the following link: www.comm.ecowas.int/sec/?id=treaty&lang=en. See also the Pact of the Arab League of States was signed on March 22, 1945, and can be found at the following link: http://avalon.law.yale.edu/20th_century/arableag.asp. See also the Charter of the Organisation of the Islamic Conference that was signed March 14, 2008, and can be found at the following link: www.comcec.org/TR_YE/Yeni_Site_Dokumanlar/Basic_Documents/OIC_Char.

¹⁹¹ The relevant part of the Preamble states that "whereas the said countries, with a view to realising a fast and balanced regional development are resolved to creating an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectorial policies and their efficient management while taking cognisance of the developments in the world economy as contained in the Marrakesh Agreement Establishing the World Trade Organisation, 1995 referred to "as the WTO Agreement" and as may be decided by the Partner States, the development of technological capacity for improved productivity"

similarities with BITs as it assures that Member States' investors will enjoy "reasonable security" in the territory of the host state and this level of protection shall be guaranteed only by intervening "against non-commercial risks" and establishing "special judicial systems"¹⁹².

Other African regional organisations have filled in existing lacunae through the inclusion of provisions mentioning the objectives of regional treaties or the adoption of additional protocols concerning investment. According to both treaties' provisions on the objectives of the agreements¹⁹³ and the preambles of additional investment protocols¹⁹⁴, the promotion of investment flows can take place only when host states are able to establish a favourable investment environment. The ECOWAS has identified the characteristic of a sound investment environment which are reliability, transparency, stability and predictability¹⁹⁵.

3. African regional treaties not assuring protection and security to foreign investment.

The treaties establishing African regional organisations usually do not refer to foreign investment¹⁹⁶. In some cases, a few agreements have reserved some clauses to investment, but only in provisions mentioning investment among the objectives of regional organisations¹⁹⁷. Nevertheless, no one of these agreements includes any provision concerning the standard of full protection and security.

The COMESA Treaty is the only regional agreement which has included a Chapter dedicated to "investment promotion and protection"¹⁹⁸. But, the only means which should help Member States to favour investment flows consist in the assurance of fair and equitable treatment, as well as the adoption of new regulations to improve domestic legislations and the appeal of internal climate. Protection has only been generically mentioned in relation with the activities which should be defined as investment.

¹⁹² See the Preamble of the Convention establishing the Inter-Arab Investment And Export Credit Guarantee Corporation (IAIECGC) entered into force in April 1974 and was amended in 1988. The text can be found at the following link: <http://unctad.org/Sections/dite/iaa/docs/compendium/en/30%20volume%202.pdf>.

¹⁹³ See Article 7(c) concerning the aims and the objectives of the IGAD Agreement. See also the Preamble of the Treaty establishing the Eastern African Community (EAC). The Treaty was signed in 1999 and entered into force on July 7, 2000; it was later amended in 2006 and 2007. It can be found at the following link: www.eac.int/treaty. See also the Preamble and Article 3(2)(h) concerning the objectives and aims of the ECOWAS Treaty. See also Article 3(c) of the COMESA Treaty. See also Article 2(b) of the Investment Agreement for the COMESA Common Market which can be found at the following link: www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf.

¹⁹⁴ See the Preamble of the SADC Protocol on Finance and Investment signed on August 18, 2006. It can be found at the following link: www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf. See also the Preamble of the CEMAC Investment Charter, Regulation No.17/99/CEMAC-20-CM-03 adopted on December 17, 1999. It can be found at the following link: www.droit-afrique.com/images/textes/Afrique_centre/CEMAC%20-%20Charte%20Investissements.pdf. See also the Preamble of the Unified Agreement for the Investment of Arab Capital in the Arab States, ratified by the Member states of the Arab League and entered into force on February 22, 1981. It can be found at the following link: <http://unctad.org/sections/dite/iaa/docs/Compendium/en/36%20volume%202.pdf>. See also the Preamble of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference that entered into force on September 23, 1986, and can be found at the following link: <http://unctad.org/Sections/dite/iaa/docs/compendium/en/38%20volume%202.pdf>.

¹⁹⁵ See ECOWAS Supplementary Act on Common Investment Market (ECIM). The Protocol was adopted in 2007 and it can be found at the following link: www.privatesector.ecowas.int/en/III/Supplementary_Act_Investment.pdf. See also the Draft of the Community Investment Code has not entered into force yet, despite the efforts of ECOWAS' institutions. It can be found at the following link: http://acpbusinessclimate.org/PSEEF/Documents/Final/ecowas_cic_en.pdf.

¹⁹⁶ The Treaties establishing the Arab Maghreb Union (AMU) and the Economic Community of Central African States (ECCAS).

¹⁹⁷ See the Treaties establishing the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), the Eastern African Community (EAC), the Southern African Development Community (SADC) and the Pact of the Arab League of States and Charter of the Organisation of the Islamic Conference.

¹⁹⁸ Chapter XXVI, and especially Article 159, of the Treaty establishing the Common Market for Eastern and Southern Africa.

On the other hand, the SADC Protocol on Finance and Investment is the only additional protocol, specifically dedicated to investment, which does not explicitly refer to full protection and security or the international minimum standard of treatment. It only refers to fair and equitable treatment and the idea of investment protection it promotes, consists in the attempt of protecting investment from unlawful expropriations¹⁹⁹.

4. The use of additional protocols to remedy the lacunae of regional treaties.

The general nature of the treaties establishing African regional organisations and the fact that they usually do not rule the field of foreign investment have influenced the decision of Member States to adopt additional protocols specifically dedicated to foreign investment. These protocols present a structure more similar to BITs and, while addressing investment security, they use to refer to the "simple" or the "qualified" standard of protection.

The "qualified" standard has been included in the ECOWAS Community Investment Code and in the OIC Agreement on Promotion, Protection and Guarantee of Investments, which respectively call for "full protection and security"²⁰⁰ and "adequate protection and security"²⁰¹. Other investment protocols, such as the Protocol on EAC Common Market and the Unified Agreement for the Investment of Arab Capital in the Arab States, just refer to the "simple" standard. They respectively bind Member States to assure "protection and security"²⁰² and to "protect the investor [and] safeguard his investment"²⁰³.

Even the SADC Model BIT adopts this formulation of the standard. It is a note-worthy document because of its originality: it is the only Model BIT ever adopted by an African regional organisation and it also proves the level of development reached by the organisation, with respect to other similar institutions. SADC Member States have decided to include, in Article 9, a provision exclusively dedicated to the protection and security standard stating that the protection granted to investors should not be less than that

¹⁹⁹ Articles 5 and 6 of the SADC Protocol on Finance and Investment. The provision states that "investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non discriminatory basis and subject to the payment of prompt, adequate and effective compensation".

²⁰⁰ See Chapter 5 of the ECOWAS Community Investment Code.

²⁰¹ Article 2 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference. The provision states that "the contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws. The invested capital shall enjoy adequate protection and security and the host state shall give the necessary facilities and incentives to the investors engaged in activities therein".

²⁰² Article 29 of the Protocol on the Establishment of the EAC Common Market. The article states that "the Partner States undertake to protect cross border investments and returns of investors of other Partner States within their territories. For the purposes of paragraph 1, the Partner States shall ensure: (a) protection and security of cross border investments of investors of other Partner States; (b) non-discrimination of the investors of the other Partner States, by according, to these investors treatment no less favourable than that accorded in like circumstances to the nationals of that Partner State or to third parties; (c) that in case of expropriation, any measures taken are for a public purpose, non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation. The Partner States shall within two years after coming into force of this Protocol take measures to secure the protection of cross border investments within the Community".

²⁰³ Article 2 of the Unified Agreement for the Investment of Arab Capital in the Arab States. It states that "the States Parties to this Agreement shall, within the framework of its provisions, be permitted to transfer Arab capital freely between them and to promote and facilitate its investment according to the economic development plans and programmes within the States Parties and in a manner beneficial to the host State and the investor. They shall undertake to protect the investor, safeguard his investment and its related revenues and rights and, to the extent possible, to ensure the stability of the pertinent legal provisions".

accorded to nationals or citizens of a third country²⁰⁴. SADC Member States have acknowledged the frequent practice of including the standard in provisions already concerning other standards, like the fair and equitable treatment or the international minimum standard. However, they believed in the importance of reserving to the full protection and security standard a specific provision, in order to "better identify its scope and limit the potential for huge damage awards"²⁰⁵.

Finally, the Unified Agreement for the Investment of Arab Capital in the Arab States and the COMESA Protocol on Investment do not mention the full protection and security standard, but they refer to the international minimum standard of treatment. According to the Unified Agreement, the provisions included in the treaty "constitute a minimum standard to be applied in the treatment of any investment subject thereto"²⁰⁶. Instead, the Protocol adopted by COMESA includes a provision on customary international law and the international minimum standard of treatment²⁰⁷.

5. The perception of African regional organisations of physical and legal protection.

A few regional organisations have addressed the debate on the level of protection that investment from Member States should enjoy in the territory of host states, clarifying whether full protection and security should be interpreted as applying to either or both the physical and legal levels.

The COMESA Investment Agreement states that the fair and equitable treatment should include the features which commentators and jurisprudence have tried to attribute to legal protection²⁰⁸. The Agreement implicitly admits that the standard of full protection and security should be reserved only to the physical protection of investment. This provision is also relevant because it recognises the existence of different levels of development of Member States which can prevent them from achieving "the same standards at the

²⁰⁴ See Article 9 of the SADC Model BIT Template with Commentary, which states that "a State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State. Investors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State". The document can be found at the following link: www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

²⁰⁵ See Article 9 of the SADC Model BIT Template with Commentary.

²⁰⁶ Article 3 of the Unified Agreement for the Investment of Arab Capital in the Arab States. it affirms that "the provisions of this Agreement shall constitute a minimum standard to be applied in the treatment of any investment subject thereto. Within the limits of such minimum standard, the provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties".

²⁰⁷ Article 14 of the Investment Agreement for the COMESA Common Investment Area. The provision affirms that "Member States shall accord fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law. 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. Paragraph 1 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard. 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".

²⁰⁸ Article 14 of the Investment Agreement for the COMESA Common Investment Area.

same time". The consequence has been the affirmation that the other parts of the provision "do not establish a single international standard in this context".

On the other side, the ECOWAS has combined the approaches followed by COMESA and EAC, obtaining a more complete provision divided into two parts both referring to the standard of full protection and security: one dedicated to the international minimum standard²⁰⁹ and the other to the fair and equitable treatment²¹⁰. The first part affirms that the level of full protection and security granted to investors mirrors an existing customary international rule. The standard is interpreted as assuring the "full legal protection and security" of investment. The protocol also faces the possibility that the standards mentioned "are not available or have not been fully developed" and it concludes that the best solution is that they should be established through the cooperation of investors and Member States. The second part of the provision explains the meaning of full protection and security, as demanding "each Party to provide the level of police protection required under customary international law". A similar formulation of full protection and security arises doubts on whether police protection and legal protection both belong to the standard of full protection and security, as it seems to come out from the first part, or whether they should be considered as two separate elements.

In the end, a cross-referenced analysis of the provisions dealing with the level of protection included in African BITs and regional agreements shows a double trend on the level of protection assured by the same states at the bilateral and regional levels. The reference to physical protection in the BITs concluded by some Member States of the COMESA mirrors the regional approach, while there are some cases of ECOWAS Member States which have assured a broader level of protection at the regional level and not at the bilateral level²¹¹. Nevertheless, until now, there has not been any conflict between bilateral and regional provisions on investment protection and security: regional agreements concern only intra-African investment and the BITs have been concluded with countries from third continents. Problems could arise in the case a regional agreement assures legal protection and two Member States of that organisation subsequently conclude a bilateral treaty merely granting physical protection.

²⁰⁹ See Chapter 5 of the ECOWAS Community Investment Code. The part of the Code dedicated to the international minimum standards affirms that "each Party shall ensure that all measures of general application are administered in a reasonable, objective, and impartial manner. Each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. Where relevant internationally accepted standards of the type described in this Article are not available or have not been fully developed, the investor and the Party may establish such standards. Investments of either Party shall at all times be accorded fair and equitable treatment, and shall enjoy full legal protection and security in accordance with international law. Neither of the Parties shall obstruct, in any manner, either through arbitrary or discriminatory measures, the enjoyment, use, management, conduct, operation and sale or other disposition thereof of such investments. Each Party shall comply with any obligation assumed regarding investments of the other Party".

²¹⁰ While, in the part of the ECOWAS Code concerning the fair and equitable treatment, it has been stated that "each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. The obligation in paragraph 1 to provide: a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article".

²¹¹ In the last years, the Netherlands have concluded BITs with Benin, Burkina-Faso, Gambia, Mali and Nigeria stating that foreign investment would have enjoyed physical protection.

6. The efficiency of African regional organisations: doubts on their ability to implement obligations to assure protection and security.

The increasing relevance of FDI flows for national economies has had the effect of fostering also regional integration processes²¹². The proliferation of African regional organisations is not an exception: it is a phenomenon which has interested the entire continent since the first years after decolonisation and has significantly increased in the last decades. Regional integration can be advantageous for very poor and small countries²¹³, which characterise the most part of the states of the African continent and are mainly located in SSA. In the case of poor countries, integration would help to improve their economic regimes, while small states would have the advantage of increasing the number of joined activities and of establishing an effectively functioning cooperative environment that would contribute to the attraction of higher levels of FDIs.

The attempt of resulting more attractive to foreign investors, by providing further and more modern guarantees on investment protection, is the main reason that has moved African countries to foster regional integration. The improvement of attractiveness is motivated, not only by the objective of seeming more reliable for investors willing to invest in Africa, but also by the desire of improving the conditions for African investors. Intra-African investment relations have always represented a weakness point for the development of African countries. Even though in the last years an increase of investment flows has been registered, their level is still low if compared with flows from countries of other continents²¹⁴.

The objective of increasing the attractiveness of national investment frameworks is also directly linked with the strong competition among states to modify their legislations in order to establish more favourable investment environments. This competitiveness among African states should be reduced because it is causing more harm than benefits²¹⁵. In this scenario, only states having already established an acceptable investment environment would prevail, while least developed countries will be excluded from investment allocations. The promotion of regional integration should uniform states' attractiveness so that they can benefit from the same possibilities. The "protective" role of regional organisations would increase, not only

²¹² See Sacerdoti G., *The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties*, Journal of World Investment, Vol. 1, 2000, p. 110.

²¹³ See the Working Paper of the World Bank, entitled "*Regional Integration in Sub-Saharan Africa Experience and Prospects*", drafted by Faroutan F. and presented on October 1992, p. 1-28. The document can be found at the following link: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1992/10/01/000009265_3961003095633/Rendered/PDF/multi0page.pdf. See also Ngwenya S., *Reviewing the Differences and Common Goals of SADC and Comesa*, in Clapham C. ed., Mills G. ed., Morner A. ed., Sidiropoulos E. ed., *Regional Integration in Southern Africa: Comparative International Perspectives*, South African Institute of International Affairs, 2001, p. 44. See also the Working Paper (No. ERS-2011-14) of the Economic Research and Statistics Division of the WTO on "*Regional Integration in Africa*" released on October 2011 and drafted by Hartzenberg T, p. 3. The document can be found at the following link: www.wto.org/english/res_e/reser_e/ersd201114_e.pdf. See also the "*Economic Development in Africa Report 2013. Intra-African Trade: Unlocking Private Sector Dynamism*", released by the UNCTAD, p. 4. The document can be found at the following link: http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

²¹⁴ See the "*Economic Development in Africa Report 2013. Intra-African Trade: Unlocking Private Sector Dynamism*", released by the UNCTAD, p. 39. The document can be found at the following link: http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

²¹⁵ See Ogutçu M., *Foreign Direct Investment and Regional Development. How to Enhance the Competitiveness of Regions in Brazil, China, Russia and Turkey*, Journal of World Investment, Vol. 4, 2003, p. 493.

intra-African relations, but would also improve the "bargaining power" of these states with third countries²¹⁶. This is necessary especially for the African continent, where the most part of the countries are often imposed by industrialised states certain obligations or expectations without having the possibility of effectively discussing them.

Preconditions for the success of regional integration processes are the creation of institutions having an effective action power, and thus the possibility of facing member states' violations, as well as the commitment of states to respect the obligations undertaken and not to use the contrasts which could arise within the organisation as a means to rekindle previous situations of conflict. This would allow African countries to eventually develop their own positions on crucial investment matters and not to be considered as mere marginal investment recipients. It is fundamental that these states develop a "collective self-reliance"²¹⁷ which would allow them to emerge in the field of foreign investment and to abandon the marginal role they have experienced since the continent's decolonisation. African regional organisations present pronounced differences due to factors like the complexity of their legal frameworks, the political and economic strength of respective Member States and the resources at their disposal. Nevertheless, they have generally contributed to allow states to reach higher levels of development in areas fundamental for their surviving, that they could not have probably been able to achieve by themselves²¹⁸.

In 2012, for the first time, investment flows to developing states have registered higher levels than flows to developed countries and, besides Latin America, Africa was the other developing region which registered an increase of investment inflows²¹⁹. Nevertheless, it is not correct to give credit for these positive results only to the contribution of regional organisations. The proliferation of regional forms of association can be positively evaluated as long as it effectively solves regional issues or put pressure on member states to adopt cutting edge standards.

African regional experiments have proved to be quite ineffectual, especially in SSA²²⁰, mainly for two reasons. Firstly, there has been an excessive proliferation of African regional organisations and their

²¹⁶ See the World Bank's Report "Trade Blocs", Vol. 763, released in 2000, p. 7. The document can be found at the following link: www.unige.ch/ses/ecopo/demelo/Cdrom/RIA/Readings/Trade_Blocs_Chap01.pdf. See also Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 334.

²¹⁷ See Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 334.

²¹⁸ See Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 335.

²¹⁹ Specifically, Latin America led with a 12% increase and Africa with a 5% one. On the contrary, Asia and Caribbean suffered from a negative trend and lost respectively the 7% and the 2% of inflows. In Asia, China, Hong Kong and India are the strongest economies, while the problems come from the south-eastern part of the continent (Cambodia, Myanmar and Viet Nam); in South America, the Caribbean are slowing the rapid growing of the region. See the 2013 World Investment Report presented by UNCTAD, p. ix. It can be found at the following link: http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

²²⁰ See the Working Paper (No. ERS2011-14) of the Economic Research and Statistics Division of the WTO on "Regional Integration in Africa" released on October 2011 and drafted by Hartzenberg T, p. 14. The document can be found at the following link: www.wto.org/english/res_e/reser_e/ersd201114_e.pdf. See also Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 334. The author underlined that among the reasons of African regional organisations' failure there are elements like "a weak human capital stock; a lack of economic

overlapping has been inevitable. African states prefer to establish new organisations rather than revitalising the ones already existing, contributing to their proliferation²²¹. The only encouraging element is that, at least in the economic field, this trend has not registered the same rates as other sectors²²². Possible solutions consist in reducing the funding to these organisations or withdrawing from them. Especially in SSA, there are many LDCs that have to deal with the poor state of their economies. Financing an international organisation can be very onerous, particularly if a country is facing precarious economic conditions, because of the considerable misuse of human and economic resources deriving from the membership to many organisations. Moreover, it is doubtful whether these states, lacking means and skills, will be ever able to implement the obligations included in regional treaties which are very demanding.

Secondly, one of the beneficial results of entering a regional organisation should be the reduction of intra-states conflicts. On the contrary, the surviving of regional organisation in the African continent has been particularly hard. Too often, political, economic or differences of other nature among Member States have caused the failure of regional organisations. The origin of these differences among organisations' states can be traced back to colonial domination (due to different languages, cultures, types of institutions or currencies, etc...)²²³, and to subsequent frictions developed after decolonisation (in certain cases due to the process of decolonisation and the adjustment of new state entities). Two of the most significant examples of the effects of these contrasts are the collapse of the EAC, in 1977, which was revitalised only in the 2000, and of the AMU that, on the contrary, has been completely blocked by the inactivity of its Member States since the first years of the 2000s because of acute political disagreements. In other cases, the political instability and the lack of security in the territories of Member States have prevented the organisations from implementing their objectives. The main example has been the paralysis of the IGAD in several occasions due, for instance, to high tensions between Ethiopia and Eritrea²²⁴ or the Rwandan genocide²²⁵.

diversification (with the majority of exports attributable to a few commodities); lack or weak economic and market facilitating infrastructure particularly in the energy, transport and communications sectors; an under-developed financial sector and slow "second generation" macro-economic and legal reforms". See also the United Nations' Economic Commission for Africa's report "Assessing Regional Integration in Africa IV African Union African Development Bank Economic Commission for Africa. Enhancing Intra-African Trade" released in 2010, p. 10. Similarly to the previous document, it has been underlined that the poor results registered by African states are mainly due to "poor infrastructure development, maintenance and connectivity, conflicts and security issues among the regions and the presence of trade barriers". The document can be found at the following link: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Assessing%20Regional%20Integration%20in%20Africa%20-%20Towards%20an%20African%20Continental%20Free%20Trade%20Area.pdf>. See also the Working Paper of the World Bank, *Regional Integration in Sub-Saharan Africa Experience and Prospects*, drafted by Faroutan F. and presented on October 1992, p.2. The document can be found at the following link: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1992/10/01/000009265_3961003095633/Rendered/PDF/multi0page.pdf. See also Ngangjoh-Hodu Y., *Sino-African Relationship and its impacts on Africa's Regional Integration Process*, Journal of World Investment and Trade, Vol. 10, Issue 2, 2009, p. 299.

²²¹ See Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 338. See also Ngangjoh-Hodu Y., *Sino-African Relationship and its impacts on Africa's Regional Integration Process*, p. 304.

²²² See the Working Paper of the World Bank, *Regional Integration in Sub-Saharan Africa Experience and Prospects*, drafted by Faroutan F. and presented on October 1992, p.1. The document can be found at the following link: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1992/10/01/000009265_3961003095633/Rendered/PDF/multi0page.pdf.

²²³ See the Working Paper of the World Bank, *Regional Integration in Sub-Saharan Africa Experience and Prospects*, p. 4.

²²⁴ See the article of the Special Delegate for the Italian Government in Somalia, Hon. Raffaelli, *La crisi umanitaria sfocia nel caos*, published on the online review Affari Internazionali. The article can be found at the following link: www.affarinternazionali.it/articolo.asp?ID=673.

The issue of security has been affecting also the proper functioning of African regional organisations and their investment frameworks. The risk of regional organisations' failure is high since the general situation of instability of the continent has not changed in the last years, a trend which can undermine also the work of these organisations²²⁵. The frequent situations of conflict affect investment flows from both other continents' countries and intra-African ones²²⁷. The objective of assuring a secure investment environment should be directed to foreign investors from third countries, as well as to African investors. The prevalence of regional and national conflicts, and the deriving climate of uncertainty, have had the effect of either favouring short-term investment²²⁸ or discourage any investment attempt²²⁹. Thus, it does not seem sure that African regional organisations will be willing or able to assure a certain level of protection and security to foreign investment, since their own efficiency is undermined. As the Assembly of the African Union has affirmed, "the security of each African country is inseparably linked to that of other African countries and the African continent as a whole"²³⁰.

²²⁵ See Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 337.

²²⁶ See Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008, p. 345.

²²⁷ See also the "Economic Development in Africa Report 2013. Intra-African Trade: Unlocking Private Sector Dynamism", released by the UNCTAD, p. 93. The document can be found at the following link: http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

²²⁸ See Mathoma P. T., *Challenges for Southern Africa*, in Clapham C. ed., Mills G. ed., Morner A. ed., Sidiropoulos E. ed., *Regional Integration in Southern Africa: Comparative International Perspectives*, South African Institute of International Affairs, 2001, p. 29-30.

²²⁹ See Ramsamy P., *SADC: The Way Forward*, South African Institute of International Affairs, 2001, p. 37-38.

²³⁰ See the Solemn Declaration on a Common African Defence and Security Policy which was adopted by the Second Extraordinary Session of the Assembly of the African Union, in February 2004, p. 3. The document can be found at the following link: www.peaceau.org/uploads/declaration-cadsp-en.pdf. See also Ngwenya S., *Reviewing the Differences and Common Goals of SADC and Comesa*, in Clapham C. ed., Mills G. ed., Morner A. ed., Sidiropoulos E. ed., *Regional Integration in Southern Africa: Comparative International Perspectives*, South African Institute of International Affairs, 2001, p. 47.

3. The interpretation of the full protection and security standard.

SECTION I. Arbitral tribunals interpreting full protection and security.

1. The value of BITs preambles.

In the last years, the number of arbitral tribunals focusing on the fundamental role of BITs preambles in treaty interpretation has significantly increased. The reference to the general rule regarding the nature of international agreements' preambles as expressions of the object and purpose of an agreement, embodied in Article 31(2) VCLT, has been at the core of these awards²³¹. The reference to Article 31 has always represented a sort of introductory part of awards discussing the relevance of BITs preambles²³². In *Société Generale v. Dominican Republic*, the tribunal affirmed that the proper interpretation of an international treaty has to consist also of the analysis of its preamble²³³. Simply considering the provisions of an international agreement is not sufficient to develop a comprehensive overview of the purposes of contracting states.

Arbitral tribunals have often defined BITs preambles as expressions of the objects and the purposes of those treaties²³⁴ and there is a discrete arbitral practice also in disputes involving African countries following this trend. In *Standard Chartered Bank v. Tanzania*, the preamble of the UK-Tanzania BIT was considered to interpret the use of specific terms in the agreement²³⁵. The tribunal divided its reasoning into two separate parts: one concerning the text and context of the BIT (where also the preamble was considered)²³⁶ and the other regarding the object and purpose of the treaty²³⁷. The tribunal grounded its analysis on Articles 31 and 32 VCLT²³⁸. It stated the BIT's preamble presented several "instructive" elements

²³¹ See See *Weeramantry J. R., Treaty Interpretation in Investment Arbitration*, Oxford University Press, Oxford, 2012, p. 40. See also Wälde T. W., *Interpreting Investment Treaties: Experiences and Examples*, within Binder C., Kriebaum U., Reinisch A., Wittich S., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009, p. 746.

²³² See *Lauder R. S. v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, para. 292. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 215. See also *Tokios Tokelés v. Ukraine*, ICSID, Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, para. 27. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 89. See also *Azurix Corporation v. Argentine Republic*, ICSID, Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003, paras. 307. See also *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 50. See also *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID, Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, para. 90-91.

²³³ See *Societe Generale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. Dominican Republic*, UNCITRAL, Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 9, 2008, para. 15-31.

²³⁴ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 215. See also *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, May 17, 2006, paras. 298-299. See also *Azurix Corporation v. Argentine Republic*, paras. 307-360. See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID, Case No. ARB/01/7, Award, May 25, 2004, para. 113. See also *Noble Ventures Inc. v. Republic of Romania*, para. 52.

²³⁵ See the Preamble of the Tanzania-UK BIT signed on January 7, 1994, and entered into force on August 2, 1996.

²³⁶ See *Standard Chartered Bank v. Republic of Tanzania*, ICSID, Case No. ARB/10/12, Award, November 2, 2012, paras. 214 and ff.

²³⁷ See *Standard Chartered Bank v. Republic of Tanzania*, paras. 226 and ff.

²³⁸ See *Standard Chartered Bank v. Republic of Tanzania*, paras. 206 and ff.

that actively contributed to clarify the ambiguous parts of the agreement setting out the object and purpose of the BIT²³⁹. Similarly in *Malicorp v. Egypt*, the tribunal briefly described the main provisions of the UK-Egypt BIT²⁴⁰ and equated the BIT's preamble to a "statement of the objectives sought by the Contracting Parties"²⁴¹. Also in *Millicom v. Senegal*, the tribunal defined the preamble of the Senegal-Netherlands BIT²⁴² as a summary of the purpose and the object of the BIT²⁴³.

These cases have shown the emergence of an arbitral practice recognising the importance of preambles to treaties as expressions of contracting states' purposes and, consequently, as primary means for treaty interpretation in accordance with the rules on interpretation codified in the VCLT. However, these considerations have been maintained subordinate to the general rule that preambles should not be interpreted as having an operative nature. In *Biwater Gauff*, the tribunal referred to the preamble of the Tanzanian Investment Act (TIA) and not to the Tanzania-UK BIT. The claimant recalled the Preamble of the Tanzanian Investment Act (TIA) in the part granting investors "more favourable conditions" in the attempt of justifying the theory that this guarantee would have allowed to choose the more favourable treatment established by the BIT's arbitral clause²⁴⁴. The tribunal ultimately favoured the host state, rejecting the claim on the grounds that the "generalised introductory language" of the Act's preamble could not have the same effects as an operative provision²⁴⁵. However, I believe that a preamble could be binding in different circumstances, such as the case a BIT does not include any reference to full protection and security, allowing the foreign investor to obtain a more favourable interpretation from arbitral panels.

2. The interpretation of the standard of liability.

A consolidated arbitral practice on the protection and security standard's interpretation has developed over decades. Arbitral tribunals tend to recognise that BITs obligations requiring the protection of foreign investment cannot be interpreted as absolute obligations or standards imposing strict liability upon host states whenever they fail to assure that no damage at all would occur²⁴⁶. Accordingly, states are bound to

²³⁹ See *Standard Chartered Bank v. Republic of Tanzania*, para. 228.

²⁴⁰ See the Preamble of the Egypt-UK BIT signed on June 11, 1975, and entered into force on February 24, 1976.

²⁴¹ See *Malicorp Limited v. Arab Republic of Egypt*, ICSID, Case No. ARB/08/18, Award, February 7, 2011, para. 91. See also *Lauder R. S. v. Czech Republic*, para. 292.

²⁴² See the Preamble of the Senegal-Netherlands BIT signed on August 3, 1979, and entered into force on May 5, 1981.

²⁴³ See also *Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal*, ICSID, Case No. ARB/08/20, Decision on Jurisdiction, July 16, 2010, para 71.

²⁴⁴ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 333.

²⁴⁵ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 333.

²⁴⁶ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID, Case No. ARB/98/4, Award, December 8, 2000, para. 84. See also *Waguhi Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID, Case No. ARB/05/15, Award, June 1, 2009, para. 447. See also *Mr. Joseph Houben v. Republic of Burundi*, ICSID, Case No. ARB/13/7, Award, January 12, 2016, para. 161. See also *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 48. See also *Tecnicas Medioambientales Tecmed v. United Mexican States*, ICSID, Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 177. See also *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, May 17, 2006, para. 484. See also *Gemplus S. A. & others v. United Mexican States*, ICSID, Cases Nos. ARB (AF)/04/3 and ARB (AF)/04/4, Award, June 16, 2010, part IX, p. 7. See also *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 164. See also *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID, Case No. ARB/05/8, Award, September 11, 2007, para. 357. See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID, Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, para. 180. See also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID, Case No. ARB/05/16, Award, July 29,

implement "all measures necessary to ensure" foreign investment will enjoy protection and security, but as highlighted in *AMT*, they should refrain from the invocation of national legislations in the attempt of evading such duty²⁴⁷. In a similar scenario, as recalled in *Wena Hotels*, host states are not "insurer or guarantors" and thus cannot be held responsible for every kind of damage occurring to an investment²⁴⁸. Arbitral tribunals agree that the protection and security standard includes "an obligation of vigilance"²⁴⁹, basically corresponding to the due diligence principle²⁵⁰, requiring states to "adopt all reasonable measures" for the protection of the investment²⁵¹. The *AAPL* tribunal underlined that due diligence is a "standard of general international law" and any interpretation of that standard as imposing strict liability upon states "cannot be justified under any of the canons of interpretation"²⁵².

There is consolidated jurisprudence affirming that the interpretation of full protection and security has not changed over decades and leading to the conclusion that any interpretation relying on the concept of strict liability is against that practice²⁵³. Even the ICJ's considerations on full protection and security expressed in the *ELSI* case reflected the "status of International Law Investment Standards as reflected in "the worldwide BIT network"²⁵⁴. In that occasion, the ICJ declared that Article 5 of the Italy-US FCN Treaty mentioning the obligation to exercise protection and security could not "be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed"²⁵⁵ and, thus, as an absolute standard imposing strict liability.

Tribunals also focused on the importance host states act preventively, through the exercise of due diligence²⁵⁶, to adopt appropriate precautionary measures as well as on their duty to prove they have effectively acted in that way²⁵⁷. In a similar scenario, a state can be held responsible if it has showed "substantial negligence to take reasonable, precautionary and preventive action"²⁵⁸. The *Wena Hotels* tribunal added that, even in the hypothesis a state's defence is enough to excuse its failure in preventing the occurrence of damage to the investment, it might not be enough to excuse also its failure of taking "any immediate action" to protect the investment after the damage has occurred²⁵⁹. In the specific circumstance a

2008, para. 663. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 164.

²⁴⁷ See *American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire*, para. 6.05.

²⁴⁸ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 84. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 162.

²⁴⁹ See *American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, para. 6.05. See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 84.

²⁵⁰ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID, Case No. ARB/05/22, Award, July 24, 2008, para. 725. See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID, Case No. ARB/04/13, Award, November 6, 2008, para. 269. See also *Mr. Joseph Houben v. Republic of Burundi*, para. 161.

²⁵¹ See *Saluka Investments B.V. v. Czech Republic*, para. 484.

²⁵² See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, paras. 45-46.

²⁵³ The *AAPL* tribunal referred to the *Sambiaggio* and *ELSI* cases in order to prove that point. See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, paras. 48-49.

²⁵⁴ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 49.

²⁵⁵ See *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, ICJ, Reports 1989, Judgment, July 30, 1989, para. 108.

²⁵⁶ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 447.

²⁵⁷ See *American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire*, para. 6.05.

²⁵⁸ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 725. The tribunal recalled *AAPL v. Sri Lanka* where the tribunal had referred to Brownlie I., *Principles of Public International Law*, Oxford University Press, Oxford, 1979, p. 453.

²⁵⁹ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 88.

state explicitly admits its armed forces have damaged the investment, as well as its failure to implement any measure whatsoever to protect the investment (characterising the dispute at the core of *AMT*), this would be qualified as an admission of its failure to preventively protect the investment and adopt necessary measures to assure full protection and security²⁶⁰.

In general arbitral practice, the reference to states' "obligation of vigilance" does not imply a strict liability of the host state. But, in one dispute (*AMT*), the tribunal seemed to refer to the alleged existence of a "strict liability"²⁶¹. It declared Zaire should have "taken all measures of precaution" to grant the investment's full protection and security, while, in reality, it failed to do so when it merely recognised the investment had been damaged²⁶². The principle of due diligence does not bind a state to take every possible precautionary measure, a characteristic typical of strict liability. Zaire did not refuse to recognise that damage occurred and did "apparently not argued that it had taken any measures to prevent it"²⁶³. But, in the hypothesis it decided to question the tribunal's approach, the latter, in order to remain in line with the commonly accepted interpretation of due diligence, should have recalled Zaire's inefficiency in adopting the measures for the protection of the investment, rather than referring to the state's inability in preventing any damage²⁶⁴.

3. Arbitral practice leaning towards a narrow interpretation of full protection and security.

The most part of arbitral disputes where the alleged violation of the full protection and security standard has been invoked by claimants has concerned episodes of physical violence²⁶⁵. The standard's interpretative problems started in conjunction with disputes where arbitral tribunals have been asked to determine whether the standard could have been applied also in circumstances concerning episodes of non-physical violence.

Lauder v. Czech Republic has been the first arbitral award of the "modern era" supporting the idea that full protection and security should be applied only in circumstances where the physical damage of an investment has occurred. Being the first award to explicitly adopt this position, it has had the effect of making *Lauder* the most relevant precedent on which several arbitral tribunals have grounded their argumentations. This award has usually been opposed to *CME v. Czech Republic* because they concerned similar events, but the respective tribunals reached opposite conclusions. In the first case, the tribunal

²⁶⁰ See *American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire*, para. 6.06 and 6.08.

²⁶¹ See Cordero Moss G., *Full Protection and Security*, p. 140.

²⁶² See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, para. 6.05.

²⁶³ See Cordero Moss G., *Full Protection and Security*, p. 140.

²⁶⁴ See Cordero Moss G., *Full Protection and Security*, p. 140.

²⁶⁵ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, paras. 6.08-6.11. See also *Tecnicas Medioambientales Tecmed v. United Mexican States*, ICSID, Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 175. *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID, Case No. ARB/05/15, Award, June 1, 2009, paras. 446-448. See also *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, paras. 46 and ff. See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, Case No., ARB/98/4, Award, December 8, 2000, para. 84. See also *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, ICJ, Reports 1989, Judgment, July 30, 1989. See also *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, paras. 15-17.

supported a somehow limited interpretation of the full protection and security standard. In the second, the tribunal had a pioneering role in extending the standard's interpretation so to include legal protection.

Arbitral tribunals more inclined to restrictively interpret the full protection and security standard, so to include only physical protection, tend to conclude that the standard "applies essentially when the foreign investment has been affected by civil strife and physical violence"²⁶⁶. According to this point of view, the standard of full protection and security "has traditionally been associated with situations where the physical security of the investor or its investment is compromised"²⁶⁷. This consideration derives from the recalling of previous arbitral decisions dealing with the physical damage of foreign investment's sites perpetrated by local authorities, like *AAPL*²⁶⁸, *AMT*²⁶⁹, *ELSI*²⁷⁰ and *Wena Hotels*²⁷¹. In similar circumstances, the level of protection which should be expected from the host state, also according to arbitral jurisprudence, concerns only the physical level and does not aim at safeguarding the "physical integrity" of foreign investment against "any kind of impairment", but rather the investment has been impaired by the use of force²⁷². The *Lauder* tribunal even added that the obligation to protect should not be interpreted as protecting "foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State"²⁷³. The tribunal recognised that in this circumstance the respondent had the sole duty of keeping "its judicial system available for the claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law"²⁷⁴.

In the previous sections, it has been underlined states' rare practice of including references to the level of protection and security to be assured in the texts of BITs. In the hypothesis BITs do not provide further clarification on how to interpret the standard, the *Lauder* tribunal affirmed that the level of due diligence the host state was required to exercise should have granted a level of protection "reasonable under the circumstances"²⁷⁵.

Generally, arbitral tribunals have not been referring to the customary rule on protection. In *Noble Ventures*, one of the cases where the arbitral panel considered also customary international law, the claimant asked the tribunal to determine whether Romania had failed to protect the investment by not properly "enforc[ing] its own laws" and "provid[ing] police protection"²⁷⁶. The BIT required that the treatment offered to foreign investment was not "less than that required by international law". According to the tribunal, the

²⁶⁶ See *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, May 17, 2006, p. 483.

²⁶⁷ See *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 324. See also *Mr. Joseph Houben v. Republic of Burundi*, para. 157.

²⁶⁸ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, paras. 46 and ff.

²⁶⁹ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, paras. 6.08-6.11.

²⁷⁰ See *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, ICJ, Reports 1989, Judgment, July 30, 1989.

²⁷¹ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, Case No., ARB/98/4, Award, December 8, 2000, para. 84.

²⁷² See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, para. 668. See also *Saluka Investments B.V. v. Czech Republic*, p. 484. See also *Lauder R. S. v. Czech Republic*, para. 308.

²⁷³ See *Lauder R. S. v. Czech Republic*, para. 308.

²⁷⁴ See *Lauder R. S. v. Czech Republic*, para. 314.

²⁷⁵ See *Lauder R. S. v. Czech Republic*, para. 308.

²⁷⁶ See *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 10.

full protection and security standard included in the BIT should not had been "understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens"²⁷⁷. Nevertheless, the claimant's lack of proof caused the tribunal to dismiss the claim, failing to clarify what customary international law required.

A broader interpretation of full protection and security, encompassing physical security, could be possible. The claimant in *BG* suggested that, in the circumstance the standards of full protection and security and fair and equitable treatment are related, arbitral tribunals would conclude that the standard of protection includes the "obligation to provide [also] a secure investment environment"²⁷⁸. The claimant argued that Argentina had breached the obligation to protect its investment²⁷⁹ because it had failed to assure legal and economic protection²⁸⁰. *BG* also linked full protection and security with fair and equitable treatment, adding that the claim also related to both fair and equitable treatment and full protection and security standard since the latter constitutes a part of fair and equitable treatment²⁸¹. According to the claimant, governmental measures can breach the standard of full protection and security even in those cases where "property has not been physically destroyed or... judicial remedies have not been available"²⁸². In the end, the tribunal disagreed with the hypothesis of adopting such an extensive interpretation of the standard and preferred to rely on the consolidated interpretation requiring the physical protection of the investment.

Few arbitral awards have attempted to fill in the interpretative gaps on physical protection left by the previous awards. For instance, in *Eastern Sugar v. Czech Republic*, the tribunal listed the actions typically constituting acts of physical violence. The tribunal interpreted full protection and security as requiring the host state to protect the foreign investor against those acts carried out by third subjects which would be "in violation of the state monopoly of physical force", like "mobs, insurgents, rented thugs and others engaged in physical violence"²⁸³. In *Parkerings*, the tribunal tried to identify host states' actions or omissions which could lead to a breach of full protection and security. The tribunal affirmed full protection and security can be violated only in three circumstances: when the host state fails to prevent the occurrence of damages to the investment, to restore the circumstances existing before the damage or to apprehend the culprits²⁸⁴.

²⁷⁷ See *Noble Ventures Inc. v. Republic of Romania*, para. 164.

²⁷⁸ See *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 326.

²⁷⁹ See Article 2(2) of the Argentina-United Kingdom BIT signed on December 11, 1990, and entered into force on February 19, 1993. The provision states that "investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party".

²⁸⁰ See *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 318.

²⁸¹ See *BG Group Plc. v. Republic of Argentina*, para. 318.

²⁸² See *BG Group Plc. v. Republic of Argentina*, para. 314.

²⁸³ See *Eastern Sugar B.V. v. Czech Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 088/2004, Partial Award, March 27, 2007, para. 203.

²⁸⁴ See *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 355.

4. Arbitral practice supporting a broader interpretation of full protection and security including legal protection.

CME v. Czech Republic has been the first award where an arbitral tribunal supported the idea that full protection and security can be applied also to investment's legal security²⁸⁵. In this dispute, the claimant affirmed the actions and inactions of the Czech Republic's Media Council constituted a breach of the full protection and security clause included in the Netherlands-Czech Republic BIT, even though the investment was not physically damaged. The tribunal defined full protection and security as "an obligation of due diligence relating to the activities of the State" which, for this nature does not impose a strict liability upon the host state²⁸⁶.

The key concepts highlighted by several arbitral tribunals are "reasonableness" and "circumstance". The treatment which is required of host states should be both reasonable and take into consideration the circumstances characterising a specific period²⁸⁷. This last affirmation follows the reasoning of the *AAPL* tribunal: "due diligence is nothing more or less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstance"²⁸⁸. The *CME* tribunal affirmed that neither any amendment of domestic legislation nor administrative authorities' actions should affect the protection and security owed to foreign investment, by withdrawing or devaluating the standard of full protection and security²⁸⁹. Moreover, even though the relevant BIT provision referred only to "investments' full security and protection"²⁹⁰, the tribunal interpreted the standard in the way that all the actions and inactions carried out by the host state's authorities, during a specific period, could be defined as "remov[ing] the security and legal protection of the foreign investment"²⁹¹. The tribunal agreed with *CME*'s claim and recognised that the Czech Republic had breached its obligation, adopting a position which would have been entirely reversed by the arbitral tribunal in *Saluka*.

However, two weaknesses characterise this award. The first is the already mentioned contrasting *Lauder* award. The other concerns the failure of the tribunal of analysing full protection and security also from a historical perspective and of providing explicit reasons for its departure from the consolidated definition of the standard²⁹². After *CME*, the number of arbitral awards having accepted a broader interpretation of full protection and security, including legal protection, have been a minority and the most

²⁸⁵ See Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 213.

²⁸⁶ See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, para. 353-354.

²⁸⁷ See *CME Czech Republic B.V. v. Czech Republic*, para. 353. See also *Lauder R. S. v. Czech Republic*, para. 308.

²⁸⁸ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, para. 77. See also *MCI Power Group L.c. and New Turbine Inc. V. Republic of Ecuador*, ICSID, Case No. ARB/03/6, Award, July 31, 2007, para. 246. In the present award, the claimants recalled the very same part of the *CME* and *AAPL* cases in order to ground their affirmation that Ecuador breached the standard of full protection and security. In the end, the Tribunal rejected the claim because the claimants were not able to provide enough proof.

²⁸⁹ See *CME Czech Republic B.V. v. Czech Republic*, para. 613.

²⁹⁰ See Article 3(2) of the Czech Republic-Netherlands BIT signed on April 29, 1991, and entered into force on October 1, 1992. The provision states that "each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned".

²⁹¹ See *CME Czech Republic B.V. v. Czech Republic*, para. 613.

²⁹² See Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 214.

part of these awards have involved either Argentina or another Latin American country. Another peculiarity of arbitral tribunals' approach relates to the variety of reasoning on which they grounded their extensive interpretation of full protection and security.

5. Arbitral tribunals recognising the possibility of a broader interpretation of full protection and security only in exceptional circumstances.

Arbitral tribunals supporting the idea that the standard of protection and security concerns physical protection have grounded such interpretation on the opinion that physical protection corresponds to the traditional interpretation of the standard. At the same time, some tribunals have recognised the possibility of alternatively interpreting the standard, opening up about the possibility of extending such interpretation to the circumstances where foreign investments have been damaged at the economic level.

In *Plama*, Bulgaria allegedly failed to exercise the appropriate level of protection against the unlawful actions of local syndics²⁹³ which apparently had affected the economic framework of the claimant's company (like unlawful increases of the company's employees or funds misappropriation) and the physical security of the company's premises (continuous strikes and the suspension of production, but police did not do anything to stop such demonstrations). In a series of disputes against Argentina (namely, *Enron*, *Sempra* and *Suez*) the core of foreign investors' claims was the adoption of the 2001 Emergency Law, aimed at reducing the negative effects of the economic crisis. The alleged violations of the standard of full protection and security included in the BITs concluded by Argentina did not concern physical protection and security, but rather the legal level, as no physical damage affected the investments.

Another group of disputes has dealt with the effects of modifications in the original investment terms negotiated by foreign investors and the possible effects in terms of host states' failure in protecting the investment. In *PSEG v. Turkey*, the claimant affirmed the disagreements and the subsequent failure of the negotiations with the Turkish Ministry of Energy and Natural Resources for the building of a power plant, mainly related to some technical aspects related to the performance of the plant and the rise of the costs for implementing the project, constituted a breach of the full protection and security standard²⁹⁴. In *AES v. Hungary*, the claimant affirmed the respondent had breached its obligation to grant "the most constant protection and security"²⁹⁵ when its authorities adopted a new legislation which completely changed initial contractual terms, devalued the investment and was contrary to the commitment of legally protecting it.

²⁹³ See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID, Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, para. 229.

²⁹⁴ See Article 2(3) of the Turkey-United States BIT signed on December 3, 1985, and entered into force on May 18, 1990. The provision states that "investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in a manner consistent with international law. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments".

²⁹⁵ See Article 10(1) of the Energy Charter Treaty which states that "such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal".

Those arbitral tribunals focused on the evolution of the standard of protection and security affirming that, historically, the standard "has been developed in the context of physical protection and security of a company's officials, employees and facilities"²⁹⁶. As recalled in *National Grid*, even the UNCTAD affirmed that the standard of full protection and security "has typically been applied in situations involving physical threats or destruction"²⁹⁷. According to those tribunals, the hypothesis that a broader interpretation of the standard is possible should not be "exclude[d] as a matter of principle"²⁹⁸, but the inclusion of legal protection is deemed possible only in "exceptional" or "appropriate" circumstances²⁹⁹.

Arbitral panels have pointed out that issues like "the stability of the business environment and legal security are more typical of fair and equitable treatment"³⁰⁰ and have focused on the necessity of distinguishing the two standards. In *Suez*, the tribunal highlighted that interpreting full protection and security too broadly could lead to an unnecessary and possibly undesirable overlap with other standards³⁰¹. According to the *Plama* tribunal, the most likely outcome would be the establishment of a close connection between the standards of full protection and security and fair and equitable treatment³⁰². Thus, it is fundamental to avoid the risk of not being able to separate circumstances in which full protection and security has been breached from others where standards like fair and equitable treatment or the prohibition of unlawfully expropriating foreign investment have been violated³⁰³. In *PSEG*, the tribunal had to face the eventuality that almost identical claims are presented under the standards of full protection and security and fair and equitable treatment and concluded that, in similar circumstances, the claim related to the alleged breach of full protection and security should be dismissed³⁰⁴.

In the above-mentioned arbitral awards, the respective tribunals recognised the possibility of extensively interpreting full protection and security, beyond the mere physical sphere, even though submitting the possibility to the existence of "exceptional circumstances". Nevertheless, the latter concept and the way arbitral tribunals have considered it raise several doubts. Arbitral tribunals have generally failed to provide clear definitions of "exceptional circumstances", of the events whose peculiar nature would allow the standard's extensive interpretation. Tribunals have also failed to state whether states have margin of appreciation in the qualification of such specific circumstances and what should be arbitral tribunals' interpretative role in similar delicate circumstances. Furthermore, tribunals have not discussed the possibility

²⁹⁶ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 286. See also *Sempra Energy International v. Argentine Republic*, para. 323. See also *Plama Consortium Limited v. Republic of Bulgaria*, para. 180. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 173. See also *AES Summit Generation Limited and AES-Tisza Eromii Kft. v. Republic of Hungary*, ICSID, Case No. ARB/07/22, Award, September 23, 2010, para. 13.2.2.

²⁹⁷ See the United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, United Nations Publication, New York, 1998, p. 75.

²⁹⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 286. See also *Sempra Energy International v. Argentine Republic*, para. 323.

²⁹⁹ See *PSEG Global Inc. and Konya Ilgin Elektirk Uretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, para. 258. See also *AES Summit Generation Limited and AES-Tisza Eromii Kft. v. Republic of Hungary*, para. 13.2.2.

³⁰⁰ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 173.

³⁰¹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 174.

³⁰² See *Plama Consortium Limited v. Republic of Bulgaria*, para. 180.

³⁰³ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 286. See also *Sempra Energy International v. Argentine Republic*, para. 323.

³⁰⁴ See *PSEG Global Inc. and Konya Ilgin Elektirk Uretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, para. 259.

of adopting an objective test to determine whether a circumstance can be defined as exceptional, allowing the standard's extensive interpretation. Tribunals limited their analysis to a fast and superficial consideration that a certain circumstance was not "exceptional enough" and dismissed the claim, without further motivating their decision. Finally, the fact that the claims have generally been dismissed contributed to prevent arbitral tribunals from addressing the issue more effectively.

6. Can the formulation of BITs provisions justify a broader interpretation of full protection and security?

The "simple" and "qualified" formulations of the standard of protection and security have arisen doubts among arbitral panels on their interpretation. Can they be considered as equivalent or, depending from the specific words used by states, should be intended as having different meanings? Arbitral tribunals are often required to clarify the meaning of these different formulations and they have reached two opposite conclusions.

Not every arbitral tribunal agrees that to different formulations of the standard should correspond different interpretations. Some tribunals affirm that the use of additional words to qualify protection and security does not influence its meaning. In those disputes, the interpretation of the different formulations of the standard is considered as playing a minor role, lacking significant diversities in the level of protection which is expected from states³⁰⁵. In *Parkerings*, for instance, the Norway-Lithuania BIT was the applicable law and it referred only to "protection"³⁰⁶. Nevertheless, the tribunal intended to apply the standard of full protection and security because it was "generally accepted" that the "simple" and the "qualified" formulation of the standard were not intrinsically different and that their indiscriminate application did not modify the level of protection which should have been assured to foreign investment³⁰⁷. The tribunal added that the use of the expression "generally accepted" was grounded on the existence of a number of according arbitral decisions, even though it did not provide any list of awards confirming that assertion. This affirmation was also declarative of the intentions of the dispute's parties since, in several occasions, they had referred to the standard of full protection and security and not to "investment protection".

³⁰⁵ See Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 244. See also Zeitler H. E., *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, Stockholm International Arbitration Review, Vol. 3, 2005, p. 30. See also Schreuer C. H., *Full Protection and Security*, Journal of International Dispute Settlement, Vol. 1, Issue 2, August, 2010, p. 1. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 219. See also Cordero Moss G., *Full Protection and Security*, in *Standards of Investment Protection*, ed. by Reinisch A. Oxford University Press, Oxford, 2008, p. 134. See also Zeitler H. E., *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, Stockholm International Arbitration Review, Vol. 3, 2005, p. 30. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 169.

³⁰⁶ See Article 3 of the Norway-Lithuania BIT signed on June 16, 1992, and entered into force on December 20, 1992. The provision states that "each Contracting Party shall promote and encourage in its Territory investments of Investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the Contracting Party in the Territory of which the investments are made".

³⁰⁷ See *Parkerings-Compagniet A.s. v. Republic of Lithuania*, ICSID, Case No. ARB/05/8, Award, September 11, 2007, para. 354.

On the contrary, other tribunals have justified the inclusion of legal protection within full protection and security thanks to the specific formulation of the standard in BITs, supporting the assumption that to different formulations correspond different interpretations. In these cases, arbitral tribunals have concluded that when the standard is strengthened by the use of specific words, like "full" or "constant", it is possible to attribute it a broader meaning. However, no arbitral panel has ventured to support the hypothesis that a strengthening formulation of the standard can "prohibit all state action injurious to investment" yet³⁰⁸. Adopting such a broad interpretation would favour foreign investors, but it would also undermine states' right to rule within their jurisdiction, since every national measure could virtually affect foreign investment.

The *Biwater Gauff* award presents an interpretation of the words qualifying the standard mirroring the previous *Azurix v. Argentina*. In both cases, arbitral tribunals agreed that the addition of "full" to "protection and security" completely changed the meaning which should have been attributed to the standard³⁰⁹, as well as the level of responsibility of the host state for any violation of the standard³¹⁰. In *Biwater Gauff*, the tribunal further affirmed that states would not have included words such as "full" if the ending result would have been similar to the "simple" standard. Similarly, the tribunal in *AAPL* stated that words like "constant" and "full" strengthened the meaning of the standard of protection and security³¹¹. The *AAPL* tribunal also tried to answer the question whether these words could influence the standard so to require a higher level of due diligence³¹². The interpretation of both the text of the BIT and its preparatory works suggested that, despite the undisputable strengthening meaning of words like "constant" and "full", in that case, those words did not have enough power to transform states' obligation to act with due diligence while protecting foreign investment "into a strict liability"³¹³.

Awards like *Suez v. Argentina* allow to observe how arbitral tribunals approach different BITs texts and carry out a comparative interpretation of similar provisions dealing with full protection and security³¹⁴. The question concerned the level of protection which should have been expected from BITs provisions in the light of their respective formulations and the verification of the possibility of assimilating them to the classical formulation "full protection and security". More specifically, the tribunal asked whether the different formulations would have "affected" the level of protection granted in the BITs³¹⁵. It ended up substantially equating different formulations using words like "full" or "constant", stating that the inclusion

³⁰⁸ See Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 253. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 214-215. In this case, the author has not debated the issue in the way Vandevelde did. However, it can be assumed, from the fact that the jurisprudential cases which he has presented consider only the hypothesis of a "secure investment environment", beyond physical security, that the same conclusions drafted by Vandevelde can also be applied to Salacuse's reasoning.

³⁰⁹ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID, Case No. ARB/05/22, Award, July 24, 2008, para. 729. See also *Azurix Corporation v. Argentine Republic*, ICSID, Case No. ARB/01/12, Award, July 14, 2006, para. 408.

³¹⁰ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 730.

³¹¹ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, para. 50.

³¹² See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 50.

³¹³ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 50.

³¹⁴ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 159.

³¹⁵ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 168. The Tribunal also recalled previous jurisprudence and, specifically, *Azurix* and *Biwater Gauff*.

of words strengthening the standard definitely had an impact on the level of protection and security offered to the foreign investment, while BITs not including similar words could not be expected to be extensively applied³¹⁶.

Thus, only the inclusion in a BIT of an explicit reference to legal protection can really ease the interpretative work of arbitral tribunals. A similar scenario has characterised *Siemens v. Argentina*, since the Germany-Argentina BIT is one of the few examples of bilateral treaties which explicitly refer to investment's legal security³¹⁷. This peculiar formulation has been used in several occasions by Germany and also in some BITs concluded with African states.

The argumentation at the ground of the extensive interpretation of full protection and security relates to the fact that foreign investments usually include both tangible and intangible assets (such as commercial or financial transfers). According to the *Siemens* and *Biwater Gauff* tribunals, it would be difficult to explain how the protection and security of intangible assets could be achieved without interpreting the standard in a broader way, going beyond the sole physical protection³¹⁸.

The most part of arbitral tribunals have not based their reasoning on BITs peculiar formulations, but rather on the interpretation of the "qualified" formulation of the protection and security standard. The core of this approach is the conclusion that full protection and security can be extensively interpreted so to include other levels of protection in all those cases where the standard has been qualified by the word "full". According to the *Biwater Gauff* tribunal, such approach "implies a State's guarantee of stability in a secure environment" from the physical, commercial and legal points of view³¹⁹. Moreover, the arbitral panel added that investment protection should not only relate to the actions carried out by third parties, but should also include those actions carried out by either the organs or the representatives of the host state³²⁰. Similarly, in *Azurix*, the tribunal concluded that an extensive interpretation of full protection and security was possible, depending on the standard's formulation. In all those cases where "the terms "protection and security" [are] qualified by "full" and no other adjective or explanation", then a broader interpretation is possible so to include the legal level³²¹. In *Suez*, the different nationalities of the claimants allowed the tribunal to compare different BITs³²². From the literal analysis of the BITs texts the tribunal declared that the absence of the word

³¹⁶ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 175.

³¹⁷ See Article 4(1) of the Argentina-Germany BIT signed on April 9, 1991, and entered into force on November 8, 1993. The provision states that "the investment of nationals or companies of one of the Contracting Parties shall enjoy full protection and legal security in the territory of the other Contracting Party".

³¹⁸ See *Siemens A.G. v. Argentine Republic*, para. 303. See also *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 729. See also *National Grid Plc. V. Argentine Republic*, para. 187.

³¹⁹ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 729.

³²⁰ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 730.

³²¹ See *Azurix Corporation v. Argentine Republic*, para. 408.

³²² See Article 3(1) of the Argentina-Spain BIT signed on October 3, 1991, and entered into force on September 28, 1992. The provision states that "each Party shall protect within its territory investments made in accordance with its legislation by investors of the other Party and shall not obstruct, by unjustified or discriminatory measures, the management, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments". See Article 3(2) of the Argentina-United Kingdom BIT signed on December 1, 1990, and entered into force on February 2, 1993. The provision states that "investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of investors of the other

"full" made impossible to support the hypothesis that the standard of full protection and security could refer to other forms of protection when the limitation of the wording suggest that only physical protection is admissible with respect to these two BITs³²³.

The *Biwater Gauff, Azurix* and *Suez* awards have been characterised by the attempt of arbitral tribunals to demonstrate that the addition of qualifying words, like "full" or "constant", represents the wish of states to attribute a broader meaning to the protection and security standard. Other tribunals reached the same conclusions by adopting slightly different points of view. In *Vivendi II* and *National Grid*, the tribunals did not focus on the effects that the addition of strengthening words to qualify the standard would have had. They rather underlined that the absence of a specific qualification of the standard did not allow any restrictive interpretation.

The BITs concluded by Argentina with France (relevant in *Vivendi II*) and the UK (relevant in *National Grid*) respectively refer to "full and complete protection" and "protection and constant security". In both disputes, the tribunals had to verify whether the protection and security standard should have been interpreted so to include the mere physical protection or whether it implied a more extensive level of protection. In *National Grid*, the tribunal also recalled an UNCTAD Report affirming that the standard of full protection and security "has typically been applied in situations involving physical threats or destruction"³²⁴. Despite the conclusions of the report and the affirmations of the respondent, both tribunals agreed that a literal interpretation of BITs provisions did not allow the conclusion that the standard had to be interpreted in a limited way, only referring to physical protection³²⁵. If contracting states wanted to limit the applicability of the full protection and security standard, they should have done so by including expressions helping to assume those intentions³²⁶. Thus, the use of words like "full" or "constant" allowed a more extensive interpretation of the protection and security standard. The tribunal in *National Grid* added that the link between full protection and security and fair and equitable treatment was the other reason which had prevented it from adopting a more restrictive interpretation. The absence of restrictions in the formulation of full protection and security and its link with fair and equitable treatment made rather difficult accepting the point of view of a standard confined to the sole physical sphere³²⁷.

The *Toto v. Lebanon* award where the arbitral panel had to address the two provisions on protection included in the BIT³²⁸ could be helpful to further qualify the debate on physical and legal protection, as well

Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party".

³²³ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 175.

³²⁴ See the United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, United Nations Publication, New York, 1998, p. 75.

³²⁵ See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/97/3, Award, August 20, 2007, para. 7.4.15. See also *National Grid Plc. V. Argentine Republic*, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008, para. 187.

³²⁶ See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, para. 7.4.15. See also *National Grid Plc. V. Argentine Republic*, para. 189.

³²⁷ See *National Grid Plc. V. Argentine Republic*, para. 189.

³²⁸ The Italy-Lebanon BIT is one of the few cases in which the requirement of protection has been included in two separate provisions. Article 2(3) of the BIT generally refers to investment protection, while Article 4(1) deals with the full protection and security standard. See the Italy-Lebanon BIT signed on November 7, 1997, and entered into force on February 9, 2000. The first

as to understand whether the presence of various provisions on security could help in broadening the standard's meaning. According to the tribunal, the two provisions substantially overlapped. For this reason, "the finding that a claim [was] not covered by Article 2(3) [would have also entailed] that it [was not] covered by Article 4(1)"³²⁹. The tribunal concluded that a breach of the more general provision, requiring the state to protect the foreign investment, did not occur and, thus, the standard of full protection and security included in the other provision had not been violated either. Nevertheless, the tribunal failed to consider the hypothesis that full protection and security could also be interpreted as guaranteeing legal protection. It would have been interesting to verify the way an arbitral tribunal would have interpreted such provisions: whether a double provision on security can have a "reinforced" meaning and work for the promotion of an extensive interpretation of the standard.

In a couple of awards, arbitral panels have provided their interpretation of legal protection. In *Siemens*, the tribunal interpreted legal security as the "quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application"³³⁰. In *Azurix*, such broader interpretation of the standard was considered desirable because the "stability afforded by a secure investment environment" was another fundamental element for foreign investors, as much as the physical protection of their investment³³¹. The common element of these affirmations is the reference to the stability of host states' legal systems and investment environments. This approach brings with it the risk that the concept of legal protection is too similar to the content of fair and equitable treatment.

Fair and equitable treatment has been relevant also in disputes where arbitral panels have extensively interpreted full protection and security because of the existence of a link between the standards established in BITs provisions. The *National Grid* tribunal asserted that the absence of restriction in the formulation of full protection and security and its link with fair and equitable treatment make rather difficult to accept the point of view of a standard confined to the sole physical sphere³³². Accordingly, the fact that the two standards had been included in the same provision and related to each other is a clue that an extensive interpretation of full protection and security was admissible.

7. The relationship between full protection and security and fair and equitable treatment.

One of the outcomes of the previous paragraph, besides arbitral tribunals' decision to extensively interpret full protection and security, depending on BITs formulations, has concerned the possible relationship between full protection and security and fair and equitable treatment. The issue is whether full

article states that "each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party". While, the other affirms that "investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Part".

³²⁹ See *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon*, para. 171.

³³⁰ See *Siemens A.G. v. Argentine Republic*, para. 303.

³³¹ See *Azurix Corporation v. Argentine Republic*, para. 408.

³³² See *National Grid Plc. V. Argentine Republic*, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008, para. 189.

protection and security is a part of fair and equitable treatment or they are separate standards, having different effects and subject to different limits.

One of the theories about the relationship between the two standards states they are undoubtedly interrelated³³³, but the fair and equitable treatment standard is defined as an "overriding general duty"³³⁴. In this scenario, the other standards are perceived as a sort of corollary which should operate to guarantee the successful implementation of fair and equitable treatment. The other standards are somehow functional to the realisation of the obligations deriving from fair and equitable treatment. Accordingly, full protection and security is a constitutive element of the fair and equitable treatment, a sort of "*lex specialis*"³³⁵ or "appendix"³³⁶.

The tribunals in *Suez* and *Noble Ventures* shared the opinion that full protection and security is "included" in fair and equitable treatment especially because of the textual formulation of the two standards in the BITs applicable to both disputes³³⁷. In *Suez*, the tribunal reached more easily this conclusion because of the peculiar formulation of the Argentina-France BIT. According to Article 5(1) of the BIT, the "full and complete protection" assured to foreign investment has to be "in accordance with the principle of just and equitable treatment" included in Article 3 of the BIT. The tribunal could not avoid addressing the relationship existing between the two standards and, more specifically, whether to a breach of fair and equitable treatment corresponded also a violation of full protection and security³³⁸. The standards, as formulated in the Romania-US BIT³³⁹ (the applicable law in *Noble Ventures*) present characteristics more similar to the majority of the BITs concluded worldwide. Fair and equitable treatment is mentioned before full protection and security and other obligations and it was interpreted as the wish of contracting states to attribute the former a primary role³⁴⁰. The tribunal interpreted fair and equitable treatment as a "more general standard which finds its specific application in inter alia the duty to provide full protection and security"³⁴¹.

Subsequently, the tribunal in *Suez* added that, by virtue of this "subordinated" role of full protection and security, a breach of the standard "automatically" entailed a breach of fair and equitable treatment³⁴², being the sphere of action of full protection and security "narrower" than that of fair and equitable

³³³ See *Azurix Corporation v. Argentine Republic*, para. 408. See also *Occidental Exploration and Production Company v. Republic of Ecuador*, para. 187.

³³⁴ See *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 290. See also Mann F. A., *British Treaties for the Promotion and Protection of Investments*, British Yearbook of International Law, Vol. 52, Issue 1, 1981, p. 243. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, British Yearbook of International Law, Vol. 70, Issue 1, 1999, p. 131 and ff. The author reports Mann's theory and affirms that, even though in Mann's article the concept has been applied only to British investment treaties, it can also be generalised.

³³⁵ See Diehl A., *The Core Standard of International Investment Protection*, International Arbitration Law Library, Vol. 26, Kluwer Law International, 2012, p. 529.

³³⁶ See also Klager R., *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, Cambridge, 2011, p. 291.

³³⁷ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 171.

³³⁸ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 170.

³³⁹ See Article 2(2)(a) of the Romania-USA BIT signed on May 28, 1992, and entered into force on January 15, 1994. It states that "investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law".

³⁴⁰ See *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 182.

³⁴¹ See *Noble Ventures Inc. v. Republic of Romania*, para. 182.

³⁴² See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 171.

treatment³⁴³. On the contrary, it is not necessarily true that a violation of full protection and security automatically causes a breach of the fair and equitable treatment³⁴⁴. The breach of both standards can take place also in the circumstance episodes of physical violence or damages affect the investment, because the standard of full protection and security has been extended over the mere physical security³⁴⁵ or because in the text of the BIT there is not any a restrictive formulation preventing this approach³⁴⁶.

A very similar approach has characterised *Petrobart v. Kyrgyz Republic* where the claimant affirmed both fair and equitable treatment and full protection and security, included in Article 10(1) of the Energy Charter Treaty (ECT), had been breached. In the ECT, the two standards are included in the same provision, but are mentioned in separate sentences and are not connected by any conjunction. The intervention of Kyrgyz authorities in a judicial proceeding involving the claimant, in the attempt of postponing the execution of a judgment in favour of the claimant, was considered as a violation of the fair and equitable treatment³⁴⁷. The tribunal added that the actions of local authorities constituted, at the same time, a breach of the full protection and security standard. The unfair and inequitable treatment reserved to the claimant was defined as not "represent[ing] the constant protection and security owed by the Treaty"³⁴⁸.

The *Occidental v. Ecuador* and *Azurix* tribunals moved this reasoning even further concluding that, once the breach of fair and equitable treatment was proved, verifying whether the standard of full protection and security had been violated too "bec[ame] moot"³⁴⁹. The recognition of the overriding nature of the fair and equitable treatment made superfluous any attempt of verifying whether a breach of full protection and security took place.

Simultaneously to the approach of arbitral tribunals and scholars to the relationship between full protection and security and fair and equitable treatment discussed in the previous paragraph, another more realistic theory has developed. It is based on the belief that the two standards are indeed overlapping, but, most importantly, different and autonomous³⁵⁰. In *Jan de Nul*, the two subsequent BITs concluded between

³⁴³ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 171.

³⁴⁴ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 171.

³⁴⁵ See *Azurix Corporation v. Argentine Republic*, para. 408. See also *AES Summit Generation Limited and AES-Tisza Eromii Kft. v. Republic of Hungary*, ICSID, Case No. ARB/07/22, Award, September 23, 2010, para. 13.3.2.

³⁴⁶ See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/97/3, Award, August 20, 2007, para. 7.4.15. The Tribunal found its interpretation compatible with those of other cases, like *CSOB, CME, Azurix and Occidental*.

³⁴⁷ See *Petrobart Limited v. Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 126/2003, Award, March 29, 2005, p. 26.

³⁴⁸ See *Petrobart Limited v. Kyrgyz Republic*, p. 26.

³⁴⁹ See *Occidental Exploration and Production Company v. Republic of Ecuador*, para. 187. See also *Azurix Corporation v. Argentine Republic*, para. 407-408. See also *Occidental Exploration and Production Company v. Republic of Ecuador*, para. 187.

³⁵⁰ See Schreuer C. H., *Fair and Equitable Treatment: Interactions with other standards*, *Transnational Dispute Management*, Vol. 4, Issue 5, 2007, p. 2-3. See also Schreuer C. H., *Full Protection and Security*, *Journal of International Dispute Settlement*, Vol. 1, Issue 2, August, 2010, p. 14. See also Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, *Journal of World Investment & Trade*, Vol. 14, 2013, p. 140-141. See also Eckardt M. N., *The Fair and Equitable Treatment (FET) Standard in International Investment Law*, *Transnational Dispute Management*, Vol. 9, Issue 3, 2012, p. 39. See also Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, *Law and Practice of International Courts and Tribunals*, Vol. 10, 2011, p. 384. See also Klager R., *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, Cambridge, 2011, p. 17. See also Schreuer S., *Introduction: Interrelationship of standards*, in *Standards of Investment Protection*, ed. by Reinisch A. Oxford University Press, Oxford, 2008, p. 4. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005, p. 217. Here,

Egypt and the Netherlands refer to "continuous protection and security" and in both cases the standard has been included in a separate provision with respect to fair and equitable treatment³⁵¹. The tribunal affirmed that the fact that the standards are mentioned in separate provisions is the reason why they should be "distinguished... even if the two guarantees can overlap"³⁵². In the light of this consideration, the tribunal separately analysed the alleged breaches of the two standards and, for each of them, evaluated whether the host state had violated the respective provisions. The separation between the two standards was so clear that the tribunal did not make any affirmation on the fact that the proved violation of one of the standards automatically authorised the assumption that a violation of the other had occurred.

8. The failure of arbitral tribunals to clarify the relationship between the two standards.

Doctrine and some arbitral tribunals have developed clear positions on the nature of the relationship between full protection and security and fair and equitable treatment, based either on subordination or autonomy. Nevertheless, several arbitral tribunals have missed the opportunity of clarifying their position on the issue, an effort which could lead to the rising of a unique consolidated practice. It is still uncertain whether fair and equitable treatment is the general standard encompassing others or the two standards relate to each other on the basis of independence, equity and cooperation. *Wena Hotels* and *LESI and Astaldi* are two of the most important awards involving African countries, having also influenced general arbitral practice, which have failed to accomplish the objective of clarifying this relationship.

In *Wena Hotels*, the claimant argued that the hotels it was managing and upgrading had been seized with the use of force by individuals under the orders of the EHC (Egyptian Hotels Company) and that local police did not take any action to either punish the perpetrators or re-establish the situation existing before the seizure³⁵³. The main claim concerned the alleged breach of Egypt's treaty obligation, set in Article 2(2) of the Egypt-UK BIT, to assure fair and equitable treatment and full protection and security to foreign investment³⁵⁴. The tribunal verified the responsibility of the Egyptian Government and Ministry of Tourism for their omissions in preventing EHC's plan to seize the two hotels or in restoring *Wena Hotels*' control and compensating the investor for the damages suffered, as well for the omissions of local police³⁵⁵. The tribunal

the authors are reporting the positions of some scholars. See also Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, Journal of World Investment & Trade, Vol. 14, 2013, p. 141. See the Report of Harrison J. presented at the XVIII International Congress of Comparative Law Washington 2010, on the Protection of Foreign Investment, p. 12. The document can be found at the following link: www.law.ed.ac.uk/includes/remote_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAIM0EIMkYIMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxvYWQlMkZwdWJsaWNhdGlvbNlMIMkYxXzYyOF91bml0ZWRRaW5nZG9tcmVwb3J0b250aGVwcm90ZWN0aW9ub2Zmb3JlLnBkZiZhbGw9MQ%3D%3D.

³⁵¹ See Article 1(2) of the Netherlands-Egypt BIT, entered into force in 1978 and currently terminated, and Article 3(2) of the new BIT, entered into force on March 1, 1998.

³⁵² See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 269.

³⁵³ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, Case No., ARB/98/4, Award, December 8, 2000, paras. 15 and ff.

³⁵⁴ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, paras. 84-95. See Article 2(2) of the United Kingdom-Egypt BIT signed on June 11, 1975, and entered into force on February 24, 1976. The article states that "investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party".

³⁵⁵ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, para. 85.

concluded that Egypt had breached its obligation to assure both full protection and security and fair and equitable treatment. Apparently, the breach of the full protection and security standard drove the Tribunal to identify a parallel breach of the fair and equitable treatment standard³⁵⁶. Nevertheless, the main deficiency of the award lies in the failure of the arbitral tribunal to define the contents of both standards and their relationship³⁵⁷.

The tribunal, in *LESI and Astaldi*, had the chance to address the issue, as the claimants related the alleged breach of the obligation of the host state to protect the investment to the standard of fair and equitable treatment. The claimant had experienced security issues on the working site, due to some fights between the Algerian regular army and fundamentalist Islamic groups. Local authorities had tried to adopt security measures, but their inefficiency caused the claimant to stop its activities in the area. The claimant invoked the breach of the obligations to grant "full and constant protection and security"³⁵⁸, included in Article 4(1) of the Algeria-Italy BIT, and fair and equitable treatment which, on the contrary, is not mentioned in the BIT. The tribunal affirmed that, through the most favoured nation clause included in Article 3 of the BIT, it would have been possible to derive the fair and equitable treatment from the Algeria-Belgium BIT. The tribunal separately analysed the two claims, but the claimant asked the tribunal to consider the alleged breach of fair and equitable treatment in relation with the security of the investment, recalling the same events which would have been analysed in relation with the violation of the full protection and security standard³⁵⁹. The tribunal had to link the two standards and to determine whether the fair and equitable treatment standard was violated as a consequence of the failure of Algeria in protecting the foreign investment. The tribunal briefly concluded that Algeria had not violated its treaty obligations towards the investors by simply affirming that "the fair and equitable treatment in the field of security [had] not been breached"³⁶⁰. Having accepted to consider the claimant's reasoning that linked the two standards, the tribunal failed to properly analyse the issue of the nature of their relationship. The conclusion referred to "the fair and equitable treatment in the field of security", an expression which arose some doubts. It seems reasonable to conclude that, in the light of the words used, the tribunal meant to underline that investment protection and security constituted a part of the fair and equitable treatment. However, without any explicit further clarification, there is not any chance that this conclusion could be used to effectively clarify the way the two standards are linked.

³⁵⁶ See Vandevelde K. J., A Unified Theory of Fair and Equitable Treatment, *New York University Journal of International Law and Politics*, Vol. 43, 2010-2011, p. 102.

³⁵⁷ See Schreuer C. H., *Fair and Equitable Treatment: Interactions with other standards*, *Transnational Dispute Management*, Vol. 4, Issue 5, 2007, p. 2.

³⁵⁸ See Article 4(1) of the Algeria-Italy BIT signed on May 18, 1991, and entered into force on November 26, 1993. According to the provision, "les investissements effectués par des nationaux ou personnes morales de l'un des Etats contractants, bénéficient sur le territoire de l'autre Etat contractant, d'une protection et d'une sécurité constantes, pleines, et entières, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en fait, leur gestion, leur entretien, leur utilisation, leur jouissance, leur transformation, ou leur liquidation sous réserve des mesures nécessaires au maintien de l'ordre public".

³⁵⁹ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, ICSID, Case No. ARB/05/3, Award, November 12, 2008, para. 152.

³⁶⁰ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 154.

Other cases in which it has been registered a failure in providing further reasons either on the possible link between the standards or on the elements differentiating them, are mainly related with the differentiation between physical and legal protection. In *PSEG*, the tribunal, while dealing with the standard of full protection and security, concluded that in "exceptional situations" (referring to legal security) it is possible to register a "very close connection" with fair and equitable treatment³⁶¹. The fact that the tribunal did not uncover the existence of such an exceptional situation prevented further investigations on the topic and the characteristics of the closer relationship which would have taken place in an opposite circumstance. The tribunal, in *CME*, addressed the breach of the obligation to assure full protection and security by mentioning also the legal protection due to investment³⁶². Nevertheless, the tribunal formulated the standard too vaguely and did not clarify its opinion on the concept of legal security, increasing the uncertainty over the meaning of the two concepts³⁶³. Finally, in *Lauder*, the tribunal adopted a different position because it affirmed that fair and equitable treatment "related to the traditional standard of due diligence"³⁶⁴. Thus, it is possible to assume that, by virtue of this connection, there was a link also full protection and security³⁶⁵, but the tribunal did not further analyse the possible connection.

The common characteristic of the above-mentioned awards is that they failed to define the relationship between full protection and security and fair and equitable treatment. Other awards have spread some light on the relationship between the two standards, even though they failed to completely address the issue leaving some lacunae. In *Jan de Nul*, the tribunal supported the theory that the two standards should be considered separately, but are, at the same time, overlapping³⁶⁶. The tribunal grounded its reasoning on the specific formulation of the Netherlands-Egypt BIT which includes the standards in separate provisions, but it did not further explain the reasons leading to that conclusion. It also failed to consider how the standards' relationship should be qualified in the circumstance they have been included in the same provision: whether they are still separate and overlapping or subordinated one to the other.

The tribunal, in *Occidental*, analysed simultaneously the claim on the alleged breach of full protection and security and fair and equitable treatment³⁶⁷. Once the tribunal demonstrated that Ecuador had

³⁶¹ See *PSEG Global Inc. and Konya Ilgin Elektirk Uretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID, Case No. ARB/02/5, Award, January 19, 2007, paras. 257-259.

³⁶² See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, para 613.

³⁶³ See also Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1151.

³⁶⁴ See *Lauder R. S. v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, para. 292. The Tribunal shared the interpretation presented by the U.N. Conference On Trade & Development in its report "Bilateral Investment Treaties In The Mid-1990s", because it was not satisfied with the definition of the fair and equitable treatment standard included in the BIT.

³⁶⁵ In fact, while analyzing the alleged breach of the full protection and security standard, the Tribunal recalled the obligation of the host state to act diligently while protecting the foreign investment. See *Lauder R. S. v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, para. 308.

³⁶⁶ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID, Case No. ARB/04/13, Award, June 16, 2006, para. 269. See Article 3(1) and (2) of the Egypt-BLEU BIT signed on February 28, 1999, and entered into force on May 24, 2002. The provision states that "tous les investissements... effectués par des investisseurs de l'une des Parties Contractantes, jouiront sur le territoire de l'autre (des autres) Etat(s) Contractant(s) d'un traitement juste et équitable. Ces investissements jouiront également d'une sécurité et d'une protection constante".

³⁶⁷ See Article 2(3)(a) of the United States-Ecuador BIT signed on August 27, 1993, and entered into force on May 11, 1997. The article states that "investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law".

breached its obligation to assure fair and equitable treatment, it declared irrelevant to assess whether there had also been a breach of full protection and security. The tribunal interpreted the standards as being so linked that a "treatment that [was] not fair and equitable automatically entail[ed] an absence of full protection and security of the investment"³⁶⁸. Nevertheless, besides this affirmation, the tribunal did not provide any further reason to explain the nature of this relationship³⁶⁹. In *Noble Ventures*, the tribunal addressed the relationship between the two standards. The analysis was limited to the consideration that the fair and equitable treatment should be considered as a general standard finding "its specific application in inter alia the duty to provide full protection and security"³⁷⁰. The tribunal did not explain how full protection and security became an articulation of fair and equitable treatment.

9. Full protection and security and the international minimum standard treatment.

The doctrinal debate on the international minimum standard of treatment has been mainly focused on the possibility of including fair and equitable treatment³⁷¹, while commentators have not been referring to full protection and security. Similarly, there has been the development of an arbitral practice interpreting customary international law on fair and equitable treatment as a representation of the international minimum standard. Generally, arbitral awards consider the international minimum standard of treatment only in relation with claims concerning fair and equitable treatment. However, those reasoning relating to fair and equitable treatment can be extended also to the full protection and security standard. Only a minority of cases has referred to full protection and security and the international minimum standard. In *ELSI*, the tribunal interpreted Article 5(1) of the Italy-US FCN Treaty referring to "the full protection and security required by international law" as binding states to "conform to the minimum international standard"³⁷². In *Noble Ventures*, the tribunal referred to the "the general duty to provide for protection and security of foreign

³⁶⁸ See *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, London Court of International Arbitration, Case No. UN 3467, Award, July 1, 2004, para. 187.

³⁶⁹ See Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, *Journal of World Investment & Trade*, Vol. 14, 2013, p. 141. See also Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, *Vanderbilt Journal of Transnational Law*, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012, p. 1151.

³⁷⁰ See *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 182. See Article 2(2)(b) of the Romania-United States BIT signed on May 28, 1992, and entered into force on January 15, 1994. The article states that "investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

³⁷¹ See Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, Oxford, 2013, p. 83.

³⁷² See *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, ICJ, Reports 1989, Judgment, July 30, 1989, para. 111. Article 5(1) states that "the nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term "nationals" where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations". The Italy-US FCN Treaty was concluded on February 2, 1948, and entered into force on July 26, 1949.

nationals found in the customary international law of aliens"³⁷³. A similar formulation rises the question whether the international minimum standard has been interpreted as customary law.

Some arbitral tribunals have focused on the formulation of BITs provisions in the attempt of concluding whether a connection with the international minimum standard could be established. A first group of cases concerns disputes where the peculiar formulation of BITs provisions has led arbitral panels to relate BITs standards with the international minimum standard. In *AAPL*, the tribunal, while dealing with the "qualified" formulation of protection and security, asked whether the inclusion of words like "constant" or "full" in the Sri Lanka-UK BIT required states to exercise a level of due diligence higher than the international minimum standard of treatment³⁷⁴.

However, the most part of arbitral tribunals had to deal with the hypothesis the formulation "in accordance with principles of international law", frequently included in BITs, could refer also to the international minimum standard of treatment. The claimant in *Lauder* affirmed principles like "a variant of *pacta sunt servanda*, the protection of acquired rights, the treatment of foreign investment in good faith, the principle of estoppel, and recognized standards relating to the protection of property" belong to the category of general principles of international law³⁷⁵. In that occasion, the tribunal did not question whether the reference to the "principles of international law" constituted a reference to the international minimum standard of treatment. Differently, the *Suez* tribunal underlined that the well-known and well-established nature of the minimum standard led to the conclusion that it would be rather difficult to assume that two states included a possibly unclear expression such as "principles of international law", instead of directly refer to the minimum standard if that was their purpose³⁷⁶.

Another issue arising out of the possible interpretation of expressions like "in accordance with principles of international law" as referring to the international minimum standard is whether, a similar formulation, allows the interpretation of BITs standards (such as fair and equitable treatment or full protection and security) in a narrower way. In *Suez*, the tribunal interpreted Article 3 of the France-Argentina BIT, requiring states to grant "just and equitable treatment, in accordance with the principles of international law", as not limiting the content of fair and equitable treatment to the international minimum standard³⁷⁷. According to the arbitral panel, the interpretation of the provision could not have been limited to the consideration of the minimum standard, but should have been interpreted with respect to "all relevant sources of international law"³⁷⁸. The ordinary meaning of the words "principles of international law" is "the legal

³⁷³ See *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, paras. 164-165.

³⁷⁴ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, para. 9.

³⁷⁵ Article 2(2)(a) of the Czech Republic-US BIT affirmed that investment would have enjoyed fair and equitable treatment and full protection and security and, in any case, a treatment never inferior to that required by international law. See *Lauder R. S. v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, para. 206.

³⁷⁶ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 184.

³⁷⁷ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 185.

³⁷⁸ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 185.

principles derived from all sources of international law”, which are listed in Article 38 of the Statute of the ICJ³⁷⁹.

A second group of disputes concerns those circumstances where tribunals had to consider the events in the light of BITs not including any reference to the international minimum standard. The lack of any reference to the international minimum standard in BITs texts, or even principles of international law, has driven tribunals to exclude the possibility that the fair and equitable treatment standard should be interpreted so narrowly that the international minimum standard of treatment encompasses it³⁸⁰. In *National Grid*, the tribunal similarly stated that the lack of reference to the international minimum standard in IIAs cannot result in allowing an equation with the limitations typically "found in the expression minimum treatment standard under international law"³⁸¹. As highlighted in *Biwater Gauff*, BITs standards cannot be the object of "generalised statements", since they are often qualified in very different ways in the texts of IIAs and thus need to be interpreted on a case-by-case basis³⁸². In fact, provisions simply referring to standards such as full protection and security or fair and equitable treatment show contracting states' intention to interpret the standards as autonomous³⁸³.

The *Saluka* tribunal went even further affirming that similar circumstances, differently from disputes involving treaties explicitly referring to the international minimum standard (like the NAFTA), may allow tribunals to avoid the difficulties related to the establishment of a correlation between the minimum standard and other standards like fair and equitable treatment or full protection and security. The tribunal also added that "the lack of a reference to an international standard in the Treaty" might represent the parties' "very purpose" to avoid those interpretive difficulties³⁸⁴.

ICSID tribunals' references to NAFTA jurisprudence have been raising some concern. In *Meerapfel Söhne*, the tribunal seemed to confirm that the international minimum standard of treatment constituted the customary rule on treatment when it recalled NAFTA jurisprudence³⁸⁵. In *Biwater Gauff*, while referring to the thresholds for the violation of the minimum standard, the tribunal referred to several awards released by NAFTA tribunals and recognised that those tribunals' conclusions had been possible because of the specific formulation and interpretation of Article 1105 of the NAFTA, which is partially different to the formulation of the Tanzania-UK BIT³⁸⁶.

The NAFTA Treaty, and specifically Article 1105 on the international minimum standard, is the applicable law of all those disputes. The NAFTA Free Trade Commission has adopted an interpretation of Article 1105 stating that the minimum standard is the relevant customary rule and that "full protection and

³⁷⁹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 185.

³⁸⁰ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 186.

³⁸¹ See *National Grid Plc. v. Argentine Republic*, para. 170.

³⁸² See *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID, Case No. ARB/05/22, Award, July 24, 2008, para. 590.

³⁸³ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 590.

³⁸⁴ See *Saluka Investments B.V. v. Czech Republic*, para. 294.

³⁸⁵ The tribunal recalled the *Waste Management, S. D. Myers, Mondev, ADF and Loewen* awards. See *Meerapfel Söhne AG v. Central African Republic*, para. 359.

³⁸⁶ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 599.

security does not require treatment in addition to or beyond that... required by... the minimum standard of treatment of aliens"³⁸⁷. That interpretation, however, might not be binding for other states since they are not party to that treaty and it is not certain that the minimum standard reflects customary law. An ICSID tribunal should not be referring to the jurisprudence of a tribunal grounded on different rules, since there are different premises. Unless, as it happened in *Siemens*, the tribunal, after having observed the lack of any reference to the international minimum standard in the Argentine-Germany BIT, affirmed it should have interpreted standards in the light of their ordinary meaning and context³⁸⁸. The tribunal considered Argentina's support to the interpretation of NAFTA Article 1105 given by the FTC where fair and equitable treatment and full protection and security have been interpreted as not requiring "treatment in addition to or beyond that" to customary minimum standard³⁸⁹.

Concerning arbitral tribunals' interpretation of the international minimum standard of treatment, there have been several examples of states interpreting the IMS as less demanding than BITs obligations, like fair and equitable treatment. There have been several occasions where states involved in arbitral disputes have explicitly accepted the international minimum standard of treatment as a customary rule. States' declarations in these awards have showed how states can use the international minimum standard to narrow down the content of other standards, with respect to possible broader meanings deriving from the interpretation of BITs provisions. In *Biwater Gauff*, the debate concerned fair and equitable treatment. However, Tanzania affirmed it should not have been interpreted as an autonomous standard, but rather as corresponding to the content of the "customary international minimum standard"³⁹⁰. In *Rumeli*, Kazakhstan accepted the existence of a customary international minimum standard, in the attempt of circumscribing the claimants' interpretation of the state's obligations³⁹¹. In the state's opinion, the entire Kazakhstan-UK BIT represented only a "floor of minimum treatment that must be accorded to foreign investors"³⁹². In *MCI*, Ecuador initially opposed the application of the Ecuador-US BIT and other international rules, but then it agreed on the applicability of the international minimum standard³⁹³. In *Sempra*, Argentina stated that fair and equitable treatment was "indistinguishable from the customary international minimum standard" and this interpretation was at the core of a considerable practice within NAFTA and ICSID, as well as state practice³⁹⁴.

³⁸⁷ See the "Notes of Interpretation of Certain Chapter 11 Provisions" adopted by the NAFTA Free Trade Commission on July 31, 2001. The document can be retrieved at the following link: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

³⁸⁸ See *Siemens A.G. v. Argentine Republic*, ICSID, Case No. ARB/02/8, Award, January 17, 2007, para. 291.

³⁸⁹ See *Siemens A.G. v. Argentine Republic*, para. 292.

³⁹⁰ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 599.

³⁹¹ See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID, Case No. ARB/05/16, Award, July 29, 2008, para. 571.

³⁹² See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, para. 599.

³⁹³ See *MCI Power Group L.c. and New Turbine Inc. V. Republic of Ecuador*, para. 250.

³⁹⁴ See *Sempra Energy International v. Argentine Republic*, para. 292.

10. Full protection and security and the level of development of host states.

Arbitral tribunals' consideration of political, social and economic conditions characterising states involved in investment disputes has constituted only a minor practice. However, encouraging signals have been registered lately, since this practice intersects with an increasingly intense debate on the opportunity of considering states' level of development while applying investment standards. The awards where arbitral tribunals have considered the level of development of the host state can be divided into three categories as they concern disputes relating to circumstances of political disturbance, the transition from other political and economic systems, and economic and financial crisis³⁹⁵.

The awards dealing with circumstances of political insecurity or disturbance concerned, for instance, circumstances of conflict between national armed forces and fundamentalist groups (*Lesi and Astaldi*) or a status of anarchy, violence and political insecurity caused by a financial breakdown (*Pantechniki*). Arbitral tribunals have interpreted the "general insecurity" deriving from similar destabilising events as having a part in their judgments³⁹⁶, adding that the responses to the challenges posed by situations of disorder can vary on the basis of the level of development of the host state³⁹⁷. The *Pantechniki* tribunal presented the most articulated reasoning, stating that a "powerful state" is expected to "readily control" similar events, while in the hypothesis of a less developed country the same could not happen because of the country's inferior ability of reaction³⁹⁸. In circumstances of "unforeseen breakdowns"³⁹⁹, proportionality should be applied while relating to international standards. The tribunal also explicitly supported the idea that the standard of due diligence should be commensurate with the "particular circumstances" experienced by a host state, as well as "the resources of the state in question"⁴⁰⁰. Arbitral tribunals should ground their analysis of an alleged breach of a host state's obligation to assure investment's protection and security on that state's "level of development and its stability as relevant circumstance"⁴⁰¹. It would not correspond to a factual analysis the expectation that every nation is able to provide the same level of protection than any other state.

The second category of awards concerns those dealing with the transition of ex-Communist states to market economy and a new form of institutional organisation. Thus, the environment which presented to foreign investors was characterised by a relevant level of uncertainty from the economic and legislative point of view, as the entire legislative body and economic system were entirely changed and the adaptation phase

³⁹⁵ This partition comes from the observation of arbitral awards and it has also been adopted by some scholars. See Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, Law and Practice of International Courts and Tribunals, Vol. 10, 2011, p. 385. See also Gallus N., *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, World Investment and Trade, Vol. 6, 2005, p. 711.

³⁹⁶ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, ICSID, Case No. ARB/05/3, Award, November 12, 2008, para. 154.

³⁹⁷ See *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID, Case No. ARB/07/21, Award, July 30, 2009, para. 77.

³⁹⁸ See *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, para. 77.

³⁹⁹ See *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, para. 77.

⁴⁰⁰ This reasoning has been recently recalled and adopted *Mr. Joseph Houben v. Republic of Burundi*, para. 163. The *Pantechniki* tribunal adopted the conclusions drafted in Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 310. See *Pantechniki v. Albania*, para. 81.

⁴⁰¹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 310.

would have not been exempted from a period of settlement. Arbitral tribunals considering similar circumstances agreed that the peculiar political and economic situation, due to the transition from being a Communist state, influenced the domestic investment framework⁴⁰². Consequently, arbitral tribunals could not exempt from considering the "rather special factual background to the dispute"⁴⁰³ as host states were undergoing some radical legislative changes. In similar circumstances, tribunals should also consider the peculiar political and economic context linked to the establishment of similar newly independent states. Transition states are characterised by the necessity of developing new "financial, commercial and banking practices", as well as new controlling institutions⁴⁰⁴, thus it is fundamental to consider them in order to correctly evaluate the investors' legitimate expectations and the level of protection that they should expect according to the bilateral agreement into force⁴⁰⁵.

The third group of awards includes those where the arbitral tribunals had to address a severe status of economic and financial crisis. All of them concern Latin American states and the most part involve Argentina, after the financial breakdown of 2001. In *LG&E*, the tribunal implicitly admitted that economic, social and political events can influence the actions of the host state. However, the acceptance of the argumentation that arbitral tribunals should "take into account all the circumstances" (like the economic crisis which interested Argentina)⁴⁰⁶ is inadmissible in the case those circumstances disrupted the initial "legal framework constructed to attract investors"⁴⁰⁷. Anyway, the fact that arbitral tribunals take into account the internal economic conditions of a state cannot be interpreted as an excuse "to relieve the state of its treaty obligations"⁴⁰⁸. A similar approach would be deleterious for "the very fabric of international law and indeed the stability of the system of international relations"⁴⁰⁹.

There has been another group of awards where the economic and political conditions of the host state have been considered, but in this occasion in relation to the assessment of the issue of compensation for the losses incurred by foreign investors. Thus, the doubt expressed by doctrine has concerned the fact that, since these awards do not deal with the issue in the part of the award concerning the merits, it is not possible to unequivocally verify whether the tribunals believed that economic and political conditions can actually "influence the threshold for the application of the standards" or verify the possibility that "even lowered

⁴⁰² See *Parkerings-Compagniet A.s. v. Republic of Lithuania*, ICSID, Case No. ARB/05/8, Award, September 11, 2007, paras. 306-335.

⁴⁰³ See *Mr. X (United Kingdom) v. The Republic (in Central Europe)*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 49/2002, Final Arbitral Award, September 9, 2003, p. 155.

⁴⁰⁴ See *Genin A., Eastern Credit Limited INC. and A.S. Baltoil v. Republic of Estonia*, ICSID, Case No. ARB/99/2, Award, June 25, 2001, para. 348.

⁴⁰⁵ See *Generation Ukraine Inc. v. Ukraine*, ICSID, Case No. ARB/00/9, Award, September 16, 2003, para. 20.37. The award has been defined as the "starkest recent example of a tribunal incorporating a country's level of development into the standard of protection it is obliged to provide foreigners under an investment treaty". See Gallus N., *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, p. 717.

⁴⁰⁶ See *National Grid Plc. V. Argentine Republic*, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008, para. 180.

⁴⁰⁷ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 139.

⁴⁰⁸ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 258.

⁴⁰⁹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 258.

standards had been violated"⁴¹⁰. Anyway, the expressions and the concept those tribunals have relied on present significant similarities with the above-mentioned awards. In *AMT*, the Tribunal affirmed that the evaluation of the exact amount of the compensation due to AMT for the damages caused by the armed forces of the host state should be based on reality, on "existing conditions" in Zaire at the time⁴¹¹. The assessment should be based on "current happenings" in the host state, on its "commercial and industrial activities", rather than a merely abstract evaluation, totally disconnected from reality⁴¹². In *CMS*, the Tribunal stressed out the importance of not overburdening the host state "with all the costs of the crisis"⁴¹³.

Finally, concerning those awards where arbitral tribunals refused to consider the level of development of the host state as an element which can influence the application of investment standards, in *Gami*, the tribunal stated that every country is challenged by a lack of able administrators or a deficient culture on compliance, and this cannot be used as an excuse to evade existing obligations⁴¹⁴. Scholars have expressed contrasting opinions on the real meaning of the tribunal's decision. On the one hand, the award has been interpreted as a clear case "of a tribunal refusing to consider the host State's level of development in measuring their actions against the international law standard"⁴¹⁵. According to another point of view, the award should not be considered as an example of arbitral tribunals' refusal to consider the influence of economic and political events in their analysis⁴¹⁶.

SECTION II. Interpreting the standard of full protection and security.

1. The ordinary meaning of the standard.

Primary consideration has to be given to the ordinary meaning of a treaty's text (Article 31(1) VCLT) in the interpretation of the full protection and security standard. The interpretation, in good faith, of the literal meaning of an international agreement is the first step on which any further interpretation of treaty provisions should be grounded⁴¹⁷. African BITs usually refer to the standard of protection and security with specific and rather uniform linguistic patterns. Thus, I will try to determine the literal meaning of the terms more frequently used to refer to the standard.

⁴¹⁰ See Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, Law and Practice of International Courts and Tribunals, Vol. 10, 2011, p. 402.

⁴¹¹ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, para. 7.13.

⁴¹² See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, para. 7.13-14.

⁴¹³ See *CMS Gas Transmission Company v. Argentine Republic*, ICSID, Case No. ARB/01/8, Award, May 12, 2005, para. 244.

⁴¹⁴ See *Gami Investments Inc. v. United Mexican States*, NAFTA and UNCITRAL, Final Award, November 15, 2004, para. 94.

⁴¹⁵ See Gallus N., *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, World Investment and Trade, Vol. 6, 2005, p. 721.

⁴¹⁶ See Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, Law and Practice of International Courts and Tribunals, Vol. 10, 2011, p. 385.

⁴¹⁷ See Herdegen M., *Interpretation in International Law*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, para. 11. The author recalled the ICJ's affirmation in the *Territorial Dispute Case* that "interpretation must be based above all upon the text of the treaty". See *Case Concerning the Territorial Dispute (Libya v. Chad)*, ICJ, Reports 1994, Judgment, February 3, 1994, para.41.

The term "protection" is defined as the "the process of keeping someone or something safe or the condition of being kept safe... from harm, injury, damage or loss"⁴¹⁸. It indicates both the active "action of protecting" and the passive "state of being protected"⁴¹⁹. Similarly, "to protect" is defined as "to keep someone or something safe from harm, injury, damage or loss"⁴²⁰. The concept of security is directly "connected with safety and protection" and corresponds to "safety from attack, harm or damage"⁴²¹.

The concepts of protection and security are at least tightly connected, if not even synonyms. Both definitions refer to the idea of safety in circumstances of harm, injury, damage or loss. The reference to these specific circumstances seems to indicate that "protection" and "security" tend to mainly refer to events of physical nature. But, as the reading of the definitions included in dictionaries seems to highlight, there is room for interpreting the two terms as referring also to events having, for instance, financial or legal nature. The possibility of broadly interpreting the two concepts so to encompass different areas will not likely verify in the specific circumstance BITs will explicitly relate "protection and security" to the terms "physical" or "legal". In this latter circumstance, there will not be room for any margin of appreciation from the point of view of the literal analysis of the text of an investment agreement.

The analysis of African BITs has unveiled states' practice of relying on either the "simple" (merely referring to the obligation of granting protection and security) or "qualified" (further qualifying the standard with adjectives such as "full" or "constant") formulation of the standard. For this reason, I believe it is appropriate to focus also on the ordinary meaning of these terms. "Full" means "complete" and "containing the largest amount that will fit in a particular place"⁴²². "Constant" is defined as "continuous or regular over a long period of time" and as "something that always stays the same and never changes"⁴²³. "Full" and "constant" do not appear to be interchangeable concepts, like "protection" and "security". The first refers to the entirety of an object, while the second qualifies objects with respect to time. However, despite the different meaning, the two terms have a sort of "comprehensive" nature which requires to consider an object in its entirety, even thought from either a physical or temporal perspective.

2. Considering the context of BITs.

Article 31(1) VCLT further requires that international agreements are interpreted in accordance with their context, as well as their object and purpose. The "principle of integration", consisting in the consideration of a treaty's context, object and purpose, is a "corollary of the principle of ordinary

⁴¹⁸ See Macmillan English Dictionary, 2nd ed., Macmillan Publishers Ltd., Oxford, 2007.

⁴¹⁹ See Oxford Dictionary of English, 3rd ed., Oxford University Press, Oxford, 2010.

⁴²⁰ See Macmillan English Dictionary. According to the Oxford English Dictionary, "to protect" means to "keep safe from harm and injury".

⁴²¹ See Macmillan English Dictionary, 2nd ed., Macmillan Publishers Ltd., Oxford, 2007.

⁴²² See Macmillan English Dictionary.

⁴²³ See Macmillan English Dictionary.

meaning"⁴²⁴. These "interpretative parameters" do not hierarchically relate, but they jointly operate through a sort of "logic progression"⁴²⁵.

Article 31(2) VCLT specifies that the context of a treaty comprises both the text and the preamble. The contextual analysis of BITs provisions referring to the standard of protection and security requires to consider such provisions in relation to the other clauses included in treaties⁴²⁶. According to the general practice followed in African BITs, the standard of protection and security is always included in the initial provisions of investment agreements, dealing with standards of international investment law. These clauses are then followed by provisions on dispute solution, on the applicability and duration of treaties. The inclusion of full protection and security among BITs first clauses shows contracting states' intention of underlining the primary importance of full protection and security for the structure of the entire treaty. Furthermore, the standard is not usually included in separate clauses, but it is mentioned in either separate paragraphs or, more frequently, in connection with other standards and principles such as fair and equitable treatment, national and most-favoured-nation treatment, non-discrimination, expropriation, etc⁴²⁷. Such practice seems indicative of the purpose of establishing a connection with other elements of international investment law and could even allow a broader interpretation of the standard. A similar circumstance could verify particularly if the standard is mentioned in clauses dealing with issues not specifically attaining the "physical sphere" of foreign investment.

Generally, contracting states include references to investment protection in both the titles, which usually refer to the promotion and protection of investment, and preambles to treaties. In a typical preamble, contracting states "recogn[ise] that the encouragement and reciprocal protection under international agreements of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting States"⁴²⁸. The preambles of African BITs have shown that almost every BIT concluded by African countries mentions the importance of protecting foreign investment⁴²⁹. Arbitral tribunals, while considering BITs preambles, have generally referred to the rules of treaty interpretation codified in the VCLT concluding that preambles are declarations of the purposes and objects of BITs. Arbitral panels have also remarked the non-operative nature of this part of international agreements.

It is undisputed that preambles do not have a binding nature, but are rather a statement of the purposes contracting parties intend to achieve with the conclusion of an agreement⁴³⁰. IIAs preambles tend to refer to the purposes for the inclusion of the concept of protection. Being the achievement of objectives like prosperity and business' improvement the main reasons behind the conclusion of BITs, investment protection

⁴²⁴ See Brownlie I., *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford, 2008, p. 633. See also Crawford J., *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, p. 381.

⁴²⁵ See Tanzi A., *Introduzione al diritto internazionale contemporaneo*, Cedam, Padova, 2010, p. 353.

⁴²⁶ See Herdegen M., *Interpretation in International Law*, para. 12.

⁴²⁷ The issue has also been considered in Chapter 1, Section I, para. 6.

⁴²⁸ See the Preamble of the Egypt-Italy BIT.

⁴²⁹ See Chapter 2, Section I, para. 8.

⁴³⁰ See Herdegen M., *Interpretation in International Law*.

automatically becomes the primary means to accomplish that objective and assumes a central role in the legal framework established by the treaty.

The analysis of African BITs texts has highlighted the different ways states refer to full protection and security. The common element emerging from those BITs is that they include a mere reference to the protection and security standard, without clarifying its content. Thus, in the case a provision includes the "simple" or qualified" standard it does not seem likely that the preamble would help arbitrators' interpretative work, since preambles tend to refer to protection in an even more generic way than treaties. The preamble could have a primary importance in treaty interpretation in the circumstances it further qualifies investment protection (like in several BITs concluded by Germany, referring to "contractual protection") or a treaty does not include any reference to investment protection.

The increasing consideration of arbitral tribunals for BITs preambles has been a rising concern among states lately. Host states could interpret the progressive reliance on BITs preambles by arbitral panels attempting to interpret treaty provisions as potentially contrary to their interests, depending on the way these tribunals interpret the concept of protection. A possible reaction from states could be the inclusion of limitations in preambles to treaties. Nowadays, this represents a minor practice at least among African states, but there is the concrete possibility that in the future it will acquire a larger relevance. Environmental issues, public health and labour rights have been the major sectors of intervention of international investment law during the last years. The protection of security interests or public health or the environment have been the areas, needing specific attention, mentioned also in recent BITs preambles. For this reason, the most recent BITs tend to include one or more provisions dealing with the protection of these fundamental areas, as well as mentioning them in preambles. There is the concrete possibility that states, while defining the content of these categories of interest, will attempt to include as many circumstances as possible. Such practice could end up jeopardising the position of foreign investors. The danger is even higher in the case countries which are not able or do not want to properly protect foreign investments will invoke such interests as a means to elude their obligations, relaxing on investment protection.

3. The standard in the light of BITs objects and purposes.

The consideration of treaties' titles and preambles can have a primary role in helping identifying BITs object and purpose⁴³¹. Among the titles most frequently used in African BITs, it is possible to encounter the following formulations: "Agreement on the promotion and protection of foreign investment"⁴³², "Agreement on the promotion and reciprocal protection of foreign investment"⁴³³ or "Treaty... concerning the reciprocal encouragement and protection of investment"⁴³⁴. It is evident that investment agreements focus on the

⁴³¹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 113.

⁴³² See the title of the Egypt-DRC BIT.

⁴³³ See the title of the Namibia-Cuba BIT.

⁴³⁴ See the title of the Nigeria-US BIT.

concepts of protection, promotion and reciprocity as the grounds on which sound investment frameworks can develop.

The preambles of African BITs generally express contracting parties' desire to "create favourable conditions for greater economic co-operation"⁴³⁵, "create and maintain favourable conditions for investments"⁴³⁶ or to "intensify the economic cooperation... on the basis of equality and mutual benefits"⁴³⁷. The parts of preambles referring to protection have already been considered in a previous paragraph and the outcome has been that, in African BITs, investment protection is considered a necessary element to favour business initiative, economic development, national welfare, development and the increase of capitals' flows or prosperity⁴³⁸. Investment protection is the fulcrum around which fundamental objectives of growth evolve and would not be feasible without the proper guarantees of protection.

The objects and purposes of BITs can be retrieved also in the letters exchanged between plenipotentiaries of contracting parties or between national authorities of the state during negotiation phases. The US has frequently attached Letters of Submittal or Transmittal to the texts of African BITs which are available for consultation and present identical formulations⁴³⁹. The US President's Letters of Transmittal to the Senate clarify that the national BIT programme, launched in 1981, was "designed to encourage and protect U.S. investment in developing countries" with the purpose of persuading states "to adopt macroeconomic and structural policies that will promote economic growth" and favour "global economic development". In an additional Report attached to the Republic of Congo-US BIT, US authorities affirmed that "the principal purpose of the bilateral investment treaties is to promote the free flow of international investment and to encourage and protect United States investment in developing countries". The report also mentioned the US administration's consideration that "there have been no major problems involving a U.S. investment... in countries with which bilateral investment treaties are in force".

The Letters of Submittal of the US Department of State to the President add that BITs establish "a more stable and predictable legal framework for foreign investors" when "certain mutual guarantees and protections" are assured. They also refer to national legislation (namely, the Foreign Assistance Act) stating that the purpose of BITs is to "continue the U.S. policy of securing by agreement standards of equitable treatment and protection" of US citizens investing abroad. BITs concluded by the US are "designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment".

Finally, in some of the letters attached to BITs concluded in the 80s, there is further reference to other contracting states' practice. The US President expressed his appreciation of the fact that treaties'

⁴³⁵ See the preamble of the Libya-Austria BIT.

⁴³⁶ See the preamble of the Morocco-Gambia BIT.

⁴³⁷ See the preamble of the Zimbabwe-China BIT.

⁴³⁸ See Chapter 2, Section I, para. 8.

⁴³⁹ See the Cameroon-US BIT. See the DRC-US BIT. See the Republic of Congo-US BIT. See the Egypt-US BIT. See the Morocco-US BIT. See the Senegal-US BIT. See the Tunisia-US BIT. The treaties are available at the following link: www.state.gov/e/eb/afd/bit/117402.htm.

counterparts accepted "international law as the governing law", a fact considered fundamental by the US for the development of international investment policies⁴⁴⁰.

4. Supplementary means of interpretation.

According to Article 32 VCLT, the double purpose of considering the *travaux préparatoires* and the circumstances of the conclusion of IIAs is either to "determine the meaning" of a provision or "to confirm the meaning resulting from the application of Article 31". This provision proves necessary in the circumstance a textual interpretation of an international agreement "leaves [its] meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result"⁴⁴¹. International treaties' *travaux préparatoires* should be considered *cum grano salis*: they can be of great help if the textual interpretation reveals problematic because of treaties' lack of clarity; on the other hand, they could confuse interpreters, since they can reveal unclear or inconclusive⁴⁴². However, BITs' *travaux préparatoires* are not usually made available by contracting states.

As reaffirmed by the ICJ in the *Territorial and Maritime Dispute* case, it is important to carry out also "a careful examination of the pre-ratification discussions"⁴⁴³. The practice of the US represents the closest example of "pre-ratification discussions" available in relation to the conclusion of BITs. They have added the texts of the above-mentioned Letters of Submittal or Transmittal which generally recall the content of BITs and the motifs behind the conclusion of those agreements to BITs⁴⁴⁴. According to these documents, the US started its BITs programme after observing other industrialised states had already been implementing effective networks of investment agreements. Most importantly, these documents explicitly affirm that there is a concrete link between modern BITs and previous FCN Treaties. BITs have been considered as "consistent in purpose with... [and adopting the same] language and concepts" of FCN Treaties⁴⁴⁵. Furthermore, "traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection". Thus, it seems likely that the inclusion of the protection standard also in investment agreements, further proves the connection the US believed existed with the consolidated interpretation of protection, even though it was aliens' protection.

This US practice undoubtedly helps in confirming the standard's meaning, especially since the US has referred to the existence of a direct connection between US BITs and FCN Treaties. As the previous

⁴⁴⁰ See the Cameroon-US BIT. See the DRC-US BIT. See the Egypt-US BIT. See the Morocco-US BIT. See the Senegal-US BIT.

⁴⁴¹ See Brownlie I., *Principles of Public International Law*, p. 634.

⁴⁴² See Crawford J., *Brownlie's Principles of Public International Law*, p. 384. See also Brownlie I., *Principles of Public International Law*, p. 634. Brownlie highlighted that the risk relating to the consideration of the *travaux préparatoires* of multilateral agreements can present most of ambiguities, as a consequence of the different positions of negotiating parties.

⁴⁴³ See *Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Reports 2007, Preliminary Objections, Judgement, December 13, 2007, para. 116. See also Herdegen M., *Interpretation in International Law*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, para. 16.

⁴⁴⁴ The texts of the BITs concluded by the US can be found at the following link: www.state.gov/e/eb/ifa/bit/117402.htm.

⁴⁴⁵ See, the Letter of Submittal attached to the text of the US-DRC BIT, p. 4.

analysis of FCN Treaties has shown, the standard of protection used to be interpreted as requiring the exercise of due diligence (in either preventing or acting following a damage had occurred), rather than imposing strict liability upon states, and as protecting aliens against physical threats. Thus, the fact that, in this case, the US have been affirming that the BITs they conclude are "consistent in purpose" with FCN Treaties suggests that there is also a direct relationship between the way they interpreted the clauses on the protection of aliens and interpret the protection of foreign investment. The possibility of retrieving similar documents more frequently would undoubtedly contribute to the purpose of confirming the meaning of the protection and security standard, as they represent clarification of a state's intent.

Since this has not constituted a general practice, the historical circumstances behind the conclusion of BITs should also be considered. The introductory paragraphs of the present dissertation have showed that the end of World War II marked the divide in the perception of international investment law. In parallel to the exponential increase of FDI flows worldwide, there were negative events which could have affected the development of foreign investment and international investment law. The constant failure to adopt a multilateral investment agreement, the crisis of customary international law emerged after the end of the war, and the increasing disagreements between developed and developing states on the level of protection due to foreign investors (exemplified in the debate on the Calvo Doctrine and the international minimum standard of treatment) urged industrialised states to create a network of bilateral agreements offering a certain level of protection to investment especially in developing countries. The original purpose for capital-exporting states to conclude investment agreements has been to see investment originating from their countries offered a basic level of protection, especially in less developed countries. Industrialised states were convinced that capital-importing countries would have suspiciously looked at foreign investors and capitals, and that national authorities would not have been prepared to adequately protect those investments⁴⁴⁶. In my opinion, the only possible outcome was the progressive adoption of international investment agreements guaranteeing a level of protection considered acceptable by capital-exporting countries.

SECTION III. Remarks on full protection and security.

1. The influence of different formulations of the standard on its interpretation.

Since the 70s, African states have adopted different approaches towards full protection and security. In the beginning, some BITs did not include any reference to the standard at all, though it has been rare to find BITs not mentioning, at least, the principle of protection. The fact that those BITs still referred to investment protection in their preambles or titles, despite not including specific provisions, proved that states considered investment protection a fundamental element.

⁴⁴⁶ See Chapter 1, para. 5.

The peculiar structure of those BITs could have represented a source of concern only for the arbitral tribunals operating between the 60s and 70s. It was a period of weakness for international investment law and the period after World War II was characterised by a crisis of customary international law. Particularly industrialised states affirmed the crisis of customary investment law undermined also the level of security which should have been assured to foreign investors and their investment and, for this reason, started to conclude IIAs. Thus, arbitral panels would have probably found difficulties in relying on customary international law.

Nowadays, a good part of those treaties (for example those concluded by Switzerland) are being substituted with updated texts and they would not represent a problem anymore. For those texts which, on the contrary, maintain that structure, I do not think that they would arise interpretative issues for arbitral panels, since they would rely on the consolidated interpretation of the standard. Presently, the lack of references in BITs' clauses should not be interpreted as relieving states from their obligation to assure protection and security and to exercise due diligence. I believe arbitral tribunals dealing with such treaties would conclude that, even in the absence of a specific clause on protection, since the purpose of IIAs is to promote and protect foreign investors and investment the customary rule on protection would apply.

It would probably help studying the *travaux préparatoires* of those BITs in order to understand contracting parties' true intentions and to verify whether they had reasons for excluding the standard from those texts or whether it could be attributed to other factors. But, the impossibility of retrieving those documents prevents this approach. However, I do believe that in neither of those two periods of time contracting parties really intended not to assure any form of protection at all to foreign investment. It could be that contracting parties considered investment protection such a basic element that they deemed it was sufficient mentioning it in the preambles to the treaties, leading to the possibility of applying customary international law.

In several cases, contracting parties have been including two provisions on investment protection in BITs. Usually, the first reiterates the principles set in the preamble, while the second mentions the full protection and security standard. The vast majority of African states have conformed to the general practice of mentioning the standard of protection and security in the texts of BITs. Generally, provisions on protection can be divided between those referring to the "simple" and those to the "qualified" formulation of the standard. In the first case, BITs simply refer to host states' obligation of protecting foreign investment. In the other, BITs require states to exercise full, constant, continuous protection. The primary role of investment protection, even though with some exceptions, has been generally recognised also in BITs preambles.

The same trends have been followed by African countries at the regional level. The issue of FDI flows has been dealt with in specific additional protocols in regional investment agreements. Generally, the treaties establishing economic regional organisations have a more general nature and do not focus on the specific area of foreign investment. On the contrary, additional protocols usually refer to the principle of protection in their preambles and texts, while the case of agreements not including any reference to

protection at all is scant. Similarly to BITs, the formulations of the protection and security standard vary, but they tend to follow the same pattern of including "simple" or "qualified" formulations. There are also a few examples of protocols focusing on either physical or legal protection.

It could be argued that the central role attributed to investment protection also in African BITs depends from the fact that developed states have imposed their models and their perception of the issue of investment protection to African countries. This affirmation could have probably been true at the initial stages of the "BITs era", but the passing of time has shown that African states have recognised the importance of investment protection. The fact that regional agreements have followed the same practice of bilateral agreements is further proof that African states have accepted the content of the standard and do not interpret it as a clause imposed by industrialised countries. Otherwise, there would not be any trace of the protection and security standard in investment agreements.

Arbitral jurisprudence has not followed a unitary approach, while addressing the use of different formulations of the full protection and security standard⁴⁴⁷. The debate is still open between two contrasting positions. On the one hand, there are arbitral panels explicitly supporting the hypothesis that, to different formulations of full protection and security, different interpretations of the standard should correspond. In those cases where the standard of protection and security has been qualified by terms like "full" or "constant", it should be interpreted in a more extensive way going beyond the mere physical protection of the investment. Instead, when the standard has only been referred to as "protection", then a more restrictive interpretation should be adopted. On the other hand, there are tribunals affirming that different formulations of the standard can be substantially equated, since they do not imply relevant differences in the levels of protection assured by the host state.

If the first hypothesis is accepted, a broader interpretation of the "qualified" formulation of the standard could go in the sense of promoting either strict liability instead of due diligence or legal over physical protection. In this scenario, it seems unlikely that a broader interpretation inclined towards the rising of a strict liability for states would spread, while the hypothesis legal protection would be accepted as a broader interpretation of the standard appears to be a more plausible eventuality.

Indeed general rules on treaty interpretation confer a great importance to the wording of treaty clauses and the previous analysis has shown how qualifying terms, such as "full" or "constant", relate to the ideas of completeness and continuity over time. Several arbitral tribunals have considered these additions to the "simple" formulation of the protection and security standard as allowing a broader interpretation. However, scholars have underlined that this is not the only possible interpretation of these terms associated to the standard. Indeed, terms like "full" and "constant" can be an expression of states' intention of assuring protection and security at every level, but they can also stand for the objective of granting "protection and security to the highest degree possible"⁴⁴⁸. I believe the latter point of view is the one which should be

⁴⁴⁷ See Chapter 2, Section I, para. 3.

⁴⁴⁸ See Diehl A., *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, p. 534.

applied to full protection and security, particularly in the light of the considerations presented in the following paragraph.

The rules on treaty interpretation also require to consider "any subsequent practice in the application of the treaty"(Article 31(3)(b) VCLT). The analysis of state practice in investment disputes seems to lead to an opposite conclusion. States tend to use so many different formulations of the standard in the IIAs they conclude, that often the same state end up referring to the standard of full protection and security in different ways during the different phases of arbitral disputes. This can certainly be a consequence of states' intention of giving a different weight to different formulations of the standard, but I believe it is more likely a consequence of the interchangeable nature of these different formulations. Furthermore, the fact that in the presentation of their argumentations before arbitral tribunals states often use different formulations of the standard which sometimes sensitively vary from the clause included in a BIT, seems to corroborate my conclusion that the use "simple" or "qualified" formulations of the standard do not implicate different interpretations. I am more inclined to accept the point of view that the various formulations of the full protection and security standard do not influence its interpretation.

2. Reasons for preferring a limited interpretation of full protection and security.

Historically, full protection and security has been generally invoked and applied in disputes concerning the occurrence of physical threats to foreigners and arbitral tribunals have interpreted the standard as requiring host states to exercise reasonable levels of police protection or physical protection. The subsequent extension of the standard of protection also to the field of international investment has been followed by the parallel acceptance of the standard's interpretation as requiring protection against physical threats or damages.

African BITs tend to generically refer to the standard, while there is only a minority of clauses explicitly referring to the physical or legal protection of foreign investment. The only circumstance where the standard would undoubtedly be interpreted as including also legal security is if a treaty explicitly refers to legal protection. Nowadays, the debate about the possibility of including also legal protection is still very much open. The only certain element doctrine, arbitral jurisprudence and state practice agree on is that full protection and security, at least, assures that foreign investment will receive adequate protection against physical damage. Despite this common trend, it is possible to register very different outcomes. States, especially in arbitral disputes, tend to declare that the only possible interpretation of the standard is that referring to investment's physical protection, while they usually reject any interpretation including also the idea of legal protection. The inclusion of legal protection would probably imply increased obligations for host states, while they prefer to maintain to a minimum their efforts for protecting foreign investment.

Differently, arbitral tribunals appear more inclined to consider the possibility of including legal protection in the meaning of full protection and security. The generic formulation of the standard normally

included in BITs has not eased the interpretative work of arbitral tribunals. Foreign investors involved in arbitral disputes, particularly in the last decade, have been trying to convince arbitral tribunals to expand the consolidated standard's interpretation. In recent arbitral jurisprudence, the most part of arbitral panels has interpreted full protection and security as requiring host states to protect foreign investment against physical damage, pointing out that this has been the traditional practice in the standard's interpretation. Only a few tribunals have adopted a more extensive interpretation of the standard, encompassing also legal security. A third group of awards where the standard has been "restrictively" interpreted has however opened up to the possibility of a broader interpretation, but only in "exceptional circumstances". The arguable point of these awards is that arbitral tribunals have failed to explain what constitutes an exceptional circumstance enabling a more extensive interpretation of the standard so to include legal protection.

Arbitral tribunals, which have extensively interpreted full protection and security, have focused on the issues of the availability of host states' administrative and judicial systems⁴⁴⁹ and of the legal security of foreign investment, consisting in the stability of both the investment and legal frameworks⁴⁵⁰. Nevertheless, interpreting the standard as guaranteeing protection beyond physical security somehow tends to dissolve the boundaries of the standard. The consequence is that such an extensive interpretation may overlap or conflict with other standards, especially with fair and equitable treatment. This consequence is very much foreseeable especially observing the ordinary meaning attributed to the expression "legal security", which "has been defined as the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application"⁴⁵¹.

A relevant part of African BITs mentions full protection and security and fair and equitable treatment in the same provisions linking them through the use of conjunctions⁴⁵². The relationship between the two standards has also been at the core of several arbitral awards. The two main positions, shared also by doctrine, concern the affirmation that fair and equitable treatment is the overriding obligation⁴⁵³ and the belief that the two are overlapping, but also independent and autonomous⁴⁵⁴. According to Judge Asante (in

⁴⁴⁹ See, for instance, *Tecnicas Medioambientales Tecmed v. United Mexican States*, ICSID, Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 171. See also *Lauder R. S. v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, para. 314. See also *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, May 17, 2006, paras. 493-496.

⁴⁵⁰ See, for instance, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, para. 613. See also *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID, Case No. ARB/97/4, Award, December 29, 2004, para. 160. See also *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/97/3, Award, August 20, 2007, paras. 7.4.15-17.

⁴⁵¹ See *Siemens A.G. v. Argentine Republic*, ICSID, Case No. ARB/02/8, Award, January 17, 2007, para. 303. The arbitral panel quoted the definition of "legal security" as drafted in the *Diccionario de la lengua española*, 22nd edition. See Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 215.

⁴⁵² See Chapter 1, Section II, para. 7.

⁴⁵³ See Mann F. A., *British Treaties for the Promotion and Protection of Investments*, p. 243. See also Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, p. 131 and ff. The author reports Mann's theory and affirms that, even though in Mann's article the concept has been applied only to British investment treaties, it can also be generalised.

⁴⁵⁴ See Schreuer C. H., *Fair and Equitable Treatment: Interactions with other standards*, p. 2-3. See also Schreuer C. H., *Full Protection and Security*, p. 14. See also Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, p. 140-141. See also Eckardt M. N., *The Fair and Equitable Treatment (FET) Standard in International Investment Law*, p. 39. See also Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, p. 384. See also Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 17. See also Schreuer S., *Introduction: Interrelationship of standards*, in *Standards of Investment Protection*, p. 4. See also Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, p. 217. Here, the authors are reporting the positions of other scholars. See also Haynes J., *The Evolving*

AAPL) and some scholars, the relationship between the two standards has developed since both of them "underscore the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories" which is an obligation deriving from customary international law⁴⁵⁵. However, the due diligence required to states substantially diverges since the due diligence required in relation to full protection and security relates to the physical level, while that characterising fair and equitable treatment relates to the sphere of investment's environment⁴⁵⁶.

Such difference informs also the contents of the two standards. Basically, full protection and security requires states to implement "factual and legal framework" granting investment security and allowing national authorities to implement appropriate security measures; while fair and equitable treatment "consists mainly of an obligation... to desist from behaviour that is unfair or inequitable"⁴⁵⁷. Further differences between the two standards concern the fact that full protection and security deals with the omissive conduct of host states, which fail to protect foreign investment; while fair and equitable treatment "protects investors from the state's affirmative conduct"⁴⁵⁸. Fair and equitable treatment mainly relates to the protection of fundamental legal values in host states' process of decision-making⁴⁵⁹. These fundamental legal values have been identified in reasonableness, due process, good faith, transparency, predictability, accessibility to courts and impartiality and have a central role in protecting against "arbitrary, intransparent, discriminatory or even coercive... treatment by courts and administrative agencies"⁴⁶⁰. Furthermore, elements like the protection of investors' legitimate expectations, the accessibility to the judicial system, the stability of investment and legal frameworks, "certainty of the business environment lack of arbitrary measures" do not qualify full protection and security, but are normally related to fair and equitable treatment⁴⁶¹.

The definition of legal security deriving from arbitral awards shows that the concept presents more similarities with the fair and equitable treatment standard. Accordingly, legal protection and security should

Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing, p. 141. See the Report of Harrison J. on the Protection of Foreign Investment, p. 12.

⁴⁵⁵ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Dissenting Opinion of S. K. B. Asante, June 15, 1990, p. 579. The judge affirmed that "the requirements as to fair and equitable treatment, full protection and security and non-discriminatory treatment all underscore the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law". See also Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, Oxford, 2008, p. 156.

⁴⁵⁶ See also Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, p. 185.

⁴⁵⁷ See Schreuer C. H., *Full Protection and Security*, p. 14. See also Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, p. 4.

⁴⁵⁸ See Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, p. 217. See also McLachlan C., Shore L., Weiniger M., *International Investment Arbitration. Substantive Principles*, p. 247.

⁴⁵⁹ See Diehl A., *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, p. 170. See also McLachlan C., Shore L., Weiniger M., *International Investment Arbitration. Substantive Principles*, p. 247.

⁴⁶⁰ See Diehl A., *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, p. 170-174. See also Vandeveld K., *Bilateral Investment Treaties. History, Policy and Interpretation*, p. 235. See also Klager R., *Fair and Equitable Treatment in International Investment Law*, chapter 7. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 230. See also Vandeveld K. J., *A Unified Theory of Fair and Equitable Treatment*, p. 52. See also Westcott T., *Recent Practice on Fair and Equitable Treatment*, *Journal of World Investment and Trade*, Vol. 8, Issue 3, 2007, p. 414. See also Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, p. 373-374.

⁴⁶¹ See Cordero Moss G., *Full Protection and Security*, p. 150. See also Sornarajah M., *The International Law on Foreign Investment*, p. 204. See also Klager R., *Fair and Equitable Treatment in International Investment Law*, chapter 7. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 230. See also Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, p. 373-374.

be granted, for instance, as a consequence of the adoption of modification to host states' legislations or of the actions of national administrative bodies changing the initial investment framework⁴⁶². Furthermore, legal protection would entitle to the protection of legal rights⁴⁶³, the applicability of the standard to intangible assets⁴⁶⁴, the guarantee of a stable legal framework assuring foreign investors' legal protection⁴⁶⁵, the stability of the investment environment (at the physical, commercial and legal levels)⁴⁶⁶ or protection from non-physical harassment⁴⁶⁷. Nevertheless, elements such as a stable and predictable investment environment, relevant normative changes arbitrarily modifying the initial legal framework, the violation of legitimate expectations of foreign investors or unpredictable administrative interventions typically characterise the fair and equitable treatment standard.

The utility of stretching the borders of full protection and security so to include issues normally recognised as belonging to other standards is doubtful⁴⁶⁸. It appears a redundant exercise, not bringing any positive contribution to the definition of the standards of protection. It rather seems to confuse the few already established features of the two standards. Interpreting the two standards in a similar way could prove useful if treaty texts explicitly link them. In the opposite circumstance, it is difficult to understand the benefit of associating the interpretation of different standards established as "separate bases for liability"⁴⁶⁹. This consequence is clear especially through the analysis of arbitral jurisprudence: the common outcome of interpreting full protection and security as entitling investment also to other forms of protection, beyond the physical level, has been that arbitral tribunals have ended up focusing on fair and equitable treatment, subordinating any finding of a possible breach of full protection and security to the verification of a violation of fair and equitable treatment⁴⁷⁰.

I agree with scholars affirming that full protection and security necessarily needs to be circumscribed to the field of physical protection, in the attempt of distinguishing it from fair and equitable treatment⁴⁷¹. It would be a redundant practice including various security clauses with the same meaning in investment agreements. It would be more coherent if the standards are considered as autonomous and applicable in different circumstances. Arbitral tribunals are trying to include legal and economic stability within the requirements of fair and equitable treatment, thus the recent attempts of other arbitral panels of including the same elements within full protection and security seems a rather unnecessary exercise⁴⁷². The true effect of extending the interpretation of full protection and security so to encompass also legal protection, an element

⁴⁶² See *CME Czech Republic B.V. v. Czech Republic*, para. 613. See also *Siemens A.G. v. Argentine Republic*, para. 308. See also *AES Summit Generation Limited and AES-Tisza Eromii Kft. v. Republic of Hungary*, para. 13.2.2.

⁴⁶³ See *CME Czech Republic B.V. v. Czech Republic*, para. 613.

⁴⁶⁴ See *Siemens A.G. v. Argentine Republic*, para. 308.

⁴⁶⁵ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 448.

⁴⁶⁶ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 729. See also *Azurix Corporation v. Argentine Republic*, para. 408.

See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 448.

⁴⁶⁷ See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, para. 7.4.17.

⁴⁶⁸ See Cordero Moss G., *Full Protection and Security*, p. 150.

⁴⁶⁹ See Cordero Moss G., *Full Protection and Security*, p. 150.

⁴⁷⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 313.

⁴⁷¹ See Diehl A., *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, p. 534.

⁴⁷² See Sornarajah M., *The International Law on Foreign Investment*, p. 360. See also Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 293.

typical of fair and equitable treatment, would be the concrete risk of not giving proper consideration to full protection and security⁴⁷³.

I believe that in order to avoid the overlapping of full protection and security with other standards, it would be better to limit the broadness of the standard's interpretation. The positive purpose of increasing the circumstances covered by the standard, favouring investment protection, could be frustrated by the uncertainty of the sphere of application of the standard. Since standards such as full protection and security and fair and equitable treatment are objectively separated and autonomous, unless the contrary is expressly derived from state practice or the text of a treaty, I think their borders should be kept well-defined and every attempt of blurring them should be avoided.

3. The standard of liability.

Since BITs clauses do not qualify the standard of liability for the breach of full protection and security, it is necessary to consider state and arbitral practice, as well as doctrine. Full protection and security substantially mirrors the features of the standard of protection granted in the very first FCN Treaties, which focused on aliens' protection. Since the end of the 19th century, the standard of protection was interpreted as requiring states to exercise due diligence doing everything reasonable in their power to protect aliens, instead of imposing strict liability upon states⁴⁷⁴. The Letters of Submittal and Transmittal attached to US BITs texts, considered as supplementary means of interpretation, have helped in showing this existing link between BITs and previous FCN Treaties: the US BIT programme has been created as a continuation of the previous treaty programme.

The interpretative work of arbitral tribunals has exercised some influence on the formation of a consolidated state practice⁴⁷⁵. It is not infrequent that states' argumentations about the standard's interpretation in arbitral disputes include references to arbitral jurisprudence. States involved in arbitral disputes have generally agreed with arbitral panels that full protection and security is a "standard deriving from customary international law"⁴⁷⁶ and cannot be interpreted as entailing strict liability for host states, but it rather requires states to act diligently⁴⁷⁷. Frequently, the obligation of acting diligently has been alternatively qualified as a "duty of vigilance" and given the same meaning. The only obligation deriving from the standard is for host states to provide a reasonable level of protection, in relation to specific

⁴⁷³ See also Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, p. 185-186.

⁴⁷⁴ See Chapter 1, Section I.

⁴⁷⁵ The issue has been analysed in-depth in Chapter 1, Section IV, para. 2.

⁴⁷⁶ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 718. See the OECD Report on "Fair and Equitable Treatment Standard in International Investment Law", Working Papers on International Investment, No. 2004/3, September, 2004. The document can be found at the following link: https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

⁴⁷⁷ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 723. See also *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 32. See also *Tecnicas Medioambientales Tecmed v. United Mexican States*, para. 177. See also *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, para. 354. See also *Gemplus S. A. & others v. United Mexican States*, ICSID, Cases Nos. ARB (AF)/04/3 and ARB (AF)/04/4, Award, June 16, 2010, part II, p. 8. See also *Noble Ventures Inc. v. Republic of Romania*, para. 163. See also *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 352. See also *Plama Consortium Limited v. Republic of Bulgaria*, para. 179. See also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, para. 664.

circumstances⁴⁷⁸. In few disputes, states also focused on the importance of "anticipating or responding to harm to the investment caused by outside agencies" as parts of due diligence⁴⁷⁹. Preventive actions should consist in the adoption of all reasonable measures necessary to face events likely to happen or that the state has concrete knowledge will verify⁴⁸⁰.

Thus, it seems possible to conclude that there is general agreement about the standard of liability of full protection and security, since even doctrine shares the conclusions of arbitral tribunals and state practice. Scholars agree that the full protection and security standard requires the exercise of due diligence, and does not entail strict or absolute liability upon host states, a circumstance which would allow to attribute responsibility to the state for any event negatively affecting the foreign investment⁴⁸¹. States are rather required to implement reasonable measures to prevent the occurrence of harm to foreign investment and, in the circumstance they fail to comply with their duty of vigilance, they are required to prosecute the culprits⁴⁸². The reason for preferring the exercise of due diligence to the establishment of a strict liability is grounded on the idea that a state "is not an insurer or a guarantor of [aliens'] security, any more than that of its own citizens"⁴⁸³.

However, arbitral tribunals have always been referring to the principle of due diligence in abstract⁴⁸⁴, without attempting to define it⁴⁸⁵. On the contrary, the principle should be applied on a case-by-case basis, in accordance with specific circumstances⁴⁸⁶. In a similar scenario, due diligence should be interpreted as a principle requiring "nothing more or less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances"⁴⁸⁷. There are also scholars suggesting that states cannot be excused in the hypothesis they have failed to implement those reasonable measures due to insufficient means at their disposal⁴⁸⁸. A similar affirmation requires a further level of analysis in order to understand whether to different levels of development, and consequently

⁴⁷⁸ See *CME Czech Republic B.V. v. Czech Republic*, para. 354.

⁴⁷⁹ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 719. See also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, para. 663.

⁴⁸⁰ See *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 351.

⁴⁸¹ See Schreuer C. H., *Full Protection and Security*, Journal of International Dispute Settlement, Vol. 1, Issue 2, August, 2010, p. 14. See also Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague, 1995, p. 61. See also Dolzer R., Schreuer C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010, p. 243. See also Sacerdoti G., *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Collected Courses, Hague Academy of International Law, Vol. 269, Martinus Nijhoff Publishers, Leiden, 1997, p. 347. See also Cordero Moss G., *Full Protection and Security*, in *Standards of Investment Protection*, p. 139.

⁴⁸² See Schreuer C. H., *Full Protection and Security*, p. 14. See also Dolzer R., Stevens M., *Bilateral Investment Treaties*, p. 61. See also Dolzer R., Schreuer C., *Principles of International Investment Law*. See also Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, p. 244. See also, United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, United Nations Publication, New York, 1998, p. 55.

⁴⁸³ See Freeman A. V., *Responsibility of States for Unlawful Acts of Their Armed Forces*, A. W. Sijthoff, Leiden, 1957, p. 14.

⁴⁸⁴ See Zeitler H. E., *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, p. 11.

⁴⁸⁵ See Brownlie I., *Principles of Public International Law*, Oxford University Press, Oxford, 2008, p. 552.

⁴⁸⁶ See Brownlie I., *Principles of Public International Law*, p. 552.

⁴⁸⁷ See Freeman A. V., *Responsibility of States for Unlawful Acts of Their Armed Forces*, Recueil des Cours, Vol. 88, 1956, p. 261. According to the *Suez* tribunal, this definition has been frequently referred to by both arbitral tribunals and scholars. See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 163.

⁴⁸⁸ See Dolzer R., Schreuer C., *Principles of International Investment Law*.

different levels of available resources, can correspond a different interpretation of full protection and security.

In this sense, the ICJ's position on the "duty to prevent" expressed in the *Genocide case* can be of help. The Court highlighted that the duty to act diligently automatically "calls for an assessment *in concreto*"⁴⁸⁹. In that case, the Court noticed that the ability of preventing a certain action depends on various elements and, in any case, it "varies greatly from one State to another"⁴⁹⁰. Thus, applying these conclusions to international investment law and specifically to the full protection and security standard, which requires the reliance on the due diligence principle, I think the Court's jurisprudence contributes to clarify that due diligence is a principle to be applied concretely on a case-by-case basis. Furthermore, the fact that it referred to various parameters which could influence a state's ability to prevent certain events, leaves open the possibility of including the level of development and available resources among the elements to be considered.

4. Adapting full protection and security to the level of development of host states.

The socio, political and economic weakness of Sub-Saharan countries has favoured the rising of the question whether African least developed states, in their singular capacity, should be required to assure the same level of protection as industrialised or developing countries may be required to grant. Are states identically bound by the obligation to assure full protection and security to foreign investors and their investment? The question is whether both developed states and states at different stages of development are required to offer the very same degree of protection to foreign investment, or the standard which host states are required to respect can be adapted to their level of development. In other words, is an African LDC or developing country under an obligation to grant foreign investors a level of protection identical to the one that a developed state is able to assure? Or, is it rather preferable to support the hypothesis that the level of protection will be commensurate to the means at the disposal of the host state, thus, taking under due consideration its level of development?

Despite the exponential proliferation of investment agreements, both their structure and provisions tend to present similar features⁴⁹¹. This consideration can undoubtedly be extended also to the standard of protection and security. African BITs do not approach the standard of full protection and security in the same manner, since there are BITs referring to either the "simple" or "qualified" formulation of the standard.

⁴⁸⁹ The Court added that, in similar circumstances, state responsibility arises in the hypothesis the country "manifestly failed to take all measures to prevent". See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, Judgement, February 26, 2007, para. 430.

⁴⁹⁰ The ICJ referred only to the parameter concerning "the capacity of the State to effectively influence the actions of persons likely to commit genocide". According to the ICJ a state's ability to influence the conduct of somebody depends on three elements: "the geographical distance of the State concerned from the scene of the events"; the "strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events"; the assessment of that capacity through "legal criteria". See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 430.

⁴⁹¹ See Gallus N., *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, World investment and Trade, Vol. 6, 2005, p. 711.

However, as it has already been debated, the most part of doctrine and arbitral tribunals do not consider those different formulations as having any influence in the standard's meaning. Thus, moving from the conclusion that to different formulations of the standard of protection and security do not correspond different meanings, it is possible to affirm that the following analysis of the interrelation between a state's level of development and the protection and security it is required to offer can be applied to all the BITs dealing with the standard of protection and security.

For its nature, full protection and security is probably more apt than other standards to be considered in relation with the specific circumstances interesting host states. The fact that the standard does not impose strict liability upon states, but rather requires them to act diligently, shows the peculiarity of the standard. In fact, the duty of acting diligently "is limited by a state's capacity to act"⁴⁹². Furthermore, it includes the requirement of "reasonableness" as host states are committed to adopt all reasonable measures to protect foreign investment. The result is that the qualification of a measure as "reasonable" inevitably "will be influenced by the circumstances prevailing in the host State, including the resources at its disposal"⁴⁹³. This suggests, once more, that the standard of full protection and security is flexible enough to "take account of the different stages of development across-nations"⁴⁹⁴. In the light of these preliminary considerations, a foreign investor should expect a different application of the principle of due diligence on the basis of the host state's level of development, with the consequence that the assessment of host states compliance with the obligation to assure due diligence shall be based also on the consideration of states' level of development⁴⁹⁵.

There still is an open debate on whether elements like state development and national resources can directly influence the level of due diligence states are expected to assure⁴⁹⁶, but the issue should be considered more frequently by both arbitral tribunals and doctrine. The relevance of the debate about the influences the level of development of a host state can exercise on the application of the standard of protection and security has been noticed also by arbitral tribunals. It is possible to identify two macro-categories of arbitral awards which have explicitly dealt with this issue. On the one hand, there are awards that have considered host states' level of development as an element which can influence tribunals' assessments on the alleged violations of BITs obligations. In these cases, tribunals moved from the assumption that they have to consider also the "political, socioeconomic, cultural and historical conditions prevailing in host states"⁴⁹⁷. On the other hand, there are those awards which have explicitly refused to consider host states' level of development as an influencing factor in their final decisions. The analysis of these awards has shown that, few arbitral tribunals have considered the level of development of the host state

⁴⁹² See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 310.

⁴⁹³ See Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, Law and Practice of International Courts and Tribunals, Vol. 10, 2011, p. 384.

⁴⁹⁴ See Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, p. 384.

⁴⁹⁵ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 310.

⁴⁹⁶ See Schreuer C. H., *Full Protection and Security*, p. 16.

⁴⁹⁷ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID, Case No. ARB/03/29, Award, August 27, 2009, para. 192. See also *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID, Case No. ARB/04/19, Award, August 18, 2008, para. 340. See also *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon*, ICSID, Case No. ARB/07/12, Award, June 7, 2012, para. 165.

as an element which can effectively influence their decisions. Of this group of awards, only a minority of tribunals has expressed contrary opinions on the reliance on this element.

Reminding the considerations of the *Gami* tribunal, the institutional and legislative lacunae of a host country cannot excuse the evasion of existing obligations⁴⁹⁸. A similar reasoning could be grounded on the principle of sovereign equality of states. This concept holds from a legal perspective, but it does not take into account the economic and political differences normally characterising states. The guarantees deriving from states' sovereign equality do not minimise the questionable "factual inequality" existing among states⁴⁹⁹. Furthermore, the progressive practice of concluding international agreements establishing more favourable treatment for certain groups of states seem to deteriorate the principles of sovereign equality and reciprocity which used to characterise international relations and the process of conclusion of international agreements⁵⁰⁰. Since there is a consolidated practice in international law to accord preferential treatment to specific groups of states, it is difficult to understand the reasons for refusing the same approach also for international investment law. Furthermore, the peculiar nature of the standard of full protection and security and the principle of due diligence, requiring to act reasonably on a case-by-case basis, shows that there would be the possibility of allowing an interpretation of the standard which takes into consideration the level of development of host states.

Adopting a similar approach does not automatically mean that investors' legitimate expectations will be put aside in order to favour only host states. Both investors' expectations and the possibility for host states not to be held liable in every circumstance should be preserved. A possible collateral positive element of considering development and the economic and political condition of host states in arbitral decisions could be an increasing level of confidence of states in the arbitration system. States would probably feel more protected and not continuously menaced by a system which they perceive as imprinted on the protection of foreign investors. The effects in medium-long term of such approach can be double. On the one hand, there is the risk that states with less advanced governance systems will try to perpetuate their unstable status in order to benefit from it. But, the opposite risk is that states and tribunals which will try to support the idea that the development and the economic and political condition of the host state should not be taken into account and that standards should be equally applied to every country, will end up creating an impersonal system totally disconnected from reality. Both sides of the coin present noteworthy challenges, so, the best practice would be to follow a middle path.

⁴⁹⁸ See Chapter 2, Section I, para. 11. See *Gami Investments Inc. v. United Mexican States*, NAFTA and UNCITRAL, Final Award, November 15, 2004, para. 94.

⁴⁹⁹ See Kokott J., *States, Sovereign Equality*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, para. 2.

⁵⁰⁰ See Kokott J., *States, Sovereign Equality*, para. 48.

5. Full protection and security as a part of the international minimum standard under customary international law.

The international minimum standard of treatment was introduced by industrialised countries and equated to "the established standard of civilization"⁵⁰¹. It developed particularly in the 20th century, as a standard that "unfairly favoured some states"⁵⁰² and to whose formation non-developed countries had not participated in⁵⁰³. The standard would have been applicable only to the group of less industrialised or developed countries as a guarantee that they would have offered a level of protection to foreign investment similar to that industrialised countries used to assure. On the other hand, for industrialised countries, the international minimum standard corresponded to the national treatment and would not have implied additional obligations. Originally, the standard was grounded on a basis of inequality⁵⁰⁴. The consequence has been the disregard of the principle of state equality, since a group of states was "exempted" from the respect of international obligations. Furthermore, the principle of equality was frustrated because the application of the international minimum standard of treatment would have caused a part of states to conform to the rules established by a minority of states, which additionally could have not been held internationally responsible for the breach of obligations having such origin⁵⁰⁵.

Past arbitral practice has relied on the international minimum standard in disputes concerning episodes of expropriation, violence exercised by private individuals towards aliens, failure to guarantee contractual rights and denial of justice⁵⁰⁶. In detail, the physical protection of aliens is the element of protection included in the international minimum standard⁵⁰⁷. The major outcomes of those arbitral awards have been the certainty that the international minimum standard was the object of a customary international rule and that the standard should have been extended from the field of aliens' protection also to that of investment protection.

Despite acknowledging that in a significant part of early arbitral disputes the minimum standard had been applied in relation to aliens' physical protection, scholars have expressed doubts about the standard's content in terms of investment protection⁵⁰⁸. Also the definition of the content of the international minimum standard of treatment under international law has generated an ample debate, particularly in relation to whether other standards, such as full protection and security or fair and equitable treatment, can be included in the former. According to one interpretation, from the 50s, both treaty practice and arbitral panels have been acknowledging the existence of a relationship between fair and equitable treatment and the international

⁵⁰¹ See Root E., *The Basis of Protection to Citizens Residing Abroad*, p. 521.

⁵⁰² See Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, Oxford, 2013, p. 40.

⁵⁰³ See Borchard E., *The "Minimum Standard" of the Treatment of Aliens*, p. 452.

⁵⁰⁴ See Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, p. 2.

⁵⁰⁵ See Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, p. 2.

⁵⁰⁶ See Chapter 1, Section I, para. 6.

⁵⁰⁷ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 309.

⁵⁰⁸ See Sornarajah M., *The International Law on Foreign Investment*, p. 130, 346.

minimum standard of treatment⁵⁰⁹. Other scholars are convinced that both these standards, as well as the due diligence principle, are currently "well-accepted element of the minimum standard of treatment"⁵¹⁰.

In recent years, there has been the development of an arbitral practice connecting international investment law standards to the international minimum standard of treatment⁵¹¹. The *ELSI* case has been one of the most relevant examples. Article V of the Italy-US FCN Treaty explicitly stated that parties would have enjoyed "the most constant protection and security for their persons and property... required by international law"⁵¹². The ICJ stated that the treaty clause on "protection and security must conform to the minimum international standard", but also opened up to the possibility that a treaty clause "sets standards... which may go further in protecting nationals of the High Contracting Parties than general international law requires"⁵¹³. In this occasion, the reference to international law included in the treaty was interpreted "not as a limitation of the standard to the international minimum standard but found that general international law provided a residual standard below which the treaty standard may not fall"⁵¹⁴.

Subsequently, there have been other arbitral tribunals following the practice that if BITs clauses link standards like full protection and security to the obligation of conforming to international law principles, then a connection with the international minimum standard has been established. Differently, in disputes where applicable BITs simply mention standards like full protection and security without including any reference to existing principles of international law, arbitral panels have been rejecting the possibility that those standards are related to the customary international minimum standard. Another point made by several arbitral tribunals has concerned the fact that the international minimum standard of treatment is less demanding than the standards included in investment agreements, such as full protection and security or fair and equitable treatment. The minimum standard has been interpreted as a sort of floor, a minimum treatment that has to be granted to foreign investment under customary international law.

Doctrine generally recognises that foreigners are due a minimum standard of treatment under customary international law in host countries⁵¹⁵. The *Neer* and *ELSI* cases represent cornerstones in the field of the international minimum standard of treatment. However, there are scholars convinced that international minimum standard is "relatively underdeveloped", since it originated as a standard of protection of aliens and their properties and has been borrowed by international investment law and applied to the figures of foreign investors and their investment⁵¹⁶. Furthermore, scholars have been arguing that recent arbitral tribunals' attempts of including "very demanding legal concepts" in the international minimum standard are a

⁵⁰⁹ See Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, Oxford, 2013, p. 83.

⁵¹⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 235 and 246.

⁵¹¹ See Chapter 1, Section IV, para. 10.

⁵¹² See *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, para. 103.

⁵¹³ See *Elettronica Sicula S.P.A. (ELSI) Case (USA v. Italy)*, para. 111.

⁵¹⁴ See Schreuer C. H., *Full Protection and Security*, p. 12.

⁵¹⁵ See Westcott T., *Recent Practice on Fair and Equitable Treatment*, p. 411.

⁵¹⁶ See Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, p. 124.

dangerous exercise⁵¹⁷. Not only there is a general lack of state practice following this pattern, but scholars and arbitral panels end up arrogating the right to create or modify international investment law, once again, recalling the fundamental principles and concepts from the practice of the most influential countries (the industrialised ones)⁵¹⁸.

Presently, there is another issue arising out of the arbitral disputes dealing with the international minimum standard of treatment. These disputes have mainly concerned episodes of expropriation, violence and denial of justice, issues which are dealt with specific provisions in IIAs. Thus, the question is whether the standards included in investment treaties offer foreign investors enough protection and make the international minimum standard useless, with the exception of those circumstances where an investment agreement has not been concluded between two countries.

IIAs clauses simply bind states to grant a minimum standard of treatment, but do not contribute to clarify its content. This lack of clarification could make "immaterial" the rule's frequent inclusion in IIAs if a parallel interpretive work is not carried out⁵¹⁹. The inclusion of the standard in IIAs binds only contracting parties and cannot have effects upon third countries, thus "establish[ing] the existence of the standard as between the parties"⁵²⁰. The main example is the practice of NAFTA states which included the international minimum standard in Article 1105 NAFTA and agreed that it represents a codification of an existing customary rule⁵²¹. The subsequent interpretation of the standard by the NAFTA FTC has clarified that full protection and security and fair and equitable treatment have been equated to the international minimum standard through the affirmation that "the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens". Furthermore, in some NAFTA cases like *ADF* and *GAMI*, arbitral panels have highlighted that the standard, as codified in Article 1105, was in a constant "process of development" and could not have possibly been the same standard mentioned in *Neer*⁵²².

The practice of including references to the international minimum standard in investment agreements has originated an ample doctrinal debate. Referring to the international minimum standard in IIAs has the effect of "restricting the meaning" of other investment standards, such as full protection and security⁵²³. In order to avoid this consequence the latter standard should be kept separated from the former and considered as "additional to customary international law", if the investment treaty does not explicitly mention a similar

⁵¹⁷ See Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, p. 14.

⁵¹⁸ See Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, p. 14.

⁵¹⁹ See Sornarajah M., *The International Law on Foreign Investment*, p. 347.

⁵²⁰ See Sornarajah M., *The International Law on Foreign Investment*, p. 345.

⁵²¹ See Point B(1) of the Free Trade Commission Clarifications Related to NAFTA Chapter 11, released on July 31, 2001. The document states that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party". See also *ADF Group Inc. v. United States of America*, para. 179. The tribunal also recalled the declarations of NAFTA states accepting the international minimum standard as a customary international rule.

⁵²² See *ADF Group Inc. v. United States of America*, para. 179. See also *Gami Investments Inc. v. United Mexican States*, NAFTA and UNCITRAL, Final Award, November 15, 2004, para. 95.

⁵²³ See Schreuer C. H., *Investments, International Protection*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, para. 54.

limit⁵²⁴. However, the existence of some contact points with other standards like full protection and security and fair and equitable treatment is undisputed, since one of the main purposes of the minimum standard is to "protect foreign investors against adverse action"⁵²⁵. Recalling the circumstances mentioned in *Neer* that constituted a violation of the international minimum standard (namely, bad faith, wilful neglect of duty or lack of due diligence⁵²⁶), it is possible to notice a similarity with the contents of the other standards such as full protection and security and fair and equitable treatment. Nevertheless, it would be excessive to conclude that these treaty standards "automatically incorporate the international minimum standard"⁵²⁷.

One of the elements characterising the international minimum standard has been identified in the due diligence principle⁵²⁸. Early arbitral jurisprudence has highlighted that the bulk of arbitral disputes has concerned cases of physical violence against the person and the properties of aliens⁵²⁹. Thus, host states exercising a minimum standard of treatment under international law are required to exercise due diligence in the protection of foreigners and their properties. Furthermore, jurisprudence and state practice have evolved in the sense of requiring that due diligence has to be exercised also in the field of "administration of justice, for example, by investigating or prosecuting" culprits⁵³⁰.

There has been the opposition of two different theories on the relationship between the international minimum standard and other treaty standards. This "equating approach" originally grounds its roots in the rather vague definition of fair and equitable treatment and the consequent attempt of filling in the gaps referring to a standard more consolidated in customary international law⁵³¹. There have also been several arbitral tribunals sharing this interpretation⁵³². Nevertheless, facts like the strong opposition to the international minimum standard which lasted for a rather extended period and the indefiniteness of the same minimum standard, which could not be relied upon to fill in other treaty standards' lacunae, show that another point of view should be preferred over the "equating approach"⁵³³.

Opposed to this vision there is the so called "plain meaning approach" grounded on the assumption that states' use of expressions like full protection and security or fair and equitable treatment are a representation of the intention of separating these standards from the minimum standard⁵³⁴. It seems a theory

⁵²⁴ See Schreuer C. H., *Investments, International Protection*, para. 54.

⁵²⁵ See Schreuer C. H., *Full Protection and Security*, p. 12.

⁵²⁶ See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, p. 61-62.

⁵²⁷ See Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, p. 144.

⁵²⁸ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 245.

⁵²⁹ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 245. See also Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, p. 65.

⁵³⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 245.

⁵³¹ See Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 56.

⁵³² See *American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire*, para. 6.06. See also *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, Dissenting Opinion of S. K. B. Asante. See also *Genin A., Eastern Credit Limited INC. and A.S. Baltoil v. Republic of Estonia*, para. 367.

⁵³³ See Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 56.

⁵³⁴ See Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, p. 260. See also Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague, 1995, p. 60. See also Schreuer C. H., *Fair and Equitable Treatment in Arbitral Practice*, p. 364. See also Hussein Haeri, *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, *Arbitration International*, Kluwer Law International, Vol. 27, Issue 1, 2011, p. 33-34.

endorsed also by a relevant number of arbitral panels⁵³⁵. Investment treaty standards are "self-contained standards", thus needing to be considered as autonomous concepts and to be interpreted on a case-by-case basis⁵³⁶. The formulation of treaty clauses constitutes a primary aid: it is rather difficult to believe that contracting parties would include expressions like full protection and security, if their original intention was to refer to the international minimum standard of treatment under customary international law⁵³⁷. It appears more convincing the theory that, being absent a formal reference to the international minimum standard of treatment in treaty clauses, simply referring to full protection and security or other standards, such clauses cannot be interpreted as implying a connection with the minimum standard⁵³⁸. It seems more likely that the intention of contracting states of referring to customary international law in treaty clauses would be explicit: it does not appear convincing that states would use expressions like full protection and security or fair and equitable treatment to refer to customary international law, they would probably refer to custom "using a different expression"⁵³⁹. Anyway, in both the hypothesis of guaranteeing a level of protection either higher or mirroring the international minimum standard of treatment, necessarily there is the need IIAs contracting parties operate a "clear and unequivocal drafting"⁵⁴⁰. The "plain meaning approach" has also had the effect of motivating states to revise BITs texts in order to clarify their original intentions for including certain standards, aiming at reducing the risk that arbitral tribunals will interpret unclear provisions in a too broad way damaging their interests⁵⁴¹.

The full protection and security standard included in IIAs has been "derived from customary international law", along with its meaning⁵⁴². The fact it is generally mentioned in IIAs seems to be a consequence of states' intention of applying similar standards even in the relations with states normally refusing to acknowledge the customary nature of such standards⁵⁴³. However, standards like full protection and security or fair and equitable treatment have an autonomous nature from the international minimum standard of treatment⁵⁴⁴, by virtue of their *lex specialis* nature⁵⁴⁵. Furthermore, the equation of treaty standards with the international minimum standard, particularly if operated by arbitral tribunals, might have

⁵³⁵ See *Saluka Investments B.V. v. Czech Republic*, paras. 286-290. See also *Siemens A.G. v. Argentine Republic*, para. 29. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*. See also *Occidental Exploration and Production Company v. Republic of Ecuador*, paras. 188-190. See also *PSEG Global Inc. and Konya Ilgin Elektirk Uretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, para. 239. See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID, Case No. ARB/01/7, Award, May 25, 2004, paras. 110-112. See also, confirming the assertion, the IISD Report by Malik M., *The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?*, November, 2011, p. 9. The report can be found at the following link: http://www.iisd.org/pdf/2011/full_protection.pdf.

⁵³⁶ See Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 59.

⁵³⁷ See Schreuer C. H., *Full Protection and Security*, p. 12.

⁵³⁸ See Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, p. 360.

⁵³⁹ See Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, p. 360.

⁵⁴⁰ See Westcott T., *Recent Practice on Fair and Equitable Treatment*, p. 430.

⁵⁴¹ See Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, p. 262-263.

⁵⁴² See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1147.

⁵⁴³ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1147.

⁵⁴⁴ See Schreuer C. H., *Full Protection and Security*, p. 12.

⁵⁴⁵ See Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, p. 1148.

the effect of reducing their ability of extending the sphere of application of protection standards because of the limits imposed by customary international law⁵⁴⁶.

Another issue concerns the presence of treaty clauses dealing with standards of protection pointing out, at the same time, the importance of acting in accordance with international law. In a previous paragraph, it has been shown that this has been a limited practice in African BITs. Apparently, the inclusion of references to existing principles of international law has been mainly required by industrialised countries⁵⁴⁷. The reference of IIAs to existent rules of international law can be interpreted as having a double meaning. On the one hand, the more immediate, is the equation of expressions like "required by international law" or "in accordance with international law" to the international minimum standard of treatment⁵⁴⁸; while provisions only mentioning full protection and security or fair and equitable treatment, consider the standards as autonomous⁵⁴⁹. On the other hand, scholars have suggested that those expressions can be interpreted as allowing to refer also to other "sources of international law, such as treaty obligations or general principles of law"⁵⁵⁰.

It is also possible that references to international law have been included in treaty clauses to restate the complementary role with investment standards⁵⁵¹. Indeed, the possibility that treaty standards are linked in provisions united with state practice of referring to international custom or existing rules of international law has the effect of showing that in similar circumstances the international minimum standard may not be entirely comparable with the other standards⁵⁵². A similar reference to international law in IIAs "could possibly be made *ex abundante cautela*", but, especially if it is at the core of a state's constant practice, it could not constitute simple "verbiage"⁵⁵³. In a similar scenario, the international minimum standard seems more of a floor on which more articulated standards have been built and its reference in investment agreements has the double purpose of highlighting the existing difference with other, possibly more evolved, treaty standards.

To conclude, the international minimum standard presents a vague general definition which encompasses various areas such as the protection of aliens, the protection from expropriation and fair and equitable treatment. Thus, it presents only some point of contacts with full protection and security, like the concepts of physical protection and the due diligence principle. These features characterise both the customary rule on protection and the international minimum standard of treatment. The customary rule on

⁵⁴⁶ See Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, Journal of World Investment and Trade, Vol. 9, Issue 4, 2008, p. 258.

⁵⁴⁷ See Sacerdoti G., *Bilateral Treaties and Multilateral Instruments on Investment Protection*, p. 347.

⁵⁴⁸ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 253. See also See Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, p. 259-260.

⁵⁴⁹ See Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, p. 259-260.

⁵⁵⁰ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, p. 253.

⁵⁵¹ See Klager R., *Fair and Equitable Treatment in International Investment Law*, p. 59.

⁵⁵² See the UNCTAD Series on issues in international investment agreements, Doc. No. UNCTAD/ITE/IIT/11 (Vol. III), *Fair and Equitable Treatment*, p. 39. The report refers to the fair and equitable treatment, but the considerations on the relationship with the international minimum standard of treatment can also be extended to full protection and security. The document can be found at the following link: <http://unctad.org/en/Docs/psiteiitd11v3.en.pdf>.

⁵⁵³ See the UNCTAD Series on issues in international investment agreements, *Fair and Equitable Treatment*, p. 39.

protection formed before the international minimum standard, while the latter formed more recently and there is not agreement on its general acceptance. It is a standard grounded on inequality, since it was thought to be applied to non-industrialised countries requiring them to conform to the national treatment on aliens' protection normally granted in industrialised states. It was conceived as a standard allowing to establish a more homogeneous global approach to the issue of the protection of aliens and their property, even though that uniformity was intended with respect to the practice already consolidated in industrialised countries.

The standard of full protection and security normally included in IIAs allows to take into consideration further, but still linked, elements such as the level of development of host states, allowing a more complex and complete analysis. Furthermore, full protection and security treaty clauses could potentially have broader application. The formulation of the standard leaves open the possibility of future changes in its interpretation, and one example is represented by the present debate on the possibility of including the concept of legal protection. The international minimum standard can work as a basis on which to ground the full protection and security standard, because of their points of contact, but at the same times they are two standards needing to be differentiated. Also the fact that in some disputes the minimum standard has been interpreted, particularly by the host countries involved in those disputes, as less demanding than BITs standards contributes to prove that standards like full protection and security are similar, but at the same time autonomous and different. Thus, references to the international minimum standard should be explicitly made in IIAs. As I earlier stated in this paragraph, if contracting parties want to refer to the international minimum standard or to customary law, they should explicitly do so instead of using different expressions and concepts such as that of full protection and security.

4. The attribution of conduct for the violation of the full protection and security standard.

SECTION I. State organs.

1. The relevance of ILC Articles on state responsibility in investor-state disputes.

Arbitral tribunals generally interpret ILC Articles on State Responsibility as a codification of customary international law. In *Jan de Nul v. Egypt*, the tribunal acknowledged that the draft Articles had originally been codified with the objective of "asserting the responsibility of a State towards another State"⁵⁵⁴. The applicability of these rules in investor-state disputes has been possible through an analogical extension of the "question of attribution" of responsibility "of a state towards another state", so to include also state responsibility "towards private parties"⁵⁵⁵. The tribunal in *Lahoud v. DRC* reached the same conclusion when it stated that ILC Articles are, not only applicable among states, but also both "pertinent" and "regularly applied by analogy to disputes opposing states to private investors"⁵⁵⁶.

The application of ILC Articles also in disputes involving private individuals has arisen the concern that arbitrators will apply international rules and principles external to BITs or other investment agreements, without properly justifying the "precepts and implications" of applying these provisions⁵⁵⁷. The *Lesi and Astaldi v. Algeria* tribunal perceived the risk and discussed the reasons at the basis of its decision to refer to the ILC Articles. According to the tribunal, ICSID arbitral panels are enabled by the Washington Convention to refer to ILC Articles, even though the Convention does not explicitly define the conditions for the attribution of responsibility to states. Article 42(1) of the ICSID Convention has been considered the legal basis: it rules tribunals' faculty of adopting those "rules of international law as may be applicable" and, thus, to apply the general rules codified in the ILC Articles⁵⁵⁸.

In the past, states "often seem[ed] to be unaware of [the] existence"⁵⁵⁹ of the rules of state responsibility. They did not have the same relevance as in more recent arbitral awards. The attribution of conduct to states is now a central aspect in the law of state responsibility and in recent investment arbitrations⁵⁶⁰. The central role of the rules on state responsibility also in arbitral disputes has motivated my

⁵⁵⁴ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID, Case No. ARB/04/13, Award, November 6, 2008, para. 156.

⁵⁵⁵ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 156.

⁵⁵⁶ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 375.

⁵⁵⁷ See Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, Foreign Investment Law Journal, Vol. 25, Issue 1, 2010, p. 202.

⁵⁵⁸ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, ICSID, Case No. ARB/05/3, Award, November 12, 2008, para. 102.

⁵⁵⁹ See Hobér K., *State Responsibility and Investment Arbitration*, Journal of International Arbitration, Vol. 25, Issue 5, 2008, p. 545-546. See also Knahr C., *International Investment Law and State Responsibility: Conditions of Responsibility*, within Hofmann R., Tams C. J., *International Investment Law and General International Law*, Nomos, Baden-Baden, 2011, p. 96.

⁵⁶⁰ See Hobér K., *State Responsibility and Investment Arbitration*, p. 545.

decision of carrying out a comparative analysis of the obligations codified in the ILC Articles and how arbitral tribunals interpret them. ILC Articles concerning the conduct of state organs, entities exercising governmental authority and persons or groups under the direction or control of the state are the provisions more frequently recalled in disputes involving African states⁵⁶¹. Investors often invoke these provisions as alternative attribution grounds, in the attempt of attributing host states the conduct of entities they believe related to them. Thus, I will consider how both arbitral tribunals and states deal with the issue of state responsibility in specific scenarios involving state organs and other entities, like armed forces, police forces, private individuals and private military companies. I will also consider the possibility of holding states responsible for their failure in protecting foreign investors from the actions of individuals operating in insurrectional movements or terrorist groups.

In investor-state disputes, arbitral tribunals often debate whether the attribution of responsibility should be discussed either in the jurisdictional phase or in the merits of arbitral proceedings. The issue of the attribution of responsibility "is only a means to ascertain whether [a] State is involved" and cannot be relied on to determine "whether there has been a violation of international law"⁵⁶². The same ILC Article 2 explicitly states that there are two separate conditions to be met in order to ascertain the existence of an internationally wrongful act⁵⁶³. Consequently, the analysis of the acts violating an international obligation and their possibility of being attributed to a state should be kept separated⁵⁶⁴, even though it seems unlikely that the attribution of responsibility and the merits of a dispute can be separately considered⁵⁶⁵. The challenge of effectively dividing the analysis of the two conditions codified in Article 2 has favoured the practice of considering both issues in the merits of the disputes, instead of separately analysing them at the jurisdictional stage. The *Hamester* and *Jan De Nul* tribunals agreed that the attribution of actions or omissions to host states can be better discussed at the merits stage of an arbitral proceeding⁵⁶⁶. Similarly, in *Lahoud v. DRC*, the tribunal decided that the attribution to the DRC of the conduct of Congolese state organs and of an entity exercising governmental authority had to be considered in the merits of the dispute⁵⁶⁷. A careful reading of

⁵⁶¹ Both acts *iure imperii* and *iure gestionis* carried out by state organs, as well as the acts of individuals or entities acting under the instructions, control or directions of the state can be attributed to the state. Differently, acts *iure gestionis* of individuals or other entities exercising governmental authority cannot be attributed to the state. The tribunal in *Noble Ventures v. Romania* was one of the few tribunals which expressed a contrary opinion when the tribunal had to deal with the respondent's interpretation of the acts that can be attributed to a state. Romania relied on the general rule while stating that acts *iure imperii* and *gestionis* need to be separately considered and the latter category of acts could not be attributed to itself. Nevertheless, the tribunal disagreed with that interpretation, holding that the distinction is material only in a dispute concerning state immunity. On the contrary, before an arbitral tribunal there should not be any similar distinction because "ILC Draft does not maintain or support such a distinction... [and] it is difficult to define whether a particular act is governmental". See Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 4, para. 6, stating that "it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial or as *acta iure gestionis*". See also *Noble Ventures Inc. v. Republic of Romania*, ICSID, Case No. ARB/01/11, Award, October 12, 2005, para. 82. See also *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 143-147.

⁵⁶² See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 143-147.

⁵⁶³ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 2, para. 9.

⁵⁶⁴ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 144.

⁵⁶⁵ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 145.

⁵⁶⁶ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID, Case No. ARB/07/24, Award, June 18, 2010, para. 144. See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID, Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, para. 85.

⁵⁶⁷ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, ICISD, Case No. ARB/10/4, Award, February 7, 2014, para. 373.

Article 25 of the Washington Convention seems to justify this interpretation. According to the provision, the jurisdiction of the ICSID arises in relation to "any legal dispute... [involving] a Contracting State or any constituent subdivision or agency". Thus, the issue of attribution can be better discussed while considering the merits of a dispute, since it is sufficient to verify the existence of a legal dispute and the involvement of a state, in order to have the Centre's jurisdiction.

The tribunal in *Jan De Nul* identified two admissible exceptions to the consideration of attribution at the merits stage⁵⁶⁸. The first exception was derived from *Lesi and Dipenta v. Algeria* which concerned the case of manifest absence of any link between the host state and the entity against which the dispute had arisen. The *Lesi and Dipenta* tribunal affirmed that a *prima facie* analysis could allow to determine whether the host state was involved in the dispute. The existence of a link with the dispute is more needed when a tribunal is asked to consider the actions or omissions of an entity "entirely extraneous to [the state's] activities and influence"⁵⁶⁹. The second exception, highlighted in *Jan De Nul*, stemmed from both *Salini v. Morocco* and *Consortium R.F.C.C. v. Morocco*. In those disputes, the arbitral tribunals preferred to consider the issue of attribution at the jurisdictional stage in the spirit of satisfying the parties' legitimate expectations, instead of reserving the analysis of the nature of the entity at the core of the claimants' argumentations to the analysis of the merits⁵⁷⁰. The tribunals believed necessary to discuss the claimants' argumentations on the alleged wrongful actions of the state-owned Société Nationale des Autoroutes du Maroc (ADM) at the jurisdictional stage since they could have influenced the analysis of the merits of the dispute⁵⁷¹.

2. Qualifying state organs.

According to ILC Article 4(1), state organs are those entities which can exercise legislative, executive and judicial powers. States generally recognise Presidents of the Republic⁵⁷², Prime Ministers⁵⁷³, Ministers⁵⁷⁴, National Assemblies⁵⁷⁵, the army and the police as state organs because they "are part of the

⁵⁶⁸ See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, paras. 85-86.

⁵⁶⁹ See *Consortium Groupement L.E.S.I. - Dipenta v. Republic of Algeria*, ICSID, Case No. ARB/03/08, Award, January 10, 2005, para. 19(ii), concerning the tribunal's evaluation on whether the dispute involved a state.

⁵⁷⁰ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, Jurisdiction, para. 30. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, Jurisdiction, para. 34.

⁵⁷¹ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, Jurisdiction, para. 30. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, Jurisdiction, para. 34.

⁵⁷² See Articles 65 and ff. for the Republic's President, Articles 89 and ff. for the Ministers and Articles 98 and ff. for the General Assembly, of the Congolese Transitional Constitution. For a more complete analysis of the identity of Congolese state organs, the Transitional Constitution, in force at the time of the events from which the dispute originated, stated that "[l]e pouvoir judiciaire est exercé par la Cour suprême de justice, les Cours d'appel et les cours et tribunaux civils et militaires ainsi que les Parquets». Elle prévoit également, dans sa partie sur le pouvoir exécutif, que «le Gouvernement dispose de l'administration publique, des forces armées, de la police nationale ainsi que des services de sécurité civile et de protection civile» et, dans la partie consacrée à la police nationale, que cette dernière «est soumise à l'autorité civile et est placée sous l'autorité du Ministre de l'Intérieur». Le Président de la République, le Ministre de la Justice, et l'Assemblée Nationale sont eux aussi évidemment des organes de l'Etat congolais". See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 385.

⁵⁷³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 175.

⁵⁷⁴ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 385. See also *Mohamed A. Al-Kharafi & Sons Co. v. State of Libya*, p. 248.

⁵⁷⁵ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 385.

executive power⁵⁷⁶ of the state. Administrative courts are state organs exercising judicial powers⁵⁷⁷. Even the conduct of local authorities can arise states' responsibility. As stated in *Houben v. Burundi*, these authorities involve the state "in the same way as those of higher-ranking officials"⁵⁷⁸.

African states have never contested the formulation of Article 4. At the most, they have attempted to prevent the inclusion of state organs among disputes' parties, as it happened in *Tanmiah v. Tunisia* and *Al-Kharafi v. Libya*⁵⁷⁹. In *Tanmiah*, the Tunisian Office of State Litigation, which resumed the state's defence, affirmed that the Prime Minister could not figure among the respondents because of a specific national provision forbidding it. In *Al-Kharafi*, Libya attempted to exclude the Tourism Development Authority, the entity at the core of the dispute, from its state organs because of the different legal status of the entity⁵⁸⁰.

Arbitral tribunals agree that the above-mentioned institutions cannot be "separate[d] from the state", since they all are fundamental components of its organisation and can be "qualified as state organs *ex ILC Article 4*"⁵⁸¹. A further point concerns tribunals' refusal of accepting the argumentation that state organs cannot figure among the respondents of a dispute on the grounds of domestic law. In *Tanmiah*, the Office of State Litigation recalled Tunisian legislation, which does not admit that the Prime Minister is directly referred to in a legal proceeding⁵⁸², but the arbitral Court rejected that argumentation. The Unified Agreement for the Investment of Arab Capital in the Arab States conferred the Court a certain discretionary power in determining the parties to the dispute since it does not mention domestic law among the requirements which should be respected in identifying the parties to a dispute⁵⁸³.

Arbitral tribunals have generally attempted to deal with the inclusion of state organs in investment disputes by considering the concrete role of these entities in the events from which disputes have originated. The *Tanmiah* tribunal solved the issue of the presence of a rather restrictive national legislation by considering the role exercised by the Tunisian Prime Minister. Concerning the relationship between the COMG and the Tunisian Prime Minister, the Court was able to determine that, despite the autonomous legal personality, the former was officially appointed to a "mission under the authority of the Prime Minister and [was] authorised to enter into contracts necessary for the organisation of the Games"⁵⁸⁴. Thus, the Prime Minister could be held liable for the actions of the COMG and for the proper execution of the contract. In *Al-Kharafi*, there were doubts on the status of the tourism authority and on the possibility of including it among the defendants⁵⁸⁵. The tribunal was able to restate the governmental nature of the tourism authority, in the

⁵⁷⁶ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 182.

⁵⁷⁷ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 175.

⁵⁷⁸ See *Mr. Joseph Houben v. Republic of Burundi*, para. 172.

⁵⁷⁹ The analysis of the background of the two disputes can be retrieved in Annex 1, attached to the present dissertation.

⁵⁸⁰ See *Mohamed A. Al-Kharafi & Sons Co.v. State of Libya*, p. 248.

⁵⁸¹ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 385.

⁵⁸² See Ben Hamida W., *The First Arab Investment Court Decision*, p. 712-713.

⁵⁸³ See Chapter VI of the Unified Agreement which deals with the "Settlement of Disputes", Articles from 25 to 36.

⁵⁸⁴ See Ben Hamida W., *The First Arab Investment Court Decision*, p. 714-715.

⁵⁸⁵ Among the defendants figured the State of Libya, the Ministry of Economy, the Ministry of Finance and the Libyan Investment Authority. The Court considered the competences of the tourism authority observing that Libya owned the plot of land intended for the location of the touristic site and the entity had been conferred the right to appoint the land's rights of usufruct. The competence exercised by the tourism authority showed that the entity could have been nothing else but a "governmental body". According to the Court, the appointment of "state-owned property" can be operated only by state organs, since other entities cannot dispose something

light of the principle that only governmental bodies are legitimated to implement national policies, as well as the facts that the investment authority was responsible for Libyan national investment policy and the tourism authority was subordinated to that institution⁵⁸⁶.

It seems reasonable to include in the test to determine the status of an entity also the consideration of the status of the entities defending it. In *Al-Kharafi*, the tribunal stated that the definitive confirmation of the validity of its reasoning on the tourism authority came from the same Libyan state organs when they decided that all the respondents would have collectively been defended by the State Litigation Department of the Ministry of Justice. This decision represented an "acknowledgement... of their governmental capacity"⁵⁸⁷.

Ultimately, arbitral tribunals usually tend to extensively consider the issue of the conduct of state organs and the possibility of attributing it to host states. However, there have been a few cases where arbitral panels have only briefly addressed whether the entities at the core of the disputes could have been defined as state organs and whether either ILC Articles or customary law on state responsibility could have been applied⁵⁸⁸. Arbitral tribunals' failure to consider the issue of state responsibility more in-depth can represent an additional risk for the protection of foreign investors and investment. Circumstances similar to those presented in this paragraph highlight the need arbitral tribunals address the issues concerning the conduct of state organs. And, in the hypothesis they will not discuss those argumentation, they should at least motivate those choices. Recalling Special Rapporteur Crawford's statement, mentioned in a previous paragraph, customary law does not "attempt to define an "organ"⁵⁸⁹. Thus, arbitral tribunals can assume an even more relevant role: they could fill in the gaps by helping to identify the characteristics of entities which cannot immediately be qualified as state organs.

The awards considered in the present paragraph have shown that arbitral tribunals' approach, while dealing with the determination of entities' status and the possibility of attributing the responsibility for their conduct to host states, presents similarities with the "structural and functional test". Thus, the question I will

they do not exercise property rights upon. Furthermore, the reformation of the tourism authority and its subjection to the Authority for Investment Promotion, now affiliated to the Ministry of Economy, meant that both entities were public bodies, even though they were financially autonomous and had legal personality. See *Mohamed A. Al-Kharafi & Sons Co.v. State of Libya*, p. 248-251.

⁵⁸⁶ The Libyan Supreme Court agreed that administrative authorities can have their own moral personality and financial independence, but this does not automatically imply these entities are not tied to the state, since their activities are supervised by the state. See *Mohamed A. Al-Kharafi & Sons Co.v. State of Libya*, p. 254 and 264.

⁵⁸⁷ See *Mohamed A. Al-Kharafi & Sons Co.v. State of Libya*, p. 256.

⁵⁸⁸ The tribunals in *Funnekotter v. Zimbabwe* and *Al-Kharafi* had to deal with the conduct of police forces, but, even though the issue of attribution was extensively considered by the parties, the tribunals did not consider either evidence or the argumentations submitted to their judgement. In *Funnekotter*, the tribunal entirely focused on rural land's occupation and expropriation, not examining proof against the omissions of Zimbabwean police forces in the attempt of attributing responsibility to the state. The tribunal concluded that Zimbabwe did not compensate the unlawfully expropriated investors and, thus, it was not necessary to evaluate the other claims (the violation of the fair and equitable treatment and full protection and security standards). In *Al-Kharafi*, the tribunal should have considered, in the optic of verifying whether Libya had fulfilled its obligation to protect the foreign investment, the claimant's attempts of starting the construction works which were obstructed by the presence and the attacks of other individuals who were still occupying the land assigned to the investor, as well as by the omissions of local police. Libyan responsibility was even worsened by the subsequent inaction of its highest authorities that did not intervene to protect the investor *ex post*, but rather asked the claimant to indefinitely interrupt his activities. In the initial paragraphs of the award, the tribunal declared it would have analysed the alleged breach of several provisions of the Unified Agreement, but it ended up focusing only on the expropriation claim failing to address also the issue of the protection of the foreign investment.

⁵⁸⁹ See the First Report on State Responsibility presented by the Special Rapporteur, J. Crawford, DOCUMENT A/CN.4/490, released in 1998, p. 34.

try to answer in the following paragraph is whether that test can be applied also in relation to state organs or should be limited to the sphere of entities exercising governmental authority.

3. The "structural and functional test" applied to state organs.

Entities like State Ministers, the army and the police undoubtedly belong to the category of state organs. But in several disputes, states have been opposing claims stating that entities related to their structure could be qualified as state organs. The lack of agreement on the status of these entities and even the lack of clarity of national legislations have motivated arbitral tribunals to rely on an objective test in the attempt of clarifying the status of these entities. The "structural and functional test" has been perfected by the tribunal in *Maffezini v. Spain* and, since then, it has been generally used by arbitral tribunals to verify whether an entity exercises or not governmental authority or whether it is a state organ. It is a two-level analysis aiming at considering, in the first place, the structure and organisation of the entity and, in the second place, the concrete functions exercised by it.

In recent years, states have been diversifying the procedures establishing entities linked to them, in the attempt of disguising their status and competences. This practice, followed also by African countries, has proven useful in legal proceedings involving such entities. States have frequently attempted to justify the absence of any relationship with the conduct of these entities affirming their status could not be related to the state. In *Jan de Nul v. Egypt*, applicable Egyptian law did not qualify the SCA (Suez Canal Authority) as a state organ, thus structurally it was not part of the state. Furthermore, the laws establishing the entity defined it as a "public authority" with autonomous legal personality⁵⁹⁰, insisting on the commercial nature of the entity's activities and its financial autonomy⁵⁹¹. The SCA was established with the purpose of managing and utilising a "nationalised activity" and was not designed as a "part of the central or decentralized structure of the State", thus missing the qualities to be defined a state organ⁵⁹². In *Hamester v. Ghana*, Ghanaian laws established Cocobod as a "commercial corporation": a public entity, whose only purpose was to "trade in cocoa beans and generate a profit for the Government"⁵⁹³. In *Lahoud v. DRC*, doubts arose in relation to the figure of the "Conservateur des Titres Immobiliers". According to Congolese legislation, national districts were administered by an official and the state was responsible for the actions or omissions of those individuals⁵⁹⁴. Those officials were competent for the administration of a Registration Division, established by the President of the Republic, for the application of land tenure and for the issuance of certificates of registration⁵⁹⁵.

⁵⁹⁰ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 160.

⁵⁹¹ See Articles 4, 5 and 10 of the Law No. 30/1975.

⁵⁹² See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 161.

⁵⁹³ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 184.

⁵⁹⁴ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 383.

⁵⁹⁵ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 384.

Arbitral practice, in these disputes, has shown that entities legally defined as public authorities and commercial corporations are not recognised as *de iure* organs, since domestic legislations do not support such definitions⁵⁹⁶. However, as the ILC has highlighted, "a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law"⁵⁹⁷. Because of this trend, the further level of analysis performed by arbitral tribunals has proved fundamental. In the attempt of determining whether an entity is a state organ, it is necessary to consider also the *de facto* nature of that entity.

There has been an opposition to arbitral tribunals' decision of applying the "structural and functional test" to determine whether certain entities are *de facto* state organs even from states involved in investment disputes. In *Jan de Nul*, while arguing that the SCA was a "public authority" with an independent legal personality and not a state organ, Egypt stated that the relevant test was not the "structural and functional test", but rather determining "the existence of an independent personality" established in accordance with national legislation⁵⁹⁸. Egypt grounded its conclusion on the *Noble Ventures* award where the tribunal stated that ILC Article 4 concerns "acts of so-called *de iure* organs which have been expressly entitled to act for the State within the limits of their competence"⁵⁹⁹. Consequently, it would have been sufficient to highlight the autonomous legal personality of an entity in order to confirm its separateness from the state⁶⁰⁰. The tribunal concluded that the entities at the core of the dispute, operating in the field of privatising Romanian State-owned enterprises (namely the State Ownership Fund, SOF, and the Authority for Privatization and Management of the State Ownership, APAPS), could not be considered as *de iure* state organs. A similar argumentation was presented by Algeria in *Lesi and Astaldi* in the attempt of interpreting the term "organ", even though the state did not believe that the word "organ" could be applied to a public entity like the ANB (Agence Nationale des Barrages). Accordingly, the autonomous legal personality and decision power of the entity, as well as its independent financial resources and managing organisation, were considered sufficient to conclude that the ANB was neither a state organ nor an entity controlled by Algerian organs, even though it was under the guardianship of the Ministry competent for hydraulics.

A similar approach opens up to the possibility of applying the "structural and functional test" also in relation to state organs. It is particularly so in the light of arbitral tribunals' failure to properly define *de iure* and *de facto* state organs, since they referred in general terms to the two categories of organs without clarifying the meaning they attributed to those expressions. International courts' jurisprudence could be of some help, since it has been recognising the existence of a category of *de facto* state organs. A few examples are the decisions of the ICJ in the *Nicaragua Case* and that of the ICTY in the *Tadić Case*⁶⁰¹. Scholars have

⁵⁹⁶ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 160. See also *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 188.

⁵⁹⁷ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 4 para. 11.

⁵⁹⁸ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 153.

⁵⁹⁹ See *Noble Ventures Inc. v. Republic of Romania*, para. 69.

⁶⁰⁰ See *Noble Ventures Inc. v. Republic of Romania*, para. 69.

⁶⁰¹ In the *Nicaragua Case*, the ICJ had to verify the level of dependence and control of the US Government on the *contras*, as well as whether those paramilitary forces could be equated to American armed forces because of their activities which could be attributed to the US as those of a *de facto* state organ. In the *Tadić Case*, the ICTY moved from the "effective control test" applied in the

interpreted arbitral tribunals' failure to define the expressions "*de iure*" and "*de facto*" state organs as a sort of "reluctance to enter into the debate on the scope of ILC Article 4 underlying the *de facto* organ dispute"⁶⁰². Indeed, interpreting the concept of "*de facto* state organ" is more problematic. Some commentators consider the concept meaningless because, in their opinion, the definitions of *de facto* organs and entities exercising elements of governmental authority can almost be equated⁶⁰³.

A clear interpretation of the meaning of "*de facto* state organ" in the above-mentioned disputes could have helped to avoid, for instance, the claimant's confusion in *Jan de Nul* when he stated that the SCA was a *de facto* organ because it exercised elements of governmental authority. It is possible that the tribunal, with its decision of directly considering whether the SCA was exercising governmental authority, rather than considering whether it was a *de facto* organ, was of the opinion that there is no such thing as *de facto* state organs. In order to avoid this kind of uncertainty on the existence of *de facto* state organs, they should clarify whether or not there can be a distinction between *de iure* and *de facto* state organs, as well as defining them. The concept of "*de facto* organ" could help in further widening the definition of state organ, in order to include entities which might be excluded from the definition of entities exercising governmental authority because of the stringent requirements included in ILC Article 5. Nevertheless, at the same time, the opportunity of widening the possibilities of applying ILC Article 4 is doubtful. The simple and clear formulation of the provision seems to have been thought to avoid an extensive interpretation⁶⁰⁴.

I believe that accepting the argumentation that the autonomous legal personality of an entity should be the only way to determine whether it is or not a state organ brings with it the risk that such interpretation would allow host states to disguise the status and competences of entities, which could otherwise be defined as state organs. The recent practice of African countries of camouflaging the status and competences of entities linked to them by adopting different procedures and conferring them different "official status" has uncovered the importance of developing a deeper analysis on the nature of state organs. Since the mere consideration of the *de iure* status of certain entities does not prove to be the ultimate test, there is the need of including a further level of analysis. In my opinion, the extension of the "structural and functional test" to state organs has proved useful to effectively determine whether certain entities *de facto* act as state organs. Furthermore, as Special Rapporteur Crawford affirmed, customary law does not "attempt to define an

Nicaragua Case in order to verify whether General Tadić and other officers acted as *de facto* organs of the FRY, since it had already determined that they were not *de iure* organs. The core of the issue concerned "the conditions on which, under international law, an individual may be held to act as a *de facto* organ of a State". The Appeals Chamber concluded that the "general rules of international law that establish when individuals may be regarded as acting as *de facto* state officials... belonged to the body of law on state responsibility". The reason for considering the attribution to states also of the actions of *de facto* organs lies on the need of not allowing states "on the one hand to act *de facto* through individuals and on the other hand to disassociate themselves from such conduct when these individuals breach international law". The Appeals Chamber also highlighted that "the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international". See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Reports 1986, Merits, Judgment, June 27, 1986, paras. 105-115. See also *Prosecutor v. Duško Tadić*, ICTY, Case No. IT-94-1-A, Appeal Judgement, July 15, 1999, paras. 104-117. See also Cassese A., *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law, Vol. 18, Issue 4, 2007, p. 656.

⁶⁰² See Schicho L., *State Entities in International Investment Law*, Nomos, Baden-Baden, 2012, p. 92.

⁶⁰³ See Schicho L., *State Entities in International Investment Law*, p. 92.

⁶⁰⁴ See Schicho L., *State Entities in International Investment Law*, p. 93.

“organ”, although it is clear that the term is used in its broadest sense⁶⁰⁵. The ILC's objective was to adopt a provision which could be applied to the most diverse circumstances in order to adapt to every state's domestic legislation. I believe that, until arbitral tribunals and scholars will concretely try to provide a shared answer, arbitral tribunals should continue to determine whether certain entities can be considered as *de facto* state organs, in order to be able to consider a wider spectrum of circumstances.

4. Acts of the judiciary.

The *Siag and Vecchi v. Egypt* award shows a different scenario that could verify while considering the conduct of state organs⁶⁰⁶. The claimant requested the tribunal to attribute responsibility to Egypt for the failure of its highest organs in acknowledging a judicial decision concerning the claimants, issued by an Egyptian administrative court. The claimants had been involved in a proceeding for bankruptcy, but at the initial stages of the ICSID arbitration Egypt did not have any knowledge of that proceeding.

Egypt grounded its defence on the absence of a central bankruptcy register and, consequently, the claimants could not have raised the issue at the jurisdictional stage because of lack of knowledge of Egyptian highest authorities⁶⁰⁷. Egypt further argued that the lack of knowledge about the national judgment declaring bankruptcy could not be classified as an internationally wrongful act, since it concerned a national act and it was not obliged to acknowledge the capacity of the claimant. In the state's opinion, international rules on state responsibility and, in this case ILC Article 4, allowed the attribution of responsibility to a state only for the actions and omissions of its organs and not for the failure in acknowledging a non-wrongful act, in that case the decisions rendered by its judicial bodies⁶⁰⁸. On the contrary, the claimants affirmed that, according to international law, "Egypt's courts are the Egyptian state" and their conduct has to be interpreted as Egypt's conduct⁶⁰⁹. Egyptian courts are state organs, their actions and decisions have to be attributed to Egypt⁶¹⁰.

The position of the host state was judged inadmissible by the tribunal because Article 4 is "a general principle of international law... not limited to the wrongful acts of a state organ"⁶¹¹. Then, the tribunal added that, according to a general rule, a state "cannot deny knowledge of its own acts", even the non-wrongful ones⁶¹². It referred to the assertion, made in relation to Article 4, that "acts of a state's organ will be attributed to that state even if they are contrary to law"⁶¹³.

⁶⁰⁵ See the First Report on State Responsibility presented by the Special Rapporteur, J. Crawford, Document No. A/CN.4/490, released in 1998, p. 34.

⁶⁰⁶ The dispute concerned the sale of a plot of land for the development of touristic facilities by the Egyptian Ministry of Tourism, acting on behalf of the Egyptian Government. Egyptian authorities ultimately expropriated the land once they found out that one of the claimants' business partners was an Israeli citizen.

⁶⁰⁷ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID, Case No. ARB/05/15, Award, June 1, 2009, para. 128.

⁶⁰⁸ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 171.

⁶⁰⁹ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 135.

⁶¹⁰ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 192.

⁶¹¹ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 194.

⁶¹² See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 195.

⁶¹³ See Dolzer R., Schreuer C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012.

A similar affirmation has to be read in accordance with ILC Article 7, reaffirming the basic principle that "the conduct of an organ of a State or of a person or entity... shall be considered an act of the State under international law... even if exceeds its authority". Indeed, if wrongful actions or omissions can be attributed to a country, the non-wrongful acts of a state organ "will be applied *a fortiori* to the State"⁶¹⁴. The tribunal supported this affirmation recalling the similar conclusions of other arbitral tribunals in *Azinian v. Mexico* and *Saipem v. Bangladesh*. In *Azinian*, the principle of separation of state powers was reaffirmed with the exception of the circumstance of the attribution of state responsibility: the judicial power is autonomous with respect to the executive, but "the judiciary is not independent of the State"⁶¹⁵. In *Saipem*, both the tribunal and the respondent agreed that national courts are "part of the state", whose actions can be attributed to the latter⁶¹⁶.

Egypt's decision of justifying its authorities' lack of knowledge of the acts of the judiciary, referring to the lack of a national register for bankruptcy proceedings, has revealed useful to identify a scenario which could affect the protection of foreign investment. Foreign investors should be aware of the possibility that host states will attempt to invoke the lack of communication among state organs to avoid the attribution of a conduct. The awards considered in the present paragraph have restated a few fundamental concepts. The judiciary of a country are state organs and, by virtue of this nature, state organs cannot rely on the lack of communication or existence of national databases to justify their ignorance of other organs' actions and decisions.

5. State responsibility for the conduct of armed forces.

Since decolonisation, the frequent military coups d'état, intra-state conflicts, domestic conflicts and similar events, have transformed Africa in the geographic region with the highest conflict rate. Armed forces' role in shaping African countries' history and their continuous involvement in the maintenance of national stability, along with the level of militarisation, have inevitable repercussions on people's daily lives and can also have negative effects on the correct performance of foreign investment. Thus, I believe in the importance of considering the consequences of the conduct of these state organs on foreign investment.

AMT v. Zaire originated from the damages occurred to the claimant's industrial facility caused by Zairian armed forces in two specific periods of time, 23-24 September 1991 and 28-29 January 1993⁶¹⁷. A US company, AMT, was the majority shareholder of the Zairian company SINZA, operating in the industrial (producing automotive and dry cell batteries) and commercial sectors (importing and reselling goods and foodstuffs). In 1991, members of Zairian armed forces, deployed in the area of SINZA's industrial facilities,

⁶¹⁴ See *Waguith Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 195.

⁶¹⁵ See *Robert Azinian, K. Davitian and E. Baca v. United Mexican States*, ICSID, Case No. ARB(AF)/97/2, Award, November 1, 1999, para. 98.

⁶¹⁶ See *Saipem S. p. A. v. People's Republic of Bangladesh*, ICSID, Case No. ARB/05/07, Decision on Jurisdiction and Recommendations on Provisional Measures, March 21, 2007, para. 143.

⁶¹⁷ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, ICSID, Case No. ARB/93/1, Award, February 21, 1997, para. 1.05.

invaded the complex and "destroyed, damaged and carried away" both raw materials and finished goods⁶¹⁸. The following year, SINZA reopened the complex, but, soon after, it was raided again by the same armed forces. The result was the permanent closure of the factory which urged AMT to ask Zaire for compensation. The arbitral tribunal had to verify whether Zaire had breached its obligation of vigilance and, consequently, whether the claimant was entitled to compensation for the losses occurred to the investment.

Zaire invoked an unusual defence. Contrarily to what could have been expected, the state did not attempt to convince the tribunal that the damages had not been caused by its armed forces or to invoke circumstances excluding the wrongfulness of that conduct. The state did not argue the damages suffered by SINZA and other companies located in the area affected by the lootings of its armed forces in 1991 and 1993, and that they had not received any compensation from the state⁶¹⁹. The respondent did not challenge the status of the perpetrators and the actual damage to the foreign investment, but it rather argued over the necessity of compensating the investors for the damages. Zairian authorities justified their decision not to compensate either the claimant or the other damaged investors operating in the same area by referring to the principles of non discrimination and of not assuring a more favourable treatment included in the Zaire-US BIT. The state affirmed the application of these two principles to the claimant would have rectified the general lack of compensation to the investors: all of them would have been equally treated and not discriminated, by not being compensated. The lack of compensation would not have discriminated investors between those who received and those who did not receive any form of compensation and, consequently, some investors would have not been treated more favourably than others. Zaire's acknowledgement of its armed forces' actions made superfluous any evaluation of the armed forces' status since the state had already assumed the responsibility of their conduct.

The tribunal focused on Zaire's defence which was entirely rejected on the grounds that it did not comply with the requirements of the international minimum standard mentioned in the Zaire-US BIT. The decision of Zaire of not protecting either SINZA or other investors did not correspond to a compliance with the principle of non discrimination, but rather to a failure to "perform a similar obligation with regard to" other states involved⁶²⁰.

AMT has been the first case of the modern era of BITs where an arbitral tribunal had to decide about the alleged violation of the full protection and security standard by a host state's military forces in Africa. The other main characteristic of the dispute has been Zaire's defence about the alleged breach of the BIT's obligation. This has been a rare, if not unique, example of a state grounding its defence not on the argumentation that it did not breach the full protection and security standard, but rather recognising that failure and using it to build an arguable counterclaim. The tribunal deemed verifying the total lack of initiative of the state in protecting the investment sufficient for the solution of the dispute: it would have been useless determining whether the full protection and security standard represented an obligation of either

⁶¹⁸ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, para. 3.04.

⁶¹⁹ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, paras. 3.08 and 3.18.

⁶²⁰ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, para. 6.10.

conduct or result⁶²¹. The respondent incontestably and voluntarily had omitted to implement all necessary measures to effectively protect AMT's investment and the choice of reiteratively breach the obligation to assure protection and security towards other foreign investors could not be held as an excuse to "exonerate the objective responsibility" of the country⁶²². Even in the case the hypothesis of a preventive protective intervention of the government was not considered acceptable, Zaire could have easily avoided the violation of the BIT's obligation by offering proper reparation or punishing the perpetrators. The conscious misinterpretation of the obligation of non-discrimination could not possibly be an acceptable solution, because its only effect had been the addition of another breached obligation.

6. Absence of protection by police forces.

Frequently, in Africa, episodes of violent conduct of states' police forces are registered in parallel to the similar conduct of armed forces. Additionally to the higher rates of violence exercised by police officers, also the criminal activities they carry out with an increasing frequency rise concern among foreign investors. For instance, a study promoted by UN-HABITAT in Kenya shows that it is not infrequent for police forces to actively operate in criminal areas like corruption, robbery and organised crime⁶²³. One of the reasons at the core of this deviation seems to be the continuous lack of financing and personnel. Thus, in the light of the risks deriving from alternative activities carried out by police forces as well as from the too frequent episodes of violent conduct of police officers, I believe in the primary importance of considering those episodes where police forces have failed to protect foreign investment.

The most relevant disputes concerning the conduct of host states' police forces have involved Egypt, namely *Wena Hotels* and *Siag & Vecchi*⁶²⁴. In both cases, the claimants deemed Egypt responsible for the omissions of its police forces and complained about their inability "to provide the most minimal levels of assistance or protection"⁶²⁵. In *Siag & Vecchi*, the tribunal even acknowledged that Egypt had not even argued or addressed the claimants' argumentations, while presenting its own counterclaims, concluding that the claimants' evidence was acceptable⁶²⁶.

Both arbitral panels agreed that the full protection and security standard is not absolute, but it requires host states to exercise due diligence in order to prevent any harm to foreign investment. In *Siag & Vecchi*, the conduct of Egyptian organs could definitely be attributed to the state and it led the tribunal to the conclusion that Egypt had failed to protect the investor and his investment, since it "fell well below the standard of protection that the Claimants could reasonably have expected"⁶²⁷. In *Wena Hotels*, the tribunal

⁶²¹ See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, para. 6.08.

⁶²² See *American Manufacturing and Trading Inc. (AMT) v. Republic of Zaire*, para. 6.10.

⁶²³ See the UN-HABITAT Report by Stavrou A., *Crime in Nairobi: Results of a Citywide Victim Survey*, Safer Cities: Series No.4, released on September 2002, p. 34.

⁶²⁴ The analysis of the background of the two disputes can be retrieved in Annex 1, attached to the present dissertation.

⁶²⁵ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID, Case No. ARB/05/15, Award, June 1, 2009, para. 3.

⁶²⁶ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 446.

⁶²⁷ See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, para. 448.

concluded that the conspicuous evidence of the police and the Minister's inactivity was enough to prove that Egypt had breached its obligation to protect and secure the investment. Indeed, the tribunal could have completed its analysis considering several complaints filed by the employees of the hotel in Cairo who declared they witnessed the presence of officials of the Ministry of Tourism had been present during the seizures⁶²⁸. But, the tribunal added that, even in the case the latter claim could have been proved, it would have not been necessary to deepen the analysis so to consider also the hypothesis that Egypt either instigated or took part in the seizures⁶²⁹.

These awards have also highlighted the difficulties faced by foreign investors in satisfying their burden of proof. In *Wena Hotels*, the inability of the claimant to unequivocally prove the active participation of ministerial officials in the hotels' seizures has not been the sole case where claimants have not been able to concretely prove the alleged violations committed by police forces. In *Hamester*, Ghana allegedly used its police forces to harass and threaten the Managing Director of Wamco (the joint-venture established by Cocobod and Hamester) during an investigation, eventually motivating his final decision of leaving Ghana⁶³⁰. The tribunal reaffirmed its jurisdiction also over the actions and omissions of Ghana's police officers because they were "a State organ"⁶³¹. But, the tribunal could not rule in favour of the claimant because there was not any evidence of those allegations, the investigation seemed legally grounded and had not breach any international obligation contracted by Ghana⁶³². Concerning the alleged personal threats carried out by the Chief Executive of Cocobod and Wamco's employees that, according to the claimant had been staged by Ghana's organs, the tribunal believed that they could not be attributed to Ghana, since those individuals were unpaid disgruntled employees.

7. State organs exceeding their authority.

The customary rule dealing with state organs or entities exercising governmental authority exceeding their power, embodied in ILC Article 7, has not been invoked in many arbitral disputes and even less frequently in disputes involving African countries. The *SPP v. Egypt* award has not only emerged from the lack of arbitral practice, but has also been recognised as a relevant precedent by other arbitral tribunals⁶³³.

Ascertained that the internationally wrongful conduct was carried out by state organs, the tribunal had to apply the international rule concerning state organs' *ultra vires* conduct, codified in ILC Article 7⁶³⁴.

⁶²⁸ The uncertainty of the evidence presented by the claimant led the tribunal to conclude that the claimant did not satisfy its burden of proving that Egypt either participated in or instigated the seizures and that the claim had to be dismissed. The claimant argued the presence of those individuals was a proof of the coordinated strategy of EHC and the Ministry of Tourism, and of Egypt's direct involvement in the two seizures. Proving that the Ministry's officials were present and had had an active role in the seizure would have allowed the tribunal to conclude that the Ministry was directly involved and the conduct of those individuals could have been attributed to the state.

⁶²⁹ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 85.

⁶³⁰ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 289.

⁶³¹ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 292.

⁶³² See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 297.

⁶³³ The dispute has been more extensively considered in Chapter 4, Section IV, para.1.

⁶³⁴ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 85.

Egypt's declaration that those acts were invalid because "the procedures prescribed by Egyptian law"⁶³⁵ had not been followed, corresponded to an admission that the state organs which had issued them had been acting *ultra vires*, but still within their capacity. In the tribunal's opinion, a provision like ILC Article 7 was of fundamental importance: the inability of holding a state responsible for the *ultra vires* conduct of its organs or entities exercising governmental authority would have rendered the entire structure of the rules on state responsibility "illusory"⁶³⁶. Differently, in his dissenting opinion, Arbitrator El-Mahdi (appointed by Egypt) criticised the majority award stating that Egypt's right of defence had been in a certain measure disregarded in the arbitral proceeding⁶³⁷. He affirmed that the respondent's defence, grounded on the nullity of official acts adopted by its highest organs, had been *a priori* dismissed by the application of the customary rule embodied in Article 7. The arbitrator argued that the decision of labelling those acts as *ultra vires* prevented the tribunal from carrying out a deeper analysis of the dispute and of Egypt's defensive argumentations.

The majority award has been recalled also in following arbitral practice, namely *Kardassopoulos v. Georgia*⁶³⁸. The *SPP* and *Kardassopoulos* tribunals correctly applied ILC Article 7 and maintained it separate from ILC Articles 4 and 5. However, the close link between these provisions carries the risk arbitral tribunals will fail to maintain them separate. For instance, in *Jan de Nul*, the tribunal affirmed ILC Articles represented a "codification of customary international law" and insisted that the provisions on the conduct of state organs and entities exercising governmental authority had to be applied to solve the issue of attribution of responsibility to Egypt⁶³⁹. Nevertheless, the interpretation of the two provisions presented some controversial points. While interpreting ILC Article 4, the tribunal properly recalled the rule, but it later added that it concerns the actions of *de iure* state organs "empowered to act for the State within the limits of their competence"⁶⁴⁰. This interpretation seems ambiguous because, on the one hand, the tribunal seemed to imply that the provision could only be applied to the category of *de iure* organs. On the other hand, the tribunal's observation seemed to suggest an incompatibility between ILC Articles 4 and 7, which in my opinion does not exist. I agree with scholars affirming that the assumption that it is possible to attribute to

⁶³⁵ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 81.

⁶³⁶ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 85.

⁶³⁷ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICSID, Case No. ARB/84/3, Dissenting Opinion, March 20, 1992, para. 3.

⁶³⁸ The issue of the application of ILC Article 7 concerned the necessity of defending foreign investors' legitimate expectations on the validity of the host state's legislation ruling the gas and oil sectors. In *Kardassopoulos v. Georgia*, the tribunal referred to the provision on *ultra vires* conduct to conclude it would have been "immaterial" to discuss whether the above mentioned acts were adopted by the state's authorities in an excess of authority or within the limits legally established by domestic legislation, being both scenarios covered by the formulation of ILC Article 7. Affirming that the acts promoted and concluded with the explicit approval of the state's highest authorities had to be considered void, would have negatively affected the investor's expectations, especially if we think that this opinion developed some time after the investor started implementing the contracts. The *Kardassopoulos* tribunal compared the frustration of the investor's expectations, deriving from the conduct of certain "officials upon which the investor relied", and the consequent breach of the BIT's obligations to the circumstances characterising the *SPP* award. The tribunal added that, even though the provision addressing state organs and entities exercising governmental authority excess of authority could not have been applicable, it would have been possible to interchangeably apply ILC Articles concerning the conduct of either state organs or entities exercising governmental authority, or the conduct acknowledged and adopted by a state. The tribunal stated ILC Article 7 was the applicable provision, but added that other ILC Articles could have been similarly applied because SakNavtobi and Transneft were state organs which also exercised elements of governmental authority, and their conduct was also adopted and acknowledged by the highest state's authorities. See *Kardassopoulos I. and Fuchs R. v. Republic of Georgia*, ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, paras. 190-194 and 274.

⁶³⁹ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Decision on Jurisdiction, para. 89.

⁶⁴⁰ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Decision on Jurisdiction, para. 89.

states only the conduct of *de iure* state organs, acting "within the limits of their competence", is "inconsistent with the rule contained in ILC Article 7"⁶⁴¹, which explicitly concerns the possibility that state organs acting within their capacity can exceed their authority.

The *Jan de Nul* tribunal misinterpreted also ILC Article 5. The tribunal correctly recalled the content of ILC Article 5, but it also affirmed that the provision represents a restatement of the customary rule on excess of authority embodied in ILC Article 7⁶⁴². It is true that the latter rule applies to the conduct of either state organs or entities exercising governmental authority and, in a certain sense, can be perceived as a corollary to ILC Articles 4 and 5. But, at the same time, the provision on excess of authority developed from the necessity of more "clarity and security in international relations"⁶⁴³ and concerns the specific circumstance where either state organs or entities exercising governmental authority exceed their authority or contravene instructions. Thus, it is odd that a tribunal, which decided to rely on the ILC Articles, ended up confusing different provisions dealing with the conduct of state organs, entities exercising governmental authority and their excess of authority.

The risk related to a superficial analysis of ILC Article 7 and its relationship with other provisions, like Articles 4 and 5, is that the party suffering the effects of a wrongful conduct will not be able to enjoy the effects deriving from the correct application of Article 7. Eventually, the misinterpretation of these provisions could even lead to the challenge of arbitral tribunals' conclusions, or could contribute to the developing of grave inconsistencies in international investment law. The rule of precedent is not officially accepted as applicable to investment arbitration, but the different reality of facts should impose upon arbitral tribunals a sort of moral obligation to consider more carefully their interpretation of provisions which could have great influence on the protection of foreign investment.

SECTION II. State-related entities and entities under the control of host states.

1. The "structural and functional test" applied to entities exercising governmental authority.

Generally, in disputes involving African countries, the claimants have perceived ILC Article 5 as the alternative ground to ILC Article 4 in the attempt of attributing the damaging conduct of an entity to a host state. When an arbitral tribunal has ascertained that an entity cannot be qualified as a state organ, the following step usually consists in the determination of the degree of state control over that entity in order to ascertain whether it exercises elements of governmental authority. One of the reasons for the inclusion of ILC Article 5 among the draft articles on state responsibility has been to face the progressive proliferation of

⁶⁴¹ See Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, British Institute of International and Comparative Law, 2007. The document can be found at the following link: http://www.biiicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

⁶⁴² See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Decision on Jurisdiction, para. 89.

⁶⁴³ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 7, para. 3.

"parastatal entities" and the privatisation of previous state corporations which continue to "exercise elements of governmental authority in place of state organs"⁶⁴⁴.

Article 5 establishes that, in order for the acts of an individual or an entity that are not state organs to be attributed to the state, there should be the cumulative existence of two elements⁶⁴⁵. It is necessary to verify that an entity has been empowered, by state law, to exercise governmental authority and that the actions or omissions at the core of the dispute have been executed in that capacity. Similarly to Article 4, as highlighted by the *Lahoud* tribunal, ILC Article 5 requires the verification of the host state's domestic legislation. The analysis of national laws should help in determining whether an entity has been empowered to exercise governmental authority and the effective use of such prerogative in specific circumstances⁶⁴⁶.

However, the structure of an entity does not always allow to unequivocally conclude that that entity is public. It is necessary to consider the issue also from an empirical point of view. Understanding the effective competences of an entity and the factual involvement of a state in its functioning is an essential step to determine its true status. Once an arbitral tribunal has determined that an entity is exercising governmental authority, the further step consists in verifying whether the actions or omissions referred to by disputes' claimants can be attributed to the host state. One of the requirements of Article 5 is that the acts attributable to the state can only be those carried out in a "particular instance". This is the element mainly differentiating entities exercising governmental authorities from state organs whose actions, on the contrary, can always be attributed to the state.

The test to verify whether an entity is public is grounded on the verification of elements like the "ownership, control, the nature, purposes and objectives of the entity"⁶⁴⁷. The "structural and functional test" was initially articulated in *Maffezini v. Spain*⁶⁴⁸ in the attempt of evaluating whether an entity's conduct can

⁶⁴⁴ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 5, para. 1. In the category of entities exercising governmental authority are usually included entities like "public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies,... like private security firms". See the Materials on the Responsibility of States for Internationally Wrongful Acts, United Nations Legislative Series, Doc. No. ST/LEG/SER B/25, 2012, p. 51.

⁶⁴⁵ There have been disputes where arbitral tribunals have had to deal with controversial interpretations of ILC Articles. In *Hamester v. Ghana*, for instance, the claimant argued over the necessity of the entire set of ILC Articles and confused ILC Article 5 with Articles 4 and 8. The claimant affirmed that the conditions mentioned in ILC Article 2 were enough to verify the state's responsibility because the actions of Cocobod (the alleged state entity that concluded a contract with the claimant) had amounted to Ghana's failure to prevent those wrongful actions. The tribunal correctly stated that Article 2 defines the elements characterising an internationally wrongful act, presenting two requirements needing to be contemporarily fulfilled, and cannot be interpreted as "autonomous basis for attribution". Article 2 is simply a "basic statement of the conditions of State responsibility" and, in line with Special Rapporteur Crawford, the tribunal concluded that an interpretation similar to the claimants' was impossible. Interpreting Article 2 as "an alternative to ILC Articles 4, 5 and 8" would not have been consistent with the entire set of ILC Articles. The further risk of a similar interpretation, highlighted by Ghana, would have been the imposition of an unfair obligation upon every state to "constantly monitor and remedy every single potentially harmful act carried out on its territory in any way related to a foreign investment by any private person not falling within Articles 4, 5 and 8". The claimant's interpretation supported the hypothesis that every action or omission could trigger state responsibility, whenever a country fails to prevent the actions or omissions which can harm foreign investment. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 155-173. See also the First Report on State Responsibility presented by the Special Rapporteur, J. Crawford, DOCUMENT A/CN.4/490, released in 1998, p. 31.

⁶⁴⁶ See *Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo*, para. 378.

⁶⁴⁷ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 76.

⁶⁴⁸ In 1989, Mr. Maffezini, an Argentinean citizen, established a joint venture (EAMSA) with a Spanish entity (SODIGA), which was the minority shareholder, for the production of chemical products in Spain. The contract concluded between the two parties provided for the possibility for Maffezini to repurchase SODIGA's share and the latter also granted a substantial loan. Moreover, the new company asked for further subsidies to the Spanish Ministry of Finance and the Xunta de Galicia. After the construction plans and

be attributed to the state *ex* ILC Article 5 and ever since it has arisen a generally followed practice⁶⁴⁹. As stated in *Salini and Consortium R.F.C.C.*, the consolidation of the "structural and functional test" has been a necessary answer to face the progressive "expansion of public authority activity" which has favoured the development of states' practice of establishing autonomous intermediary entities for the realisation of those sensitive activities they differently control⁶⁵⁰.

The purpose of the present Section will be to consider the attribution of responsibility to states from the perspective of ILC Article 5, establishing in which cases it is possible to verify the existence of state-related entities exercising elements of governmental authority or entities under the control of host states. The "structural and functional test" will represent a central point of the analysis, being the most reliable instrument to help in the purpose of unequivocally clarifying the status of those entities. Once it has been ascertained that an entity cannot be qualified as a state-related one, the further purpose of the Section will be attempting to determine whether it can be defined as an entity under the control of the state, *ex* ILC Article 8. The structure of the present Section, as well as that of the previous one, has been thought to mirror that of ILC Articles and refers to arbitral practice of analysing whether the conduct of entities linked to states can be attributed to them.

2. The "structural test".

The "structural test" is the first level of analysis and demands to focus on the structure and organisation of the entity under examination. *Salini, Consortium R.F.C.C.* and *Lesi and Astaldi* are the disputes involving African countries where the structural and functional test has been more successfully applied⁶⁵¹.

Generally, states' defences start off with a reference to national legislations conferring the nature of private legal persons to the entities at the core of the disputes⁶⁵². The further step consists in referring to the

the environmental impact assessment study were presented, in 1992, EAMSA was authorised by local authorities to start the works. Nevertheless, EAMSA started to experience financial troubles which urged Maffezini to transfer some capitals from a personal bank account. The new liquidity was not sufficient to prevent Maffezini to stop construction works and dismissing the employees, as well as to ask SODIGA to intervene providing more liquidity. The parties could not find an agreement and Maffezini resorted to ICS ID. See *Emilio A. Maffezini v. Kingdom of Spain*, ICSID, Case No. ARB/97/7, Award, November 13, 2000, paras. 39 and ff.

⁶⁴⁹ Mr. Maffezini, an Argentinean citizen, had established a joint venture (EAMSA) with a Spanish entity (SODIGA), the minority shareholder, for the production of chemical products in Spain. SODIGA was an entity operating for the "promotion of regional industrial development". One of the major issues that the tribunal had to consider related to the status of SODIGA. The tribunal would have had jurisdiction and the host country could have been held liable for the conduct of the entity only if the existence of a link between Spain and SODIGA was proven. The lacunae of both the ICSID Convention and the Argentina-Spain BIT on how to determine the nature of companies like SODIGA, motivated the tribunal to rely on customary international law and, more specifically, on the rules on state responsibility. The innovative approach introduced in *Maffezini* consisted in considering the above-mentioned elements, splitting the analysis into two levels and declaring that they do not need to be cumulatively verified to attribute a conduct to a state. They should rather be applied on a case-by-case basis decision. The tribunal also added that national laws or the considerations of national courts on the nature of an entity are "not necessarily binding on an international arbitral tribunal" which has rather to rely on international law. See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, paras. 81, 82 and 86.

⁶⁵⁰ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 35. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 39.

⁶⁵¹ The analysis of the background of the disputes can be retrieved in Annex 1, attached to the present dissertation.

⁶⁵² See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 28. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 27. See also *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, paras. 99-100.

entities' alleged exercise of governmental authority. In *Lesi and Astaldi*, Algeria further specified that, in its opinion, entities, either public or private, exercising governmental authority and entities awarded with the competence of exercising a temporary public service could not be equated⁶⁵³. In the latter case, it is not possible to assume *a priori* that the competence of an entity of carrying out public services automatically entitles that entity to exercise governmental authority⁶⁵⁴. If this consideration could be applied to different scenarios, on the contrary, the composition of the managerial apparatus of ADM allowed only the consideration of a specific circumstance in *Salini* and *Consortium R.F.C.C.* Even though the entity had its own assets, state organs had a prominent role in the management of the activities of the entity. Morocco, besides recalling the status of autonomous legal entity of ADM, always pointed out that the presence of the state as a shareholder did not have any implication on the entity's activities⁶⁵⁵. In relation to the public procurement contracts concluded between ADM and the disputes' claimants, Morocco affirmed it could not have had any influence on the status of the entity⁶⁵⁶. Then it added that the state was not a party of the contracts⁶⁵⁷ and did not have any role in the phases concerning the negotiation and conclusion⁶⁵⁸.

Focusing on the "structural test" applied by arbitral panels, it has been possible to highlight few features of the test. Both the *Salini* and *Consortium R.F.C.C.* tribunals suggested that, to determine the structure of an entity, as well as the degree of a state's participation or control, attention should be paid "in particular to its shareholders"⁶⁵⁹. The direct or indirect ownership or control of an entity by a state is generally a symptom that that entity is a state entity⁶⁶⁰. The arbitral panels concluded that ADM was not a state organ or agency, but rather belonged to the category of "state-owned companies" when they are entirely "or predominantly controlled by the State or by State institutions"⁶⁶¹.

State responsibility can also arise from contracts concluded by independent entities if a state's influence has had a predominant role, as the tribunal in *Lesi and Astaldi* underlined⁶⁶². Even commercial entities not qualified by national laws as administrative entities can be defined as state entities when conferred public powers. The ANB's structural characteristics proved that, despite the legal autonomy of the entity, its bonds with the Algerian state were strong and it closely depended from the state's instructions and

⁶⁵³ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 100.

⁶⁵⁴ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 100.

⁶⁵⁵ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 28.

⁶⁵⁶ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 28.

⁶⁵⁷ See *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 27.

⁶⁵⁸ See *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 27.

⁶⁵⁹ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID, Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, para. 31. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID, Case No. ARB/00/6, Decision on Jurisdiction, July 16, 2001, para. 35. The two disputes involving Morocco concerned very similar events involving the Société Nationale des Autoroutes du Maroc (ADM), where the arbitral tribunals had to determine whether ADM was a state entity or not. The reasoning of the tribunal in *Consortium R.F.C.C.* entirely mirrored the reasoning of the previous *Salini* award.

⁶⁶⁰ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 77.

⁶⁶¹ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 31. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 35. The tribunals supported their reasoning referring to L.J. Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*: 8 *Journal of International Arbitration*, Issue 1, 1991, p. 81-115. - K.-H. Backstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice: Arbitration International*, vol. 1, Issue 2, 1985, p. 195-199.

⁶⁶² See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 106.

control, since it was entrusted with administrative powers and exercised elements of *puissance publique*⁶⁶³. Consequently, the ANB was equated to Algeria and its actions or omissions could be attributed to the state.

The *Maffezini* award has helped by providing guidance on how to determine the true level of state control. The easiest circumstance would have been if "there [was] a direct State operation and control, such as by a section or division of a Ministry"⁶⁶⁴. Difficulties could have arisen if "the State chose to act through a private sector mechanism, such as a corporation or some other corporate structure"⁶⁶⁵. In *Salini and Consortium R.F.C.C.*, ADM was incorporated as a private limited liability company, "controlled and managed" by Morocco through the Minister of Infrastructure and other state organs⁶⁶⁶. The state was the major shareholder (89% of the shares), directly participating in the decision-making process and some of its highest authorities held controlling positions. Morocco *de facto* controlled the company's operations and even ADM's purpose was carrying out activities of public utility which are normally posed under the control of national institutions⁶⁶⁷. The contract signed with the claimants had an administrative nature and included domestic provisions, specifically adopted by national authorities, applicable to that contract. In both the awards, the tribunals concluded that ADM was "a State company, acting in the name of" the state.

Indeed arbitral tribunals' work can be helpful in identifying the circumstances in which ILC Articles can be applied and, in this specific case, whether we are in the presence of entities exercising governmental authority. Nevertheless, these awards need to be carefully considered, particularly in relation to the interpretation these panels give of ILC Articles. One of the clearest examples has been the *Lesi and Astaldi* award, where the arbitral tribunal partially confused ILC Article 5 with Article 8, concerning the conduct of private persons directed or controlled by a State, while referring to the hypothesis that Algeria strongly influenced the actions and functioning of the entity at the core of the dispute (the ANB)⁶⁶⁸. The tribunal stated that "the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence". The tribunal was dealing with an entity exercising elements of governmental authority, when it mistakenly referred to the content of Article 8 and to the state's level of influence exercised over the entity⁶⁶⁹.

⁶⁶³ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, paras. 107-108.

⁶⁶⁴ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 78.

⁶⁶⁵ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 78.

⁶⁶⁶ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 32. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 36.

⁶⁶⁷ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 35. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 37.

⁶⁶⁸ See the Materials on the Responsibility of States for Internationally Wrongful Acts, United Nations Legislative Series, Doc. No. ST/LEG/SER B/25, 2012, p. 57. The document can be found at the following link: <http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf>. See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 106. See also *Consortium Groupement L.E.S.I. - Dipenta v. Republic of Algeria*, ICSID, Case No. ARB/03/08, Award, January 10, 2005, para. 19(ii).

⁶⁶⁹ See the Materials on the Responsibility of States for Internationally Wrongful Acts, p. 57.

3. The "functional test".

In several cases, the mere "structural test" has not proven sufficient to lead to a "conclusive determination" of the real status of an entity⁶⁷⁰ and of the qualification of its actions⁶⁷¹. It is not always clear whether an entity can be qualified as a state organ or as an entity whose conduct can be attributed to a state. It is also fundamental to acknowledge the capacity in which those actions have been executed, since these entities do not always exercise governmental authority⁶⁷². For this reason, a second level of analysis has been introduced. The "functional test" allows arbitral tribunals to consider the purposes and the objectives of an entity in order to ascertain its true status⁶⁷³, in the hypothesis the "structural test" has not allowed to immediately clarify it. The previous considerations about the ownership of an entity can be applied also to the functional level.

Once again, *Maffezini* has helped in clarifying that an entity is usually a state entity when its purpose "is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals"⁶⁷⁴. The *Maffezini* tribunal recalled the *CSOB v. Slovakia* award to exemplify the concept⁶⁷⁵. The conclusions reached by the *CSOB* tribunal show that primary relevance has to be attributed to the capacity in which an entity has acted. Even in the presence of an entity exercising national-sensitive economic activities, the possibility of attributing its conduct to the state as a consequence of the exercise of governmental authority arises only in relation to activities not having a commercial purpose.

The *Lesi and Astaldi* tribunal dealt with a similar issue when it decided to verify whether the ANB had been exercising governmental authority⁶⁷⁶. The tribunal confirmed that the claims on unlawful expropriation and violation of the fair and equitable treatment and full protection and security standards could be attributed to the respondent because they related to actions having a governmental nature. Firstly, the termination of the contract concluded between the ANB and the claimants was operated through the adoption of a decision referring also to several Algerian organs. Moreover, the tribunal remarked that, if that was a true commercial move, it should have been done earlier in order to avoid the significant financial losses due to a long waiting period⁶⁷⁷. Secondly, the tribunal jointly considered the allegations on the two other standards and determined that the ANB's intervention to secure the investment (during the political

⁶⁷⁰ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 79.

⁶⁷¹ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 111.

⁶⁷² See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 111.

⁶⁷³ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, para. 31. See also *Consortium R.F.C.C. v. Kingdom of Morocco*, para. 35.

⁶⁷⁴ See *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 77.

⁶⁷⁵ The CSOB (Ceskoslovenska Obchodni Banka) had been "act[ing] on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations"⁶⁷⁵. The arbitral tribunal determined that, in a similar circumstance, it would have been necessary to focus on "the nature of [the entity's] activities and not their purpose" in order to verify whether the CSOB had been exercising elements of governmental authority. See *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID, Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, para. 20. See also *Emilio A. Maffezini v. Kingdom of Spain*, Jurisdiction, para. 80.

⁶⁷⁶ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 112.

⁶⁷⁷ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 114.

instability of the country), the changes in the construction projects and the decision of issuing a new call for tenders had a governmental nature⁶⁷⁸.

The arbitral awards considered in these paragraphs have shown that African states involved in disputes concerning state-related entities have not opposed tribunals' reliance on the "structural and functional test". For their part, arbitral tribunals have relied on the already established practice on the "structural and functional test" constantly referring to previous arbitral tribunals' conclusions, like the *Maffezini* award. They have also followed the conditions set on both levels of the test without deviations. The conclusions of arbitral tribunals have also highlighted the practice of African states to establish private entities and appointing them with the exercise of governmental authority, instead of assigning the same competences to state agencies. Another peculiarity of these entities is that state organs are usually majority shareholders and, consequently, arbitral tribunals have stressed out the importance of verifying the organisation of these entities. The "structural and functional test" has proved to be an effective test to uncover the true status of state-related entities. It has allowed tribunals not to focus only on the mere structure of state-related entities (usually established as private companies), but also to deepen their analysis so to uncover the true competences and purposes of these entities.

4. Changes in the practice of relying on the "structural and functional test".

ILC Article 5 promotes a case-by-case analysis, instead of mentioning specific requirements applicable to every circumstance. The peculiar structure of this provision and the absence of any reference to a consolidated test have "increased the risk of further fragmentation" of arbitral practice⁶⁷⁹. Several arbitral tribunals have not referred to the "structural and functional test" in their reasoning, somehow deviating from the above-mentioned practice. It is unclear whether this lack of reference to the test is conscious or not. However, the approach followed by arbitral tribunals seems to relate to the structure and purpose of the test.

Arbitral panels focused on the legislative acts establishing the entities at the core of the disputes and considered both their organisation and competences. Of the four relevant disputes⁶⁸⁰, *Wena Hotels* and *Helnan Hotels* presented similar backgrounds, since they both involved Egypt and the management of touristic facilities, and concerned the conduct of the same state-related entity. *Hamester*, concerned the conduct of a state-related entity with respect to an investor operating in the cocoa field. The latter, *Jan de Nul*, dealt with the conduct of the Egyptian authority competent for the management of the Suez Canal.

Concerning the organisation of the entities involved in those disputes, the entities involved in *Jan de Nul* and *Hamester* were respectively established as a "public authority" with "an independent juristic personality"⁶⁸¹ and as a "corporate body", a "commercial corporation" whose only purpose was to "trade in

⁶⁷⁸ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, paras. 116-117.

⁶⁷⁹ See Schicho L., *State Entities in International Investment Law*, p. 146.

⁶⁸⁰ The analysis of the background of the disputes can be retrieved in Annex 1, attached to the present dissertation.

⁶⁸¹ See Law No. 30/1975. See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 160.

cocoa beans and generate a profit for the Government"⁶⁸². Differently, the Egyptian Hotels Company (EHC) and its successor, EGOTH, presented sensitive differences, because of the pervasive presence of state authorities in their structure. The EHC, until the period of the confiscation of the hotels, "was a "public sector" company wholly owned by the Egyptian Government" which was the only shareholder"⁶⁸³. For its part, EGOTH was "under the close control of the state"⁶⁸⁴.

Concerning the competences of those entities, it is possible to notice that all of them were entitled with the exercise of both *puissance publique* and purely commercial activities. For instance, among the SCA's competences there were the faculty of issuing decrees for the canal's navigation or the ability of imposing charges for the canal's navigation, which required the exercise of governmental authority"⁶⁸⁵. Cocobod mostly had commercial competences"⁶⁸⁶ and only a residual part of them had a governmental nature"⁶⁸⁷.

Arbitral tribunals judging whether to attribute the conduct of an entity to a host state *ex Article 5* must necessarily refrain from any judgement derogating from the provision's ordinary meaning, as it happened in *Helnan Hotels*⁶⁸⁸. EGOTH's objective, established by law, was to "contribute to the development of national economy... within the framework of the public policy of the State" and operated, on behalf of the Egyptian government, for the privatisation of the national tourism industry"⁶⁸⁹. The tribunal concluded that the entity was not "officially empowered by law to exercise elements of the governmental authority", but it exercised those competences *de facto*, allowing to attribute the entity's actions to the respondent"⁶⁹⁰. ILC Article 5 requires an empowerment through the domestic laws of a state, but in the award, the tribunal suggested a further level of attribution: it would have been sufficient to prove a *de facto* exercise

⁶⁸² Cocobod was the successor to the Ghana Cocoa Marketing Board. See the Ghana Cocoa Board Law (GCB Law) of May 3, 1984, amended in 1991. The text of the law can be found at the following links: http://laws.ghanalegal.com/acts/id/514/section/1/Establishment_Of_The_Cocoa_Board and <http://faolex.fao.org/docs/pdf/gha135122.pdf>. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 184.

⁶⁸³ By the end of 1991, the EHC was reorganised and became a "State owned holding company supervised by the Minister for public sector". The Minister of Tourism was responsible for nominating half of the members of the Board of Directors, as well as of dismissing the Chairman and the members of the Board. The same Ministry of Tourism explicitly declared that the EHC was "subordinated to the Minister of Tourism" and funded with "public money". See *Wena Hotels Ltd. v. Arab Republic of Egypt*, paras. 65-69.

⁶⁸⁴ EGOTH was entirely owned by a holding company that, in turn, was wholly owned by Egypt. Egyptian Ministers exercised administrative and executive powers on the holding company and EGOTH's general assembly was "headed by the Chairman of the Holding company's board of directors". EGOTH was also publicly funded, its "memorandum and articles of association [were] reviewed by the State Council" and, finally, "the Manager and Director of EGOTH may [have been] imprisoned if he/she [did] not distribute State's share of profits". See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Jurisdiction, para. 92.

⁶⁸⁵ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 166.

⁶⁸⁶ The commercial duties consisted in "purchasing cocoa beans from Ghanaian cocoa farmers and to market and export them... encouraging of cocoa production; the undertaking of cocoa cultivation; the regulation of the marketing and export of cocoa; the establishment of industrial processing factories for the processing of cocoa; and the assistance in the development of the cocoa industry". See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 22.

⁶⁸⁷ Other Cocobod's competences, like the possibility to adopt regulations related to the preservation of the cocoa industry and the granting of licences, or the authority of imposing sanctions involved a limited legislative power. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 189.

⁶⁸⁸ See Schicho L., *State Entities in International Investment Law*, p. 126.

⁶⁸⁹ See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Jurisdiction, paras. 92-93.

⁶⁹⁰ See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Jurisdiction, para. 93.

of governmental authority. The existing ties between EGOH and Egypt uncovered by the tribunal show the appeal of this new approach⁶⁹¹.

Arbitral tribunals have carried out a case-by-case analysis of disputes' backgrounds and, in order to acknowledge the circumstances in which arbitral tribunals have been inclined to affirm that an entity had been exercising governmental authority, it is essential to refer to the texts of the awards. It is not sufficient to determine that the organisation and structure of the entity at the core of a dispute is clearly intertwined with the state's highest authorities and that they control, for instance, the entity's activities, its management and the economic resources at its disposal, even though it is labelled as "public company"⁶⁹². It would not be sufficient the simple consideration of the subject-matter of a contract concluded between the claimant and the entity which qualifies the latter's functions as governmental⁶⁹³.

Arbitral panels have furthered their analysis so to ascertain in which capacity those entities act⁶⁹⁴. State-related entities' conduct could be attributed to the host state only in the hypothesis they do not act as commercial partners⁶⁹⁵. The existence of an explicit "coordinated plan" created by the host state could allow the establishment of a link between the entity and the state⁶⁹⁶. In any case, observing that the entity has been acting as a common economic operator or as a shareholder disputing over the functioning of a society established in partnership with a dispute's claimant would suffice⁶⁹⁷. Furthermore, a clear line has to be

⁶⁹¹ See Schicho L., *State Entities in International Investment Law*, p. 126.

⁶⁹² See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Award, para. 152.

⁶⁹³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 169.

⁶⁹⁴ I think that, from the point of view of the purposes and the objectives of the entity, the *Wena Hotels* award is the only case not helping to ascertain whether EHC generally acted exercising governmental authority, but in relation to the specific events lamented by the claimant the answer should be affirmative. The officials who carried out the seizures acted with the authorisation of EHC and, subsequently, Egyptian authorities controlling the entity neither questioned the procedures nor attempted to apprehend those officials who used the force. I am of the opinion that, because of the structure of EHC, Egyptian authorities were fully aware that the seizures would have been authorised, did not undertake any measure to promote an alternative solution and voluntarily failed to punish the perpetrators.

⁶⁹⁵ See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Award, para. 152.

⁶⁹⁶ In *Helnan Hotels*, it seemed that EGOH was the one orchestrating the plan to end the commercial dispute with Helnan and had the possibility to freely sell the Shephard Hotel. The tribunal concluded that neither the downgrading of the hotel nor the inspection of its premises had been carried out in violation of the BIT. The tribunal decided to verify the existence of such plan and determined that both EGOH and other Egyptian authorities had had a role in the "implementation of a plan aiming at terminating" the contract concluded between EGOH and Helnan. Unfortunately, the tribunal did not believe that the intervention of the Minister was corroborated with unequivocal evidence, which would have allowed the attribution of responsibility to Egypt, because the claimant was not able to discharge its burden of proof. See *Helnan International Hotels A/S v. Arab Republic of Egypt*, Award, paras. 152 and 156.

⁶⁹⁷ The *Hamester* tribunal accepted Ghana's reference to two other awards, namely *UPS v. Canada* and *Jan de Nul v. Egypt*. In *UPS*, the respondent affirmed Canada Post, the entity at the core of the award, was a "public corporation" operating in a specific economic field which was also entitled to exercise elements of governmental authority, like the possibility of issuing regulations⁶⁹⁷. Nevertheless, only the actions in pursuance of the faculty of exercising governmental authority "were governmental in nature". On the contrary, those purely commercial activities could not be labelled in the same way, since they had an entirely different purpose. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, Respondent's Rejoinder, para. 123. See also, more in detail, *United Parcel Service of America INC. v. Canada*, UNCITRAL (NAFTA), Award on Jurisdiction and Award on the Merits, May 24, 2007, paras 63-78. Returning to the *Hamester* award, concerning Ghana's involvement, the tribunal did not present any clear argumentation to exclude Ghana's responsibility *ex Article 5*. In the end, the tribunal could not attribute Cocobod's conduct to Ghana. The first claim concerned the 2001 Price Agreement concluded between Hamester and Cocobod and aiming at renegotiating the price of cocoa beans, previously negotiated in the joint-venture agreement. The tribunal concluded that the signature of the Agreement was not executed by Cocobod in the exercise of governmental authority. The second claim related to the 2002 failure in delivering cocoa beans, but any interference in complying with the provision of cocoa beans (in that case a shortage of beans) could only amount to a violation of the contract concluded between Cocobod and the claimant's company. Thus, the issues relating to the shortage and Cocobod's measures to face the crisis were considered as mere acts of *iure gestionis*, which could not be attributed to the respondent. The third claim was grounded on an alleged episode of expropriation and was considered by the tribunal only in the terms of attribution and not in relation with the legality of the action itself. The tribunal's analysis concerned two main events: an exchange of

drawn between the actions carried out in the spirit of "public service" and those in the exercise of "*puissance publique*". In the analysis of attribution, what really matters is verifying the exercise of public authority: activities carried out for the purpose of realising a public service do not actually influence the attribution process⁶⁹⁸. As it happened in *Jan de Nul*, the specific actions referred to by the claimant (such as the "refusal to grant an extension of time at the time of the tender") had not been carried out in the exercise of governmental authority, but they were the kind of action that any commercial partner would have implemented for the protection of its activity. For this reason, in similar circumstances, an entity's conduct cannot be attributed to the state.

I believe reasonable to conclude that these tribunals relied on concepts typical of the "structural and functional test", basically applying the test even though they did not explicitly refer to it. This affirmation is corroborated also by the fact that arbitral panels have focused on the activities generally carried out by those entities and their nature. Once the analysis of national legislations showed that the state-related entities had been allowed to exercise elements of governmental authority, sometimes in addition to activities of purely private nature, arbitral tribunals focused on their conduct in order to determine whether, in the circumstances at the core of the disputes, those entities had exercised governmental authority. An entity can be entirely controlled by a state, but if the "quality" of its actions does not suggest that they have been executed with a different purpose from the implementation of a commercial relationship, it will still be impossible to attribute those actions to the state because the degree of control would not be sufficient.

5. National courts on entities exercising governmental authority.

In several occasions arbitral tribunals have referred to national jurisprudence to remark the general rule that only the acts of governmental authority exercised by an entity can be attributed to the state. In both *Hamester* and *Jan de Nul*, the arbitral tribunals referred to the *Rolimpe Case*⁶⁹⁹ and *Trendtex v. Central Bank of Nigeria*, very similar cases judged by the English Court of Appeal. In the present paragraph, I will be focusing on *Trendtex*⁷⁰⁰.

letters between Cocobod and Hamester concerning certain performance issues and the Ghanaian government's involvement in the general pricing and distribution policy, as well as in the final decision of banning the exportation of the claimant's company products. That exchange of letters was clearly "part of a general corporate battle" where Cocobod did not exercise any government function. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 35 and ff, 255, 266 and 282-295.

⁶⁹⁸ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 170.

⁶⁹⁹ See the judgement of the House of Lords, Case No. AC 351, rendered on January 1, 1979.

⁷⁰⁰ In 1975, the Nigerian Central Bank entered into a contract with a British company for the purchase of a certain amount of cement which should have been used for the building of government barracks. Subsequently, the British company signed another contract with the plaintiff, a Swiss company, for the delivery of the cargo. At the moment of delivering the materials in Nigeria, there were several delays because of a severe congestion of the port's facilities due to the high quantity of cement purchased by the state, whose physical acquisition could not be properly processed in time by the ports' employees. Moreover, the new military administration blocked any further acquisition of cement, suspending the imports, declared that demurrage would have been paid only in certain cases and started the "crash programme" to renegotiate the terms of existing contracts with suppliers (reducing costs and spreading the timetable of the deliveries). In the end, the Central Bank refused to pay the plaintiff the due price for the cement and the fee for the delay, which were included among the due amounts in the contract concluded between the Central Bank and the British company. The plaintiff was suing the Central Bank for the letter of credit released by the Central Bank and issued in London (thus arising British jurisdiction) and not for the purchase contract, which is the reason that convinced the Court that Nigeria should not have had any right to invoke its sovereign immunity. The defendant argued that the entire operation had a governmental nature, since the

The Appeal Court had to determine whether the defendant should have enjoyed immunity and, subsequently, whether the contract concluded by the Central Bank was an act *iure imperii* or *iure gestionis*. The Court decided it would have applied the restrictive immunity theory⁷⁰¹. The Central Bank of Nigeria acted as a national bank and as a banker for other national and international banks, but, at the same time it was pervasively controlled by the government since it had several governmental functions⁷⁰². The same Central Bank declared it was "an arm or department of that government and to have performed an act of government in granting Trendtex this letter of credit". The British Court of Appeal tried to clarify whether the entire transaction could be labelled as commercial, thus belonging to the category of acts *iure gestionis*, or it was an operation *iure imperii*⁷⁰³. The case submitted to the Appeal Court, did not concern the merits of the dispute, but the issue of Nigeria's sovereign immunity before British courts⁷⁰⁴. The Central Bank pushed to see its sovereign immunity recognised, as an organ of Nigeria, while the plaintiff argued that the defendant could not enjoy such immunity since the purchasing process had a commercial nature.

The Appeal Court allowed the appeal because the Nigerian Central Bank was not a state organ. Anyway, the application of the restrictive theory on state immunity allowed the conclusion that the purpose of the cement's purchasing was entirely commercial and thus state immunity could not be invoked. In the end, the appeal was allowed on the ground that the Central Bank was not a state organ which would have enjoyed no immunity, rather than deciding on whether the United Kingdom was bound by the absolute or restrictive doctrine on immunity⁷⁰⁵.

original contracts for the cement had been concluded by the Ministry of Defence and that the cement would have been used for the building of barracks destined to the Nigerian army. A government deciding to start market operations "should be subject to all the rules" and, at the same time, a commercial partner should not be "concerned with the purpose to which the purchaser intends to put the goods". See *Trendtex Trading Corporation v. Central Bank of Nigeria*, British Court of Appeal, Case No. Q.B. 529, Appeal, January 1, 1977. The text of the judgement can be found at the following link: <http://www.uniset.ca/other/css/19772WLR356.html>. Otherwise, it can be found in 1977, ILR, vol. 64, p. 122.

⁷⁰¹ The court started its reasoning arguing that there actually was a general international rule on state immunity declaring that "a sovereign state should not be impleaded in the courts of another sovereign state against its will". Nevertheless, at the same time, it criticised the existence of a true consensus among states since, in reality, "each country delimits for itself the bounds of sovereign immunity". After a brief digression on the mechanisms of adaptation of British law to international law, the court considered the changes in the doctrine of state immunity concluding that the doctrine of restrictive immunity is the one which has eventually prevailed. Here the Appeal Court shared the point of view of the Privy Council in *The Philippine Admiral* case, 2 W.L.R. 214, 1976, p. 232-233. In the United Kingdom, judges started to apply the restrictive immunity, but at the time of the award, the House of Lords was expected to crystallise the shift from the absolute theory to the restrictive one. Nevertheless, this Court of Appeal believed that it was not for the House of Lords to officialise that change, since "we are not considering here the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong".

⁷⁰² Among those functions there were the issue of "legal tender; [the safeguard of] the international value of the currency; and [the operation] as banker and financial adviser to the government". See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷⁰³ Some help in defining the category of commercial acts came from the analysis of the US' legislation which exhorted to look at the entire process of realisation of the cement purchase initiative and not to focus only on the purpose. The Court referred to a Bill introduced into the United States House of Representatives in 1975 which stated that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose": see section 1603 (d) of the Foreign Sovereign Immunity Act 1976". See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷⁰⁴ See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷⁰⁵ The three judges of the Appeal Court agreed that the Central Bank was not "an emanation, arm, alter ego or department of the State of Nigeria". In this way, the Appeal Court reversed the decision of the High Court of Justice stating that the state could not have been sued because clearly the Central Bank was a part of the state's structure, accepting the plaintiff's appeal initially rejected by the High Court. See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

The conclusions of one of the three judges, Lord Denning, were the more innovative and greatly influenced following British jurisprudence⁷⁰⁶. He analysed both the doctrine of sovereign immunity and the general opinion that, at the time, there was no consensus on the degree of immunity to accord to third states before national courts. In his opinion, absolute immunity developed in a time when states did not use to engage in commercial activities, but, since the beginning of the last century, that scenario started to change. That transformation also imposed an evolution of international law and brought to the development of the doctrine of restrictive immunity. Lord Denning proposed a parallel between the private citizen entering a third state for commercial purposes and the state entering another country for the same objectives and he stated that they are no different and should not be considered in different ways. He believed that "there is no immunity in respect of commercial transactions"⁷⁰⁷. Not even the fact that the Central Bank was established with a government's decree or that there was an attempt of changing its constitution would have been able to transform it into a state organ⁷⁰⁸. At the core of these conclusions there was the basic argumentation that, in order to define whether we are in the presence of a state organ or a state-related entity, it is not sufficient to rely on their funding acts, but one should also consider the *de facto* status of these subjects⁷⁰⁹. It is fundamental to carry out a deeper analysis, considering both the control and the functions of an entity, in order to determine whether it acts under state control or exercises governmental functions.

A similar conclusion was reached by the Commercial Court of Frankfurt in *Y.M.N. Establishment v. Central Bank of Nigeria*, whose background was identical to that of *Trendtex*⁷¹⁰. The German court rejected Nigeria's defence grounded on state sovereign immunity. The Commercial Court aligned to several decisions of the German Federal Constitutional Court which had affirmed that, within German jurisdiction, "a foreign state may be granted immunity... only in respect of its sovereign activity (*acta de iure imperii*) but not in respect of its non-sovereign activity (*acta de iure gestionis*), because no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign state in relation to its non-sovereign activity is precluded".

⁷⁰⁶ The other two judges were Lord Stephenson and Shaw, but their considerations on the case did not have a similar impact as Lord Denning's. Lord Stephenson argued that Nigeria established a bank and not a government department, thus, if it intended to attribute it immunity, that decision should have been mentioned in the constitutive act: domestic courts should carefully evaluate whether an entity is entitled to some degree of immunity and not to illegitimately extending it. Furthermore, the letter of credit (the object of the dispute) was a commercial act, an act *de iure gestionis*, but, differently from Lord Denning, he believed that the preference towards the restrictive immunity doctrine should have been explicitly declared by the House of Lords and was not implicitly acquired by the United Kingdom. In Lord Shaw's opinion, the status of an organisation and its competences are attributed through its constitution act and the study of the constitutive legislation of the bank showed that it was not established as a state organ. Once again, the wording of a constitutive act has a primary role in helping to define whether an entity is a state organ, a department of a state or otherwise connected to the state's structure. Lord Shaw agreed that the doctrine of restrictive immunity was the more appropriate to apply consequently to the great changes in states' activities, since the conclusion of the First World War, and similarly to Lord Denning, he believed that the Court of Appeal had the right "give effect to the new principle".

⁷⁰⁷ See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷⁰⁸ See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷⁰⁹ See *Trendtex Trading Corporation v. Central Bank of Nigeria*.

⁷¹⁰ The dispute originated in 1975, after Nigerian Ministry of Defence allowed the purchase of cement from a Liechtenstein firm and the Nigerian Central Bank issued letters of credit through the Deutsche Bank. The phases from the shipping to the delays in the Nigerian port were identical to the facts described in *Trendtex*. The claimants levied distress on the assets of the Central Bank of Nigeria then in Germany. The Central Bank tried to contest that decision on the grounds of state immunity, but the Commercial Court rejected the plea. See *Y.M.N. Establishment v. Central Bank of Nigeria*, Commercial Court of Frankfurt, Decision, December 2, 1975.

6. Entities under the control of the host state and the "effective control test".

ILC Article 8 deals with two different circumstances: private persons' actions under the instructions and actions under the direction or control of the state⁷¹¹. The first circumstance has been identified by the ILC as the case of a state "recruiting or instigating private persons or groups who act as "auxiliaries, while remaining outside the official structure of the State" for the execution of various purposes. The second case has been defined as a more general circumstance, even though it is more complex to verify. According to Article 8, the concepts of instruction, direction and control are different and disjunctive: it is sufficient to prove that a state has violated one of them in order to attribute it the responsibility of certain actions or omissions. The commentary to ILC Articles provides a definition for the terms "direction" and "control"⁷¹². The first implies an "actual direction of an operative kind... [rather than] mere incitement or suggestion". The second relates more to "domination over the commission of wrongful conduct and not simply the exercise of oversight".

The number of disputes where arbitral tribunals were asked to verify the breach of BITs obligations by entities under state's control, according to ILC Article 8, is quite scant if compared to the number of awards where the violations of BITs were allegedly perpetrated by state organs or entities exercising elements of governmental authority. Generally, disputes' claimants have been asking arbitral tribunals to determine whether entities related to host states have been under their instruction, direction or control in a residual way: only if the arbitral panels would not have been able to attribute those entities' conduct to the states *ex* ILC Articles 4 or 5⁷¹³.

State practice has shown different approaches. On the one hand, there has been the case of Egypt that, in *Jan de Nul*, explained why the SCA's conduct could not be attributed to itself neither *ex* Articles 4 or 5, but failed to present its considerations on the claimant's invocation of Article 8⁷¹⁴. On the other hand, there is the example of Ghana in *Hamester*. In that circumstance, the respondent declared that the effective control test had to be applied, since Cocobod's "conduct [would have been] attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation"⁷¹⁵. Then, Ghana concluded Article 8 could not have been applied because it set a very demanding threshold and the claimant did not have enough evidence to satisfy the requirements set by the test⁷¹⁶.

Article 8 does not focus on the structure or the functions of a person or group of persons, but it rather concerns the level of control exercised by the state⁷¹⁷. Thus, the "structural and functional test" would not be

⁷¹¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 8, paras. 1-2.

⁷¹² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 17, para. 7. The reference to "control" and "direction" included in ILC Articles 8 and 17 differ because the first disjunctively refers to the two elements, while the latter conjunctively considers them.

⁷¹³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 152. See also *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 158.

⁷¹⁴ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, paras. 153-154.

⁷¹⁵ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 168.

⁷¹⁶ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 169.

⁷¹⁷ See also Knahr C., *International Investment Law and State Responsibility: Conditions of Responsibility*, within Hofmann R., Tams C. J., *International Investment Law and General International Law*, Nomos, Baden-Baden, 2011, p. 98.

applicable to disputes concerning the conduct of persons or groups. In this scenario, either the "effective control test" or the "overall control test" could be applied. The question is whether arbitral tribunals should follow the ICJ's practice and apply the effective control test or apply the overall control test (similarly to international criminal jurisprudence). The analysis of arbitral tribunal's practice shows that the practice of relying on the effective control test is the one which has consolidated in disputes involving African countries. Arbitral panels have been especially referring to the conclusion of the ICJ in the *Nicaragua case*.

The tribunal *Jan de Nul* conformed to the high thresholds of the effective control test, set in the *Nicaragua case*⁷¹⁸, requiring that "both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake"⁷¹⁹. The tribunal's analysis was rather brief and circumscribed: it simply referred to the "effective control test", shortly defining it. Then, it determined whether the SCA acted under Egypt's instruction, without verifying the other levels of direction or control. In the end, it did not further substantiate its conclusions that the SCA's actions could not be attributed to the state. In *Hamester*, the tribunal affirmed that state responsibility can arise if "the State has a significant involvement, before the commission of the act in question, such that the act can be considered as controlled by, and thus performed by the State"⁷²⁰. The tribunal decided to conform to the conclusions of the *Nicaragua case*, when it agreed to rely on the effective control test, excluding that responsibility for the conduct of Cocobod could be attributed to Ghana *ex ILC Article 8*⁷²¹. The tribunal analysed the issue more in-depth, referring to the lack of "effective control" and "direct command" exercised by Ghana on the actions of Cocobod⁷²².

In the light of the contents of Article 8, the analysis of the *Jan de Nul* and *Hamester* awards has shown that arbitral panels limited their analysis to the verification of whether the conditions of the effective control test had been satisfied by the claimants' evidence. In neither of the disputes, the tribunals focused on the form of control allegedly exercised by host states. Similarly, in *Lesi and Astaldi*, there was a confused

⁷¹⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Reports 1986, Merits, Judgment, June 27, 1986, paras. 113-115.

⁷¹⁹ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, para. 173.

⁷²⁰ The tribunal analysed the claimant's complaints to verify, at the same time, whether responsibility could be attributed to Ghana either *ex Article 5* or, in the case it would not have been possible, *ex Article 8*. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 178 and 198.

⁷²¹ According to the tribunal, the high threshold established by the test was functional to the verification of a "general control of the State over the entity, and [a] specific control of the State over the particular act in question". See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 179.

⁷²² In relation to the 2001 Price Agreement claim, there was not any evidence that Ghana, through instructions or directives, obliged Cocobod to impose the claimant a specific price policy also through the threat of suspending the cocoa beans delivery. The claimant was not able to present convincing evidence that either the negotiation phase or the threats on the delivery process had been operated under the control of Ghana. The analysis of the second claim related to the 2002 failure in delivering cocoa beans showed that there was a "general policy of equitable distribution of the cocoa beans". It was not enough to lead the tribunal to the conclusion that Ghana had exercised any form of instruction, direction or control over Cocobod, in order to deprive the claimant's company of the beans. Concerning the third claim, the tribunal preventively noticed that "the Claimant made no reference whatsoever to any action of the Government. Instead, it only advanced a complaint about the behaviour of Cocobod and its representative, which was said to be a violation of the contract". The tribunal then concluded that responsibility could not be attributed to Ghana even in this last case. There was no evidence that the exchange of letters was motivated by any instruction or direction of the Ghanaian government, which had not even controlled the content or the existence of those messages. Similarly, the tribunal found difficult to affirm that the eventual expropriation of the investment, as a consequence of the government's intervention, had been a consequence of instructions imposed upon Cocobod. See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 199, 200, 257, 267, 278, 285 and 304.

See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, paras. 199-200.

interpretation of Articles 5 and 8 which inevitably influenced the tribunal's perception of the level of control. The result has been the generic application of provisions like Article 8, deriving from the absence of a contextualisation and of the interpretation of the problematic terms or concepts. The remarkable attempt of arbitral tribunals of relying on the rules on state responsibility has been made more difficult by such applications of the rules.

The analysis of possible different interpretive approaches has been at the core only of the *Hamester* award where the tribunal presented a parallel with international criminal jurisprudence, more inclined to refer to the overall control test⁷²³. The arbitral panel argued that the verification of the existence of a specific control is not necessary in international criminal cases, since international criminal jurisprudence agrees that "at least for military or paramilitary groups, general control is sufficient"⁷²⁴. In similar circumstances, it is sufficient to control the conduct of the heads of military or paramilitary groups and not also that of their members. Apparently, the tribunal suggested that the effective control test should prevail in international investment law, since it "is part of general international law and not concerned with the lower thresholds embraced by tribunals" dealing with international criminal cases⁷²⁵. Even the ICJ in the *Genocide case* affirmed that the effective control test, used in the *Nicaragua case*, corresponded to the customary international rule codified in ILC Article 8⁷²⁶.

In the end, I agree that in investment disputes arbitral tribunals should rely on the "effective control test". The "overall control test" is not stringent enough to avoid the risk host states will be too easily held responsible in relation to the conduct of entities over which they generally exercise control, but in the specific circumstance considered in a dispute the state was not exercising any form of control.

7. The proliferation of PMSCs in Africa.

States' increasing reliance on private military security companies (PMSCs), rather than on mercenary groups, is a consequence of the change in the perception of these entities. In the last years, countries have started perceiving PMSCs as "credible alternatives to the insufficient or inexistent public means regulating violence", with their ability of providing more efficient security services⁷²⁷.

⁷²³ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 179.

⁷²⁴ See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, para. 179.

⁷²⁵ See Schicho L., *State Entities in International Investment Law*, p. 203.

⁷²⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, Judgement, February 26, 2007, paras. 398-399. See also Cassese A., *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, *European Journal of International Law*, Vol. 18, Issue 4, 2007, p. 650.

⁷²⁷ See Leander A., *The Commodification of Violence, Private Military Companies, and African States*, Centre for Development Research Working Paper, Danish Institute for International Studies, 2003, p. 3. See also the Report of the British House of Commons' Foreign Affairs Committee, *Private Military Companies*, Ninth Report of Session 2001-2002, reference No. HC 922, August 1, 2002, p. 5-7. The document can be found at the following link: www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/922.pdf. See also Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 7-8. See also Kinsey C., *Private Security Companies: Agents of Democracy or Simply Mercenaries?*, within Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, VS Verlag für Sozialwissenschaften, GWV Fachverlage GmbH, Wiesbaden, 2007, p. 87, 92.

The 90s and particularly the end of the Cold War represented a cornerstone for the reformation of PMSCs. These companies decided to change the common impression of brutal mercenary groups and attempted to evolve into "more legitimate, efficient and respectful of democratic norms and human rights" entities⁷²⁸. The need for protection against the threats posed by Communism to market economy had ceased and states started implementing new policies for the sensitive reduction of their armed forces⁷²⁹. Consequently, the considerable number of unemployed former soldiers decided to flow into PMSCs, making available their skills to the private sector. In Africa, the end of the Cold War was more accentuated by the fact that ex mother-countries and other aid countries decided to cut the costs of the provision of equipment and expertise useful to maintain a stable security framework⁷³⁰. Furthermore, the end of the pressures exercised on the continent by the two superpowers, allowed ethnic or domestic armed conflicts to emerge creating a series of new threats that those countries were not prepared to face, opening a huge market for PMSCs⁷³¹.

The reliance on PMSCs' services has been a "necessary evil" to face the economic decline of the continent caused by the massive instability occurred after the decolonisation, the continuous national and international conflicts, and the inability of states' armed forces to restore a minimum level of stability⁷³².

⁷²⁸ See Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 2. See also Avant D., *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*, within Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies*, p. 419.

⁷²⁹ See Chapman K. J., *The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ*, Vanderbilt Law Review, Vol. 63, 2010, p. 1055. See also Gaston E.L., *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, p. 236. See also the Report of the British House of Commons' Foreign Affairs Committee, *Private Military Companies*, p. 7. See also Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper, No. 6, 2005, p. 3. See also Desai D. R., *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, University of San Francisco Law Review, Vol. 39, Summer, 2005, p. 332. See also Ballard K. M., *The Privatisation of Military Affairs: A Historical Look into the Evolution of the Private Military Industry*, within Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies*, p. 44. See also Lock P., *Africa, Military Downsizing and the Growth in the Security Industry*, within Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Institute for Security Studies, 1999, p. 13.

⁷³⁰ See Cilliers J., Cornwell R., *Africa – From the Privatisation of Security to the Privatisation of War?*, p. 236. See also Avant D., *The Privatization of Security and Change in the Control of Force*, International Studies Perspectives, Vol. 5, 2004, p. 153. See also Cockayne J., *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*, International Review of the Red Cross, Vol. 88, Issue 863, September, 2006, p. 477. See also Lock P., *Africa, Military Downsizing and the Growth in the Security Industry*, p. 14.

⁷³¹ See Singer P. W., *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, p. 9.

⁷³² Along with states, PMSCs have also been used to protect or provide additional security services to missions promoted by IGOs or NGOs, as well as to foreign investment deployed in particularly unstable territories. IGOs and NGOs have usually been criticised for their reliance on PMSCs' services for the lack of ethical principles of these companies, more focused on profits than the protection of human rights. Nevertheless, private contractors are too often the only means available to IGOs, NGOs and, most importantly, foreign investors to continue operating in certain countries and protecting investment in states that are not able to assure that basic necessity. See Holmqvist C., *Private Security Companies: The Case for Regulation*, Policy Paper No. 9, Stockholm International Peace Research Institute, 2005, p. 6. See also Cilliers J., Cornwell R., *Africa – From the Privatisation of Security to the Privatisation of War?*, p. 228. See also Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 4-5. See also Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 23 and ff. See also Avant D., *The Privatization of Security and Change in the Control of Force*, p. 154. See also Cockayne J., *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*, p. 477. See also Gaston E.L., *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, p. 224-226. See also Gillard E-C., *Business goes to War: Private Military/Security Companies and International Humanitarian Law*, p. 526. See also Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, p. 86-88. See also the Report of the British House of Commons' Foreign Affairs Committee, *Private Military Companies*, p. 24-26. See also Desai D. R., *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, p. 831, 847. It can be interesting to consider also a paper presented to the Africa Institute of South Africa's 40th Anniversary Conference by Brooks D., *Creating the Renaissance Peace: The utilisation of private companies for peacekeeping and peace enforcement activities in Africa*, 2000. The document was also published on Sandline's website and can be found at the

Resorting to PMSCs rather than to mercenaries has been a frequent practice especially of states experiencing situations of internal instability and lack of organised and functioning military and police institutions, as well as in the attempt of solving political issues⁷³³.

African countries have often avoided to properly investing in the public security sector as a consequence of inability, driving from a lack of "financial and human capital constraints"⁷³⁴, or unwillingness, interpreted by some scholars as an absence of effort to develop administrative and governmental institutions after decolonisation⁷³⁵. The only possible alternative to avoid a state of anarchy has been the frequent reliance on PMSCs during both armed conflicts⁷³⁶, in order to help national armies in either their training or in the execution of operative tasks, and the daily government of the state⁷³⁷, as a consequence of weak police forces. But, the massive reliance on PMSCs' services has frequently arisen doubts on the true positive effects of the employment of these private entities⁷³⁸. Despite the ethical considerations of leaving the management of state security in the hands of private groups and individuals, there are also significant political and economic considerations in leaving them ample operative discretion and relaxing on the control instruments over their conduct.

following link: www.sandline.com/pdfs/brooks.pdf. The thesis of the author is interesting because he believes that the only way for peace operations to succeed is to rely on the services of PMSCs and lists several reasons to justify his belief that, especially in Africa, the employment of these companies would accelerate the process of controversy solution.

⁷³³ G4S is a clear example of this trend: over the years, it has become the largest private contractor in the world operating in more than 100 countries and employing more than 600,000 personnel worldwide, with a widespread presence in the most part of SSA. More information on the company can be found in its website: www.g4s.com. See Cilliers J., Cornwell R., *Africa – From the Privatisation of Security to the Privatisation of War?*, within Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security In War-torn African Societies*, Institute for Security Studies, 1999, p. 227. See also Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, Occasional Paper Series, Vol. 1, Issue 2, African Centre for the Constructive Resolution of Disputes, 2006, p. 12-13. See also Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, Conflict, Security & Development, Vol. 6, Issue 1, April, 2006, p. 2. See also Singer P. W., *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, International Security, Vol. 26, Issue 3, Winter, 2001-2002. The article can be found at the following link: www.brookings.edu/~media/research/files/articles/2002/1/01us-military-singer/20020128.pdf. See also Gaston E.L., *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, Harvard International Law Journal, Vol. 49, Issue 1, Winter, 2008, p. 235.

⁷³⁴ See the 2014 UN-HABITAT Report, *The State of African Cities: Re-imagining Sustainable Urban Transitions*, p. 28.

⁷³⁵ See Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 13. See also Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 5. See also Holmqvist C., *Private Security Companies: The Case for Regulation*, Policy Paper No. 9, Stockholm International Peace Research Institute, 2005, p. 11. See also Lehnardt C., *Private Military Companies and State Responsibility*, International Law and Justice Working Paper, Issue 2, 2007, p. 1. See also Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, Texas International Law Journal, Vol. 41, 2006, p. 73. See also Umlas E., *Protected but Exposed: Multinationals and Private Security*, within Small Arms Survey, *Small Arms Survey 2011 States of Security*, Cambridge University Press, 2011, p. 145-146. See also the Report of the British House of Commons' Foreign Affairs Committee, *Private Military Companies*, p. 24. See also Mancini F., *In Good Company? The Role of Business in Security Sector Reform*, Demos, International Peace Academy, London, 2005, p. 46. See also Lock P., *Africa, Military Downsizing and the Growth in the Security Industry*, p. 16-17.

⁷³⁶ For instance, in Congo-Brazzaville, the state relied on an Israeli PMSC for the training and supporting of its army. See Singer P. W., *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, p. 3. See also Singer P. W., *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, Columbia Journal of Transnational Law, Vol. 42, Issue 2, Spring, 2004, p. 522. See also Gillard E.-C., *Business goes to War: Private Military/Security Companies and International Humanitarian Law*, International Review of the Red Cross, Vol. 88, Issue 863, 2006, p. 526. See also Kees A., *Regulation of Private Military Companies*, Goettingen Journal of International Law, Vol. 3, Issue 1, 2011, p. 200. See also Lehnardt C., *Private Military Companies and State Responsibility*, p. 1.

⁷³⁷ See Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 4. See also Lehnardt C., *Private Military Companies and State Responsibility*, p. 1.

⁷³⁸ See Cilliers J., Cornwell R., *Africa – From the Privatisation of Security to the Privatisation of War?*, p. 228. See also Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 8. See also Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 16 and ff. See also Avant D., *The Privatization of Security and Change in the Control of Force*, p. 154. See also Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 7.

The use of PMSCs can endanger states' monopoly of the use of force. The continuous weakening of national military and police forces, caused by the lack of resources devolved to their maintenance and development, will inevitably cause a vicious circle where states will necessarily have to rely on PMSCs for the maintenance of domestic stability. In a scenario where the roles of public security forces and PMSCs, which are concretely appointed with similar competences, are not clear it is more likely to register "accountability issues"⁷³⁹. States will tend to reduce available information on private companies' activities and, eventually, even try to deny any responsibility for the conduct of these entities whenever they will perceive the actions of PMSCs could pose a threat to the state's image. They will tend to disengage from external forms of control, a practice which allows the invocation of "plausible deniability"⁷⁴⁰.

In parallel with the issues of accountability, the most relevant threat deriving from the privatisation of security, which can have a negative impact also on foreign investment, concerns the effects on the "balance between state institutions" and their effective ability to operate in the territory⁷⁴¹. The improper financing of public security forces or the decision of central governments of not establishing police and military forces can most likely create institutional gaps. The privatisation of military and police activities, too often corresponds with the privatisation of "the decision-making process"⁷⁴². Both states and foreign investors will have to depend on PMSCs, a form of dependence which will force states to continuously rely on these entities. Furthermore, any attempt of discharging these companies from their role could pose a threat to national stability: a country which has relied for long periods on the services of PMSCs will unlikely be able to run an independent and functioning security sector. These organisational lacunae will force states, especially the weakest ones, and investors to continue to depend from external services. In the light of these considerations, the massive employment of PMSCs can affect the "perception of governmental legitimacy"⁷⁴³. It is of fundamental importance to carefully evaluate how PMSCs are employed by states and evaluate the degree of responsibility of these countries for the actions of private security companies.

Concerning the economic consequences of hiring PMSCs, the services they provide can be too onerous for countries already experiencing serious economic difficulties. For this reason, several African states have been licensing these companies to freely exploit national resources (like diamond or titanium mines and oil deposits)⁷⁴⁴. The further impoverishment deriving from this practice affects even more the

⁷³⁹ See Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 7. See also Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 15. See also Avant D., *The Privatization of Security and Change in the Control of Force*, p. 154. See also Gomez del Prado J. L., *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, *Journal of Conflict and Security Law*, Vol. 13, 2008, p. 439. See also Gaston E.L., *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, p. 238. See also Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, *Connecticut Journal of International Law*, Vol. 24, 2008-2009, p. 242.

⁷⁴⁰ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 242-256.

⁷⁴¹ See Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 10.

⁷⁴² See Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 15.

⁷⁴³ See Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 18.

⁷⁴⁴ See Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, p. 26 and ff. The author also presented the complex structure of a PMSC, including its branches operating in mining or energy exploitation, p. 41. See also Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 76 and ff. See also Fuchs A. E., *Searching for Resources, Offering Security ... Private Military Companies in Sierra Leone*, within Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, VS Verlag für

countries with scant natural resources to trade in exchange for those services. The decision of few PMSCs to accept this form of payment, continuing to operate in weak African states during the last 30 years, has been interpreted as a desire of diversifying and expanding their activities tempted by the possibility of exploiting those countries' national resources⁷⁴⁵. Nevertheless, this practice does not seem lucrative even for PMSCs receiving operating licenses. The development and exploitation of mines and other resources is time and capital consuming and, unless PMSCs are willing to heavily invest in these fields, this way of repaying PMSCs' services is not considered valuable⁷⁴⁶.

Especially in SSA, military and police forces frequently constitute an obstacle to the protection of foreign investment, not only because of their inability of protecting foreign investment, but also because they might have "become major sources of insecurity"⁷⁴⁷. The destabilising role of national armies in the frequent coups d'état or the involvement of police forces in episodes of corruption, violence or other illicit affairs are one of the main concern among foreign investors. The inability of the most part of national governments to effectively deal "with the public demand for [the most basic] services"⁷⁴⁸, has only contributed to the worsening of the perception of security among citizens and foreign investors⁷⁴⁹.

Sozialwissenschaften, GWV Fachverlage GmbH, Wiesbaden, 2007, p. 105 and ff. See also Selber J., Jobarteh K., *From Enemy to Peacemaker: The Role of Private Military Companies in Sub-Saharan Africa*, Medicine & Global Survival, Vol. 7, Issue 2, February, 2002. See also Abrahamsen R., Williams M. C., *Security Beyond the State: Global Security Assemblages in International Politics*, p. 7. See also Duffield M., *Post-modern Conflict: Warlords, Post-adjustment States and Private Protection*, p. 95. See also Frye E. L., *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the Dogs of War*", p. 2620. See also Leander A., *The Commodification of Violence, Private Military Companies, and African States*, p. 3. See also Douglas I., *Fighting for diamonds – Private military companies in Sierra Leone*, p. 179. See also Cleary S., *Angola – A case study of private military involvement*, p. 163. See also Pech K., *Executive Outcomes – A corporate conquest*, p. 89 and ff. The last three works have been included within Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security in War-torn African Societies*.

⁷⁴⁵ See Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 76.

⁷⁴⁶ See the Report of the British House of Commons' Foreign Affairs Committee, *Private Military Companies*, p. 17. One of the first cases of this peculiar payment practice was registered in Sierra Leone. During the civil war, the state was unable to pay the PMCs it hired, like Executive Outcomes (which had to use the profits from Angola in order to fund its operations in the country) or Sandline⁷⁴⁶. The circumstances did not improve with the end of the war because Sierra Leone was so impoverished that it still could not repay its debt, a circumstance which moved national authorities to grant licenses to the private contractors to exploit national diamond mines, as repayment. See Pech K., *Executive Outcomes – A corporate conquest*, within Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Institute for Security Studies, 1999, p. 91.

⁷⁴⁷ See Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 7. See also Lock P., *Africa, Military Downsizing and the Growth in the Security Industry*, p. 20. See also Mkutu K., *The Private Security Industry in Kenya: Issues and Challenges*, within Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies*, p. 185.

⁷⁴⁸ See the 2014 UN-HABITAT Report, *The State of African Cities: Re-imagining Sustainable Urban Transitions*, p. 10. The report is focused on the status of African cities and the quoted part only referred to the West African Region. Nevertheless, in relation to security issues, I believe that this reasoning can be extended to the entire Sub-Saharan region and comprehend both cities and rural areas.

⁷⁴⁹ For instance, after the end of the civil war in Sierra Leone in 2002, there was a sensitive proliferation of PSCs because of the collapse of the consensus towards both the army and the police. They were not able to provide the most basic level of protection and security even to local population and they developed a tarnished reputation as a consequence of the peaks of atrocities and corruption reached during the civil war. Similarly in Kenya, the internal instability originated from the period of conflicts and violence during the presidency of former President Moi, is still persisting and has translated into a general mistrust in the army and the police because of their criminal and violent behaviour. A survey promoted by UN-HABITAT has shown that the police have been rather active in several criminal areas (like corruption, robbery and organised crime) and one of the reasons at the core of this deviation seems to be the continuous lack of financing and personnel. The survey also showed that, as a consequence of police's corruption and participation in crime, citizens perceived that the "36% of all crime was either directly or indirectly linked to the police force". Even though this level of distrust was motivated by irrational perceptions, it has developed the opinion that "the police are... the problem behind crime rather than the solution". See Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, p. 9-10. See the UN-HABITAT Report by Stavrou A., *Crime in Nairobi: Results of a Citywide Victim Survey*, Safer Cities: Series No.4, released on September 2002, p. 34 and 35.

Foreign investors wishing to integrate the physical protection of their investment in sensitive territories usually hire PSCs or attempt to finance and increase "the security forces/military of host governments"⁷⁵⁰. The negative effects on the physical protection of foreign investment deriving from the inadequate training of both military and police forces has motivated foreign investors, especially multinational corporations, to provide training to host states' military and police corps⁷⁵¹. Ideally, foreign investors should intervene in three related areas to assure a full protection of their investment: establishing security departments within their structure, relying on local security forces including "sub-contractors and state security", and, eventually, looking for the support of "local communities"⁷⁵². Stronger relationships between states' armed forces and private investors' security personnel can lead to mutual benefits⁷⁵³. Foreign investors will benefit from the presence of recognised state officials who, with a proper training will be able to offer more adequate protection. Host states will benefit from more advanced training techniques which can be extended to the training of the rest of national armed forces, diminishing, in this way, the dependence from PMSCs services, maintaining the necessity of more adequate investment on national military and police forces.

In the end, the proliferation of PSMCs is posing a threat also in terms of regulation of their activities. PMSCs have developed on the remains of mercenary groups but present different features which make impossible to apply to them the same existing rules. PMSCs cannot be compared to mercenary groups because of the differences in the structural apparatus and the activities performed in hiring states. But, despite the evident necessity of properly identifying these private entities and defining their characteristics and competences, national legislations and international law have not evolved accordingly. Attempts of identifying the implications of the use of these private companies and the possible solutions to limit their possibility of remaining unpunished for breaches of international law have been made in the last years. Nevertheless, the concrete effects of new regulations have been minimal or inexistent, leading to the conclusion that a more effective approach to the issue is demanded.

⁷⁵⁰ See Cilliers J., Cornwell R., *Africa – From the Privatisation of Security to the Privatisation of War?*, p. 241. See also Avant D., *The Privatization of Security and Change in the Control of Force*, p. 154. See also Duffield M., *Post-modern Conflict: Warlords, Post-adjustment States and Private Protection*, Civil Wars, Vol. 1, Issue 1, 1998, p. 93. Both Angola and Nigeria are examples of the implementation of this "hybrid security system", an issue which will be considered more in-depth in the following paragraph while presenting the peculiarities of these countries legislations on PSCs. In Sierra Leone, Koidu Holdings, a subsidiary of a company hold by one of the biggest PMSCs (Executive Outcomes), obtained the management of a diamond mine in Sierra Leone as a non-monetary payment by the state for its services⁷⁵⁰. The organisation of the protection of the mining site has been appointed to private actors and a dedicated group of public police officers who are paid by both the host state and the Koidu Holdings itself. In the DRC, the state's armed forces underwent a complete reform in 2002 with the signing of the peace agreements (Global and All-Inclusive Agreement) which included an entire chapter dedicated to the reform of the military forces with the purpose of integrating state military forces and several of the most influential militia groups. Besides the possibility that war criminals have been enlisted among the militiamen integrated in the new military, this agreement did not bring to a clear reform of the army. Its structure is still unclear and, among the other concerning aspects, there is still a lack of proper and uniform training of the different army's components. See Abrahamsen R., Williams M. C., *Security Beyond the State: Global Security Assemblages in International Politics*, International Political Sociology, Vol. 3, 2009, p. 7-8. See also Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 76.

⁷⁵¹ See Faessler M., *Working with Local Security - A Case Study from the DRC*, Journal of International Peace Operations, Vol. 5, Issue 5, March-April, 2010, p. 18. See also Umlas E., *Protected but Exposed: Multinationals and Private Security*, p. 147.

⁷⁵² See Faessler M., *Working with Local Security - A Case Study from the DRC*, p. 18.

⁷⁵³ See Faessler M., *Working with Local Security - A Case Study from the DRC*, p. 20. See also Dickinson L. A., *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, William and Mary Law Review, Vol. 47, Issue 1, 2005, p. 149.

8. The attribution of responsibility for the conduct of PSCs.

Host states' inability or unwillingness to use all the means at their disposal to effectively protect foreign investment has generally caused the progressive reliance of foreign investors on PSCs. In some cases, this has translated into states' practice of requiring foreign investors to provide for their own security or of hiring themselves these private companies to protect investors. This practice has led to the progressive transfer of public security functions to private companies and the rising of an "accountability issue". The problem is whether and to what extent, in case of damages caused by the actions of PSCs, host states can be held internationally responsible for the conduct of these companies⁷⁵⁴. The objective of the following paragraphs will be to ascertain existing international rules allowing the attribution of responsibility to states. The hope is that, highlighting existing legal instruments to make states accountable for the conduct of PMSCs, states will be encouraged to improve international or national regulations establishing more clear competence boundaries for both private and public security forces and effective mechanisms of control over private contractors.

I will be focusing on the rules on state responsibility with specific reference to the ILC Articles. The analysis will concern the conduct of PSCs and not of PMCs, and will not be specifically dealing with situations of armed conflicts. The most part of studies on PMSCs focus on PMCs mainly in times of war, but the physical protection of foreign investment needs to be constantly assured also in times of peace. I will consider the actions of PSCs since they "are companies that specialize in providing security and protection of personnel and property, including humanitarian and industrial assets"⁷⁵⁵ and, thus, are the private contractors usually employed to protect foreign investment in unstable countries. Generally, studies on the possibility of attributing PSCs' conducts to host states have been made in relation to the compliance with international humanitarian law and human rights law. These studies tend to consider the conduct of PSCs' hired by both host states and foreign investors. But, the present dissertation is aimed at considering the protection and security owed to foreign investors and investment, thus I will not be following the same analytical path. I will consider the specific circumstance of PSCs hired by host states, whose conduct can have negative effects on foreign investors or investment, highlighting the implications for hiring countries.

In this light, it will be essential to verify the level of connection between a PSC and the hiring state. The ILC Articles which are most likely to be referred to in the attempt of verifying whether the conduct of PSCs hired by states can be attributed to the latter are Articles 4, 5, 7 or 8. Thus, the purpose of the following paragraphs will be to determine which Articles are more likely to be used in relation to PSCs' conduct.

⁷⁵⁴ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 2.

⁷⁵⁵ See Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 2.

a) ILC Article 4.

The conduct of a PMSC could be attributed to the hiring state if it was equated to state organs and the most realistic hypothesis is that the company has been included in the hiring state's armed or police forces. The private nature of PMSCs does not allow the attribution to states of the conduct of PMSCs acting as corporations *ex* ILC Article 4⁷⁵⁶. Different conclusions can be drafted from the hypothesis a PMSCs' employees exercise competences typical of state organs, as a consequence of the attribution of the same rights and responsibilities of armed or police forces⁷⁵⁷. If a state requires, by law, private contractors to exercise competences similar to public security organs', these individuals can be considered as temporarily belonging to the host state armed or police forces. This practice, which was used for instance by Sierra Leone and Papua New Guinea a decade ago respectively with Executive Outcomes and Sandline, was typical of that period and has not been continued over years⁷⁵⁸. It would be against the interests of both hiring states and PMSCs that private employees could be considered as a part of the hiring state's armed forces. For the hiring state, there could be higher implications in terms of easiness of attributing a certain conduct to the state. For the PMSC, the inclusion in the state's structure could bring higher responsibilities and duties which the private contractor may not be inclined to comply with.

In a scenario where it seems unlikely that PMSCs will be *de iure* included among state organs, the issue of *de facto* state organs assumes more relevance. The official incorporation of a private company's employees within a state's armed forces does not arise any doubt on the possibility of qualifying them as a state organ. Issues arise when the state does not explicitly qualify the PMSC as a state organ. In 2005, a group of experts from academies, legal institutes and national institutions operating in the human rights and foreign affairs fields reunited to discuss PMSCs and the effects of their conduct on state responsibility⁷⁵⁹. They underlined that the only circumstance in which a PMSC can be considered comparable to a state organ is if it is assimilated to the armed forces of the country in which it operates, according to the contents of Article 4(a)(1) of the III Geneva Convention⁷⁶⁰. On the contrary, the possibility of including a private contractor among a state's armed force will not happen if it can be compared to other militias or volunteer corps, according to Article 4(a)(2) of the III Geneva Convention.

The ICJ considered the issue in several occasions, namely in the *Nicaragua*⁷⁶¹, *Congo*⁷⁶² and *Genocide*⁷⁶³ cases. The present analysis has shown that any reference to ILC Article 4 has usually been made

⁷⁵⁶ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 263.

⁷⁵⁷ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 263.

⁷⁵⁸ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 263. See also Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, Cambridge, 2013, p. 137.

⁷⁵⁹ See the Report of the Expert Meeting on Private Military Contractors, *Status and State Responsibility for their Actions*, organised by the University Centre for International Humanitarian Law in Geneva, in 2005. The document, containing also the list of the experts participating to the meeting, can be found at the following link: www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf.

⁷⁶⁰ See the Report of the Expert Meeting on Private Military Contractors, p. 12-13.

⁷⁶¹ In the Nicaragua Case, the ICJ had to verify whether the contras acted as a *de facto* state organ and, thus, their conduct could be attributed to the US. The ICJ determined that the contras were an independent entity that was linked to the US only through its financing, proving that the US did not "exercise such a degree of control in all fields as to justify treating the contras as acting on its behalf". US aid was fundamental for carrying out the activities in Nicaragua, but it was "insufficient to demonstrate [the contras']

in relation with PMCs' conduct and not with PSCs'. Both the experts group and the ICJ have been referring to situations of armed conflicts, where private armed groups operated along with states. None of these cases concerned the circumstance of private companies providing security services which, on the contrary, "will usually not qualify as *de facto* organs due to the independence they tend to have in planning their operations"⁷⁶⁴.

In the light of the present considerations, ILC Article 4 does not seem useful while discussing the attribution of PSCs' conduct to hiring states, since their duties are not likely to be those of state organs. Article 4 seems more apt to be associated with the conduct of PMCs hired by states and operating in war scenarios in addition to states armed forces, like it happened when Executive Outcomes intervened in the Sierra Leonean and Angolan civil wars. In similar occasions, PMCs can be considered as state organs since they carried out activities typical of states' armed forces. Thus, the analysis necessarily has to move to the other relevant ILC Articles, namely Articles 5, 7 and 8, in order to verify the possibility of attributing the conduct of non combatant PSCs to hiring states.

b) ILC Article 5.

Differently from ILC Article 4, Article 5 seems to be better applicable to recent state practice of hiring PSCs and appointing them with security competences typical of states, without including these entities either *de iure* or *de facto* within the state's structure. The frequent attempts of states not to be held responsible for the conduct of the PSCs they hire mirror the risk that ILC Article 5 has been designed to avoid. States tend to deny any form of control over PSCs' actions by virtue of the fact that private contractors are private entities entirely untied to the state. But, the main purpose of Article 5 is exactly to prevent states

complete dependence on United States aid". It was impossible for the ICJ to conclude that "the contra force [could] be equated for legal purposes with the forces of the United States". Thus, in the hypothesis a state exercises a significant degree of control over an entity and the latter is in a position of "complete dependence", it would be possible to qualify that private entity as a *de facto* state organ. See *Military and Paramilitary Activities in and against Nicaragua*, para. 110.

⁷⁶² In the *Genocide Case*, the ICJ consolidated the point of view expressed in the *Nicaragua Case*. The question before the ICJ was whether the conduct of a person or a group can be attributed to a state even if "they do not have the legal status of State organs", but act as *de facto* state organs. Significantly, the ICJ recognised that the conduct of private individuals or groups, "for purposes of international responsibility, [can] be equated with State organs", but only if the requirement of "complete dependence" has been proven. The practice of identifying *de facto* state organs "must be exceptional" and that it has to be submitted to the verification of the existence of a "particularly great degree of State control". The ICJ concluded that the Republika Srpska, the VRS and the Scorpions were not *de facto* state organs of the FRY. Thus, their activities could not be attributed to the FRY since the above-mentioned conditions had not been met, despite the proven relationship with the respondent's authorities. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, Judgement, February 26, 2007, paras. 392, 393 and 397.

⁷⁶³ In the *Congo case*, the ICJ unequivocally established that the conduct of the Uganda People's Defence Force (UPDF), the national army, was attributable to Uganda "being the conduct of a State organ". Nevertheless, the same conclusion could not be extended to the Movement for the Liberation of the Congo (MLC) which, during the Second Congo War, controlled the north of the state and was backed by Uganda. In the *Nicaragua* and *Genocide* cases the ICJ relied on the concept of "complete dependence". In the *Congo case*, the Court affirmed that there was no proof that Uganda either "created" the MLC or controlled its activities, even though the respondent explicitly admitted "giving training and military support" to the rebel group. The ICJ concluded that the MLC's conduct could not be attributed to Uganda *ex ILC* Articles 4, 5 or 8, because those two requirements were not met. See *Armed Activities on the Territory of the Congo Case (Republic of the Congo v. Uganda)*, ICJ Reports 2005, Judgment, December 19, 2005, paras. 160 and 213.

⁷⁶⁴ See Hoppe C., *Passing the Buck: State Responsibility for Private Military Companies*, p. 991.

from avoiding the attribution of a conduct by authorising entities external to the state's structure to execute that specific activity.

The initial fundamental step to verify whether a PSC's conduct can be attributed to the hiring state *ex Article 5* is to establish if the host state has appointed the PSC with the ability of exercising elements of governmental authority. The group of experts, mentioned in the previous paragraph, has pointed out that Article 5 focuses on "governmental authority", rather than on "governmental activity". The concept of "governmental authority" is broader and allows the inclusion of the actions of PSCs, while the latter concerns a narrower range of activities and entities not allowing the inclusion of PSCs⁷⁶⁵. States can differently interpret the concept of "governmental authority", but the ILC has defined some areas "commonly regarded as intrinsically public in nature" which imply the use of governmental authority⁷⁶⁶. The ILC has referred to private security firms and to the circumstance of private security firms' employees hired to exercise duties in correctional facilities⁷⁶⁷. Unfortunately, the example included in the commentary to the Article depicts a scenario which is rather different from the competences PSCs are normally required to exercise while protecting foreign investment. The uncertainty surrounding the definition of activities implying the exercise of governmental authority could be solved through the adoption of a "hardcore list [of activities] for which there is consensus"⁷⁶⁸. A similar list could include the "exercise of police powers" among the activities requiring the exercise of *puissance publique*, since it is an activity normally exercised by PSCs protecting foreign investment.

BITs provisions assuring foreign investors full protection and security establish a clear obligation for host states to exercise elements of governmental authority. The reliance on armed or police forces for the protection and security of foreign investment necessarily requires the exercise of *puissance publique*. Furthermore, every time an international agreement requires a state to "carry out a task or achieve a given result" the international obligation implies *per se* the exercise of governmental authority, in line with Article 5⁷⁶⁹. A state cannot justify its failure in complying with an international obligation invoking the appointment of a PSC for the realisation of the international obligation established in a treaty⁷⁷⁰. The private contractor will exercise the same elements of governmental authority as public security forces in order to comply with the obligations set in the hiring contract. The point of view that treaties' obligations requiring the achievement of a specific result generally demand the exercise of governmental authority could seem too broad. It could lead to the conclusion that almost every obligation included in a treaty automatically implies the exercise of governmental authority, emphasising the possibility of attributing a conduct to the state in

⁷⁶⁵ See the Report of the Expert Meeting on Private Military Contractors, p. 16.

⁷⁶⁶ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 151.

⁷⁶⁷ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 5, para. 2. The Commission considered the very specific case of private companies operating in the correctional systems where the employees have been contracted as prison guards. In that circumstance, they can be considered as exercising governmental authority because acts like "powers of detention and discipline pursuant to a judicial sentence or prisons regulations" can be qualified as elements of *puissance publique*.

⁷⁶⁸ See the Report of the Expert Meeting on Private Military Contractors, p. 16.

⁷⁶⁹ See the Report of the Expert Meeting on Private Military Contractors, p. 17.

⁷⁷⁰ See the Report of the Expert Meeting on Private Military Contractors, p. 17.

every circumstance. But, in relation to the specific obligation to assure protection and security to foreign investment and investors it does not seem improper to affirm that such obligation requires the exercise of *puissance publique*, eventually allowing foreign investors to invoke ILC Article 5 for any damage suffered as a consequence of PSCs' activities.

In order to ascertain whether an action has been carried out while exercising governmental authority, it can be helpful to verify the purpose of that action: whether it can be qualified as an act *iure gestionis* or *iure imperii*. Verifying that an action was not executed in a "private capacity", not having for instance a commercial purpose, but was rather aimed at realising a police, military or administrative purpose can help in determining that such action has been executed *de iure imperii*. Eventually, this qualification would enlighten that that action has been carried out exercising governmental authority, since its nature required the state not to act in its "private capacity".

The qualification of a certain activity as requiring the exercise of governmental authority could be more easily determined also by answering to the question whether a PSC can perform a certain activity "without the government's permission"⁷⁷¹. Accordingly, in the circumstance of a PSC hired to integrate police activities or to enhance the protection the state guarantees to foreign investment, the private entity would unlikely be able to execute those duties without the exercise of *puissance publique* and the hiring state's authorisation. Unlike the participation of PMSCs in armed activities or in the interrogation of detainees, doubts have been expressed circa the possibility of considering an exercise of governmental power the practice of PSCs of training hiring states' military or police forces.

Verifying whether an action can be qualified as *iure imperii* or that it cannot be executed without the hiring state's authorisation are two useful tests to determine whether that action implies the exercise of *puissance publique*. These are not "absolute" tests, they provide an indisputable help in ascertaining if it is possible to invoke ILC Article 5, but they should not be the only means to rely on. They can integrate each other, but cannot direct to an exhaustive conclusion and, for this reason, it is fundamental to look at the other requirements of Article 5.

Article 5 also requires that the entity exercising governmental authority is empowered to exercise such authority by the state's domestic legislation. The acts through which a state can appoint a PSC can be more or less generic, but it seems unlikely that a state will adopt a specific legislative act to appoint a private contractor⁷⁷². It is more plausible that the state will explicitly appoint a "governmental authority to delegate its powers to" a PSC⁷⁷³ or it will directly authorise the entity by granting a license or another similar proxy to the PSC. In this light, it does not seem likely that the conclusion of "a contract between the state and the company is... sufficient *per se* to bring the latter within the scope of the provision"⁷⁷⁴. A contract is an

⁷⁷¹ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 152.

⁷⁷² See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 269. See also Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 161.

⁷⁷³ See the Report of the Expert Meeting on Private Military Contractors, p. 18.

⁷⁷⁴ See Gillard E-C., *Business goes to War: Private Military/Security Companies and International Humanitarian Law*, p. 555.

agreement which can hardly be intended as a means to authorise a private entity to exercise governmental authority, I believe it is necessary a more official investiture.

One last requirement included in ILC Article 5 is that the entity is "acting in that capacity" while carrying out the internationally wrongful conduct. Accordingly, the activities carried out as a private entity and not in the exercise of *puissance publique*, even though to implement the duties established in the hire contract, cannot be attributed to the hiring state.

Article 5 refers to circumstances in which the typical state functions implemented through the exercise of governmental authority have been privatised. A possible risk related to the privatisation of state functions for a long time is that they will be no longer considered as state function requiring the exercise of governmental authority⁷⁷⁵. The consequence of the constant appointment of PSCs to provide the basic security services to foreign investment sites, foreign investors or their personnel could be the inability of qualifying that form of police protection as an exercise of governmental authority. The final result could be the impossibility of attributing the fraudulent PSCs' conduct to the hiring state, *ex* Article 5, since that security activity cannot be considered as a typical state function anymore.

c) ILC Article 7.

The relevance of ILC Article 7 lies in the possibility of extending the attribution of a conduct to a PSC's hiring state also in the hypothesis the entity exercising governmental authority acted *ultra vires*. Article 7 is a corollary to both Articles 4 and 5 and its complementary role is fundamental because, "since PMSC misconduct will rarely be authorised by the hiring state and may even be explicitly prohibited"⁷⁷⁶, there is the need of a provision covering a broader range of circumstances. Hiring countries do not tend to qualify these private organisations as armed or police forces and they could hardly be considered as *de facto* organs because of the autonomy "they tend to have in planning their operations"⁷⁷⁷. The only restriction to the possibility of leading a conduct back to Article 7 is the requirement that the entity has acted in governmental capacity while carrying out the action believed internationally wrongful. In a similar scenario, "off-duty conduct would give rise to responsibility for a national soldier", but the same consideration cannot apply to the actions of a PSCs' employees⁷⁷⁸.

d) ILC Article 8.

Once it has been verified that Article 5 cannot be applied, Article 8 is the last provision on state responsibility which can be recalled in order to attribute the conduct of a PSC to the hiring state. In the previous paragraph it has been highlighted that hiring contracts cannot be interpreted as an official

⁷⁷⁵ See the Report of the Expert Meeting on Private Military Contractors, p. 16.

⁷⁷⁶ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 163.

⁷⁷⁷ See Hoppe C., *Passing the Buck: State Responsibility for Private Military Companies*, p. 991.

⁷⁷⁸ See Hoppe C., *Passing the Buck: State Responsibility for Private Military Companies*, p. 991.

appointment by law to exercise governmental authority. At the same time, in the light of Article 8, the same contract could be interpreted as a way through which the state can instruct, control or direct the activities of the PSC.

Of the three actions arising state responsibility mentioned in Article 8, it is more likely that a hiring state will control or direct the PSCs operating in its territory, rather than instruct them. Unlikely, a state would explicitly instruct a private contractor to breach international law⁷⁷⁹. But, in the rare hypothesis the hiring state has explicitly instructed a PSC to do so, it is necessary to prove that the instruction was given in relation to each operation in which the PSC was expected to act according to instructions⁷⁸⁰. In the specific circumstance a PSC is required to carry out multiple activities, it will be necessary to separate the activities in which the state directly participated in with its instructions from those where the state did not have any decisional role.

Necessarily, states' instructions have to be specific. A pragmatic example could be the case where the hiring state authorises a PSC to shoot individuals indiscriminately in order to protect a foreign investment's premises, like a mine or an oilfield⁷⁸¹. In this circumstance, the order to shoot without any previous inspection of individuals' identities constitutes a breach of international law, allowing the invocation of Article 8. Another case could concern the too broad definition of a PSC's duties and competences in the hire contract. Defining private companies' duties too broadly is not internationally wrongful *per se*, but it could give the PSC the discretionary power of implementing internationally wrongful actions⁷⁸². The ILC has tried to clarify this circumstance stating that "such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it"⁷⁸³. Nevertheless, the expression "incidental to the mission" leaves more questions unanswered than providing an effective clarification, especially because it gives states a broad interpretative power on the value of the term "incidental". Thus, the best solution to this second circumstance is that hiring states will define, from the beginning, the competences and the limits of PSCs' actions.

According to Article 8, the state's direction or control has to be "relate[d] to the conduct which is said to have amounted to an internationally wrongful act"⁷⁸⁴. A PSC's conduct can be attributed to a hiring state only if it has been proved that the state instructed or controlled the company to carry out the wrongful action or omission. Verifying the competences included into a hire contract concluded with a private contractor is a necessary step to ascertain whether the conduct of the PSC is attributable to the hiring state *ex Article 8*⁷⁸⁵. Concerning the contractual relationship, it is fundamental to verify the "existence of a real link between the

⁷⁷⁹ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 104, 164.

⁷⁸⁰ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 400.

⁷⁸¹ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 166.

⁷⁸² See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 166.

⁷⁸³ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 8, para. 8.

⁷⁸⁴ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 8, para. 7.

⁷⁸⁵ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 271. See also Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, p. 81. See also Mancini F., *In Good Company? The Role of Business in Security Sector Reform*, p. 78. Even though the author did not consider the importance of drafting precise hiring contracts with the requirements of ILC Article 8, the text is still relevant because of the highlighting of the fundamental relevance of properly drafted contracts establishing clear competences for private contractors.

person or group performing the act and the state", "the mere recruiting is not sufficient"⁷⁸⁶. It is also necessary that the PSC's duties and competences are clearly listed, in order to reduce to a minimum the possibility of attributing any eventual wrongful conduct of the PSC to the state. Contracts not including clearly defined competences increase the possibility of interpreting the absence of limits as an authorisation for the PSC to use any means believed appropriate to comply with its requirements⁷⁸⁷. An unclear contract can be dangerous for both the hiring state and the PSC. The state could rely on the lack of clarity of the contract to broaden the initial mandate attributed to the private contractor⁷⁸⁸. The PSC could go well beyond the limits that the state might have implied, even eroding the state's sovereignty⁷⁸⁹.

International tribunals' jurisprudence has usually relied on the "effective control test" and it is doubtful whether this practice will be changed, in disputes involving PSCs, to allow the application of a different "control test". It should be asked whether, in relation to PSCs, it would be better to rely on the "overall control test" or to introduce a "softened effective control test". Normally, hiring states tend to control the general lines of PSCs' operative strategies and do not exercise a pervasive control over every operative phase, thus "actions outside the scope of those instructions would not be attributable"⁷⁹⁰.

In the *Nicaragua Case*, the ICJ had to deal with the actions of the *contras* which, in its opinion, were not under such a control from the US to conclude that their conduct could be attributed to the US, *ex ILC Article 8*. The ICJ consolidated its practice on the "effective control test" also in the *Congo*⁷⁹¹ and *Genocide*⁷⁹² cases. In the *Genocide Case*, the ICJ specified that "the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State... [that it had] to be proved that they acted in accordance with that State's instructions or under its effective control"⁷⁹³. The ICJ recognised the "particular nature" of the crime of genocide, but it also believed that that nature could not justify a departure from its consolidated practice. Usually, private contractors having relations with hiring states' armed or police forces maintain a sort of "informal coordination" with state organs in order to exchange information and coordinate action, but it does not seem likely that such relationship will correspond to a form of control⁷⁹⁴. A similar consideration can be applied also to the case where the private contractor's only link with a state is the issuance of a license for its operation in a third state's territory⁷⁹⁵.

⁷⁸⁶ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 8, para. 1. See also Lehnardt C., *Private Military Companies and State Responsibility*, p. 12.

⁷⁸⁷ See the Report of the Expert Meeting on Private Military Contractors, p. 19.

⁷⁸⁸ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 10. The author referred this reasoning to his analysis of ILC Article 4, but it can be well applied also to the present consideration. See also Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, p. 81.

⁷⁸⁹ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 10. See also Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, p. 81.

⁷⁹⁰ See Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, p. 271.

⁷⁹¹ See *Armed Activities on the Territory of the Congo Case*, para. 160.

⁷⁹² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, paras. 399-401.

⁷⁹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 400.

⁷⁹⁴ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 13.

⁷⁹⁵ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 13.

The ICTY in the *Tadić Case* did not rely on the "effective control test" used in the *Nicaragua Case* since it was deemed too stringent. The Appeals Chamber's stated it would have been sufficient to determine the "role in planning the military actions... in addition to [their] financing" to verify the control exercised over a private group by either the hiring or exporting state⁷⁹⁶. The reason behind this changed approach was the attempt of avoiding states' from "escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials"⁷⁹⁷. The Appeals Chamber also underlined the importance of the proximity between the hiring state and the territory where private contractors' operations take place: the closest they are, the less control is required to verify the applicability of ILC Article 8⁷⁹⁸. Accordingly, it seems reasonable to expect that if the hiring state is also the territorial state in which the private company will operate, it will not be necessary to apply the "effective control test", but a less stringent test will suffice such as the "overall control test"⁷⁹⁹. A case-by-case approach continues to be the best way to verify the true state's control, but the proximity criterion undoubtedly helps to maintain a more realistic approach.

The necessity of adapting the "control test" to the circumstance of PSCs hired by a state is far more important if we think to PSCs' role within host countries. In *Nicaragua* and *Genocide* cases, the ICJ had to decide on disputes where mercenaries operated without the knowledge of the state in whose territory they were deployed and the alleged controlling state differed from the territorial state. In similar circumstances, it was reasonable to expect that the ICJ would have relied on a stricter test, the "effective control test". But, those circumstances were entirely different from the background of the *Tadić Case*, which moved the ICTY's decision of adopting a different test, and from the circumstance a territorial state is also the hiring country of a PSC. Moreover, controlling the activities of an entire PSC is different than controlling the single mission of a company's employees⁸⁰⁰. A PSC probably cannot be controlled since it is a private entity often operating in different countries and scenarios. It is more likely for the state to exercise control or direction over the employees' activities, since their activities are regulated by contracts. Through hire contracts a state can exercise a pervasive control over the PSC's activities if the duties are properly clarified and do not leave a too broad discretionary power. These contracts should rule every aspect of a PSC's mission, from its hiring to the execution and the means made available to the company by the state. In the hypothesis a contract is enough precise, it "would appear to go a long way towards fulfilling the effective control threshold"⁸⁰¹.

Article 8 has helped to spread some light also on the circumstance, highlighted by the establishment by the Angolan government of two PSCs, where a state establishes autonomous PSCs and on the relationship between the PSC and the hiring country. The commentary to Article 8 has specifically dealt with the conduct of state-owned and controlled enterprises, established either by law or by other procedures⁸⁰². The ILC has

⁷⁹⁶ See *Prosecutor v. Duško Tadić*, ICTY, Case No. IT-94-1-A, Appeal Judgement, July 15, 1999, para. 137.

⁷⁹⁷ See *Prosecutor v. Duško Tadić*, para. 117.

⁷⁹⁸ See *Prosecutor v. Duško Tadić*, para. 117.

⁷⁹⁹ See Lehnardt C., *Private Military Companies and State Responsibility*, p. 16.

⁸⁰⁰ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 170.

⁸⁰¹ See Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 171.

⁸⁰² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 8, para. 6.

specified that the conduct of these entities, generally considered separate and autonomous from the state by international law, shall be attributed to the country only in the circumstance the allegedly wrongful actions have been carried out in the exercise of governmental authority, *ex* ILC Article 5. On a case-by-case basis, it is necessary to verify that, in a specific occasion, either the company was exercising governmental authority or the state "was using its ownership interest in or control of a corporation specifically in order to achieve a particular result".

In the end, the analysis of the possibility of attributing PSCs' conduct to hiring states has confirmed the initial assumption that it is more likely that responsibility will be attributed to a state for the actions of a soldier, rather than for the actions of a private contractor⁸⁰³. The circumstance where an internationally wrongful conduct has been performed by a state's military or police forces is easier to attribute to the state, because of the different relationship existing between the host state and the private company operating in its territory. Especially in relation to PSCs, since the hypothesis of attributing their conduct to the hiring state *ex* Article 4 has been discarded since the beginning, it is even more difficult proving state responsibility. The high thresholds established by Articles 5 and 8 have not made this purpose easier. Help could come from a more "relaxed" interpretation of the "control test", but it seems rather difficult that a new jurisprudence will prevail over an already consolidated one. For this reason, it is necessary that states will try to fill in this normative gap by adopting domestic regulations or concluding specific international agreements aimed at defining the conduct which is expected by private contractors and their relationship with hiring states.

SECTION III. The attribution of conduct of private individuals and groups of persons to the state.

1. State responsibility for the actions of revolutionary movements.

Revolutionary movements have contributed to define the history of post-colonial Africa with their frequent attempts of seceding or overthrowing legitimate governments. The activities of these groups can pose serious threats to the physical security of foreign investors and investment. Generally, the conduct of private individuals cannot be attributed to a state under international law⁸⁰⁴, but the general rule can be derogated in the specific case of the activities of revolutionary groups. This rule has been included in ILC Article 10, specifically dealing with the conduct of insurrectional or other movements. The first two paragraphs of Article 10 concern the possibility of attributing responsibility for the conduct of revolutionary movements to a state if the movement establishes either a new government or a new state⁸⁰⁵.

⁸⁰³ See Hoppe C., *Passing the Buck: State Responsibility for Private Military Companies*, p. 992. See also Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, p. 66, 89. See also Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, p. 132.

⁸⁰⁴ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 10, para. 2.

⁸⁰⁵ In the hypothesis of the establishment of a new government, the criterion of continuity between the movement and the new government needs to be followed. For this reason, the ILC has excluded the possibility that "Governments of national reconciliation"

The two paragraphs ground on the generally accepted rule (recalled also in the *Venezuelan Railroads Case*), concerning damages suffered by foreign investors during an insurrection, that a state cannot be held responsible for the damages to foreigners and their properties caused by an insurrectional movement "unless the revolution was successful"⁸⁰⁶. Similarly in *Sambiaggio*, where the dispute concerned aliens' security and the attribution of international responsibility to the host state for the actions of revolutionary forces, the Umpire recalled the general rule that a "government should not be held responsible for the acts of revolutionists"⁸⁰⁷. Concerning the specific events of the dispute, the Umpire added that "the revolutionists were beyond governmental control, and the Government [could not] be held responsible for injuries committed by those who [had] escaped its restraint"⁸⁰⁸. Several years later, the tribunal in *Home Missionaries Society*, a dispute concerning several murders and the destruction of a mission's premises during a revolt, similarly stated that responsibility cannot be attributed to a state for the conduct of an insurrectional movement that acted "in violation of its authority"⁸⁰⁹.

In the commentary to Article 10, the ILC has referred to a dispute involving South Africa and Namibia in order to complete its reasoning on the conduct of insurrectional movements with concrete examples⁸¹⁰. The dispute, *Minister of Defence v. Mwandighi*, originated in 1987 during the South African administration of Namibia and continued after the latter's independence. Mr. Mwandighi claimed he had been shot by South African Forces operating in Namibia. Initially, he asked South African authorities compensation for the damages suffered, but, after Namibia's independence, he addressed his claims to the new state, which accepted to participate in the proceeding by virtue of Article 140(3) of the new Constitution⁸¹¹. Despite the ILC's assertion that the dispute allows to better comprehend Article 10, I agree

can be considered as new governments. It is to protect the state from the attribution of the conduct of revolutionary movements which have been included in a new government, for necessities of national stability and "overall peace settlement". If the revolutionary movement is able to establish a new state, necessarily the new entity has to emerge from an event like secession or decolonisation. The responsibility for the movement's conduct will be attributed only to the new subject, in a spirit of "structural and organic continuity" between the former revolutionary movement and the new state. See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 10, paras. 7-8. See also Dumberry P., *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, *European Journal of International Law*, Vol. 17, Issue 3, 2006, p. 605.

⁸⁰⁶ See *French Company of Venezuelan Railroads Case (France v. Venezuela)*, UNRIAA, Vol. 10, 1902, p.

⁸⁰⁷ In the Umpire's opinion, still valid nowadays, "revolutionists are not the agents of government, and a natural responsibility does not exist; their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life". See *Sambiaggio Case (Italy v. Venezuela)*, Italy-Venezuela Mixed Claims Commission (1903), RIAA, Vol. X, 1960, p. 513.

⁸⁰⁸ See *Sambiaggio Case*, p. 513.

⁸⁰⁹ See *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain*, UNRIAA, Vol. VI, 1920, p. 44.

⁸¹⁰ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 10, para. 14.

⁸¹¹ See *Minister of Defence v. Mwandighi I.*, Supreme Court of Namibia, Case No. SA 5/91, Judgment, October 25, 1991. The document can be found at the following link: www.saflii.org/na/cases/NASC/1991/5.html. The proceeding was initially issued against South African authorities, since they were the administering power, namely the Cabinet of the Interim Government of South West Africa (present Namibia) and the South African Minister of Defence. The government of South Africa claimed that its troops' activities could be qualified as *acta iure imperii* and, thus, it was "immune to the jurisdiction of the Courts of Namibia". On March 21, 1990, Namibia became an independent sovereign state, a different entity from the South West Africa, but the proceeding was started before the independence as well as the shooting took place around the same period. The question before the Court was whether Namibia was "liable to compensate the Respondent, in respect of crimes allegedly perpetrated by servants of the previous administration at a time when that administration controlled the territory of Namibia". The South African Minister contended "that any liability that might have vested in him as South African Minister of Defence had passed to the Namibian Minister of Defence". The Court highlighted that Namibia was a new international subject, entirely different from its predecessor, but it could not avoid to recall Article 140(3) of the Namibian Constitution. The peculiar provision affirms that "anything done... prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been

with scholars criticising that similar events could be referred to comment a provision dealing with the attribution of responsibility for the wrongful conduct of a revolutionary movement having established a new state or government. The dispute concerned the case of a newly independent country, Namibia, assuming responsibility for the conduct of the armed forces of the state previously lawfully administering the territory, South Africa. It did not concern the wrongful actions of a revolutionary group and, thus, it is not pertinent to ILC Article 10.

The issue of the establishment of a new state and the attribution of conduct for the actions of a revolutionary group has been more correctly considered in a group of national judgments released by the French Conseil d'Etat and relating to the independence of Algeria⁸¹². The Evian Accords sanctioned the end of the Algerian War and recognised Algeria's sovereignty and right to self-determination. During the independence war, however, several French citizens had suffered damages and later resorted before French courts looking for compensation.

The *Perriquet* and the *Hespel* cases concerned damages occurred to French citizens' rural property in Algeria which had been caused by the operations of insurrectional movements⁸¹³. The Commission d'arrondissement des dommages de guerre de Paris initially rejected the compensation requests, but later, the Conseil d'Etat reversed those judgements. The Conseil d'Etat recalled Article 18 of the "Déclaration de principes relative à la coopération économique et financière" and the following "Protocole judiciaire", establishing that Algeria had assumed all the rights and obligations previously contracted by France in its name⁸¹⁴. Reparation could be requested to France, but Algeria should have paid for the damages caused by the FNL (Front National de Libération) before independence⁸¹⁵. Algeria should have paid only for the damages caused by the FNL, while it would not have been responsible and would not have had to compensate for French organs' conduct in the attempt of eradicating the revolutionary movement⁸¹⁶. Obliging France to compensate the plaintiff would have corresponded to an admission of fault, when the background of the dispute showed that "damages were attributable to the [Algerian] insurrectional movement"⁸¹⁷. France should have had to pay only for the damages caused by its army.

done by the Government of the Republic of Namibia or by a corresponding Minister or official". *Minister of Defence v. Mwandighi* and the interpretation of Article 140(3) of the Constitution were considered in a dispute which arose the following year. See *Government of the Republic of Namibia and the Minister of Finance v. Cultura 2000 and Brandt J. J.*, Supreme Court of Namibia, Case No. SA 2/92, Judgement, October 15, 1993, p. 20 and ff. The judgement can be found at the following links: www.safflii.org/na/cases/NASC/1993/1.html and www.superiorcourts.org.na/supreme/docs/judgments/civil/Government-Cultura.pdf.

⁸¹² These cases have been considered in Dumberry P., *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, p. 613-615.

⁸¹³ See *Perriquet case, Mr. Hubert X*, Conseil d'Etat, 3 SS, Case No. 119737, Decision, March 15, 1995. See also *Hespel case, Consorts d'X*, Conseil d'Etat, 2/6 SSR, Case No. 11092, Decision, December 5, 1980.

⁸¹⁴ The Declaration of Principles was adopted on March 19, 1962, and Article 18 states that "Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities". The document can be found at the following link: http://fothman.free.fr/Accbitxt/Eco/dz_eco/dzeco190362coopeco/dzeco190362coopeco.html. The Judicial Protocol was adopted on August 28, 1962, and was included within the framework of the Declaration of Principles. The document can be found at the following link: www.justice.gouv.fr/art_pix/eci_conv_algerie.pdf. See also Dumberry P., *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, p. 613.

⁸¹⁵ See *Perriquet case, Mr. Hubert X*.

⁸¹⁶ See *Perriquet case, Mr. Hubert X*.

⁸¹⁷ See *Hespel case, Consorts d'X*.

In three other emblematic cases, namely *Etablissements Henri Maschat*, *Consorts Hovelacque* and *Grillo*, the French Conseil d'Etat declared its lack of competence in deciding cases where damages had been caused by Algerian rebellious groups. The new Algerian state was the recipient of the obligations France already contracted on behalf of its colony⁸¹⁸. France was solely responsible for the damages caused by its armed forces in the attempt of defeating insurgents and that it was impossible to transfer upon the European state also Algeria's obligations⁸¹⁹. The plaintiffs should not have been compensated by France because the damages caused by the FNL and the consequent prejudice for French citizens "directly originat[ed] within a foreign state" and they could have not been attributed to France⁸²⁰.

Algeria was never involved in the proceedings before French courts and, consequently, it has never been held responsible for the conduct of the Front National de Liberation. However, the above-mentioned judgments can be defined as a "declaration of principle", restating that a newly independent state is responsible for the conduct of the revolutionary movement which prevailed over the former legitimate government and that it is the new international subject that should compensate for the damages caused by the insurrectional movement. These judgements clearly demonstrate that the FNL's conduct before Algerian independence had to be considered as that "of the future state of Algeria"⁸²¹. The ILC, instead of recalling the *Mwandinghi* case to complete its analysis of Article 10, should have referred to disputes more similar to the above-mentioned ones involving Algeria. Those judgments have better demonstrated that the conduct of an insurrectional movement succeeding in establishing a new government or state is attributable to the latter.

2. The consequences of a failed insurrection.

ILC Article 10(3) covers the residual circumstance an insurrectional movement fails to prevail over the legitimate government and refers to the issue of state responsibility in the eradication of the insurrectional movement as well as the due diligence principle. The provision concerns the possibility of attributing a conduct to a state according to Articles 4 to 9, "however related to that of" a revolutionary movement. Article 10 only applies in "exceptional cases", when a state is "in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly [fails] to do so"⁸²². Over the years, insurrections' failure has been at the core of several arbitral disputes and one of the issues most frequently debated has been the compliance of the legitimate government with the due diligence principle. In some disputes of the beginning of the 20th century, like *Home Missionaries Society* and the *Spanish Zone of Morocco Claims*, arbitrators' interpretations of state responsibility in circumstances of

⁸¹⁸ See *Etablissements Henri Maschat case*, Conseil d'Etat, Case No. 04878, Decision, May 10, 1978.

⁸¹⁹ See *Consorts Hovelacque case*, Conseil d'Etat, 2/6 SSR, Case No. 35028, Decision, January 13, 1984.

⁸²⁰ In *Grillo*, the Conseil d'Etat considered the previous decisions of the Administrative Appeal Court of Lyon and the Administrative Tribunal of Nice which had rejected the plaintiff's request for compensation for the damages caused by the revolutionary movements as a consequence of Algeria's failure in compensating him. See *Grillo case*, Conseil d'Etat, 10 / 7 SSR, Case No. 178498, Decision, July 28, 1999.

⁸²¹ See Dumberry P., *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, p. 615.

⁸²² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 10, para. 15.

insurrection and states' obligation of acting diligently can help with the identification of similar issues in more recent investment disputes⁸²³.

The *Home Missionaries Society* case concerned several murders and the destruction of an American mission's premises, during a revolt in a district of the British Protectorate of Sierra Leone burst out at the end of the 19th century by the hand of natives caused by the introduction of a new tax⁸²⁴. The United Kingdom recognised that, even though the choice of pursuing the implementation of a new controversial tax was mainly correct, the execution caused negative effects⁸²⁵. For their part, the US contended that Great Britain had been well aware of the local population's resentment and had decided to continue with the execution of the planned measure. In their opinion, that behaviour showed UK's negligence in maintaining public order and protecting foreigners' lives and properties⁸²⁶. The tribunal underlined that the introduction of a new tax was in the respondent's right and that there were no signals of a potential rebellion. Even after the outburst of the revolt, the British administration did everything in its power to restore stability and adequately protected foreigners present in the region. Anyway, in the tribunal's opinion, the UK could not have been held responsible for the conduct of rebellious individuals if it had not showed "negligence in suppressing [the] insurrection"⁸²⁷.

In the *Spanish Zone of Morocco Claims*, arbitrator Huber focused on the issue of state responsibility for injuries occurred to the life and properties of British citizens during an episode of instability in the part of Morocco controlled by Spain and on the latter's obligation to protect them. The award is relevant for the clarification of the circumstances arising state responsibility in case of war or revolution⁸²⁸. According to the arbitrator, a state could be held responsible if it had not undertaken all reasonably possible measures to limit the effects of a situation of serious internal instability. Host states are bound to exercise "certain vigilance" on foreigners' physical security (granting a peaceful and stable domestic framework), on the assurance of "normal administrative and judicial conditions", as well as on the obligation of prosecuting the wrongdoers⁸²⁹. In similar circumstances, a state could be held responsible for the failure in taking preventive or subsequent measures to protect foreigners, but not for its failure to prevent the development of a situation of national instability. Consequently, if a foreigner or his property has been damaged by an insurrectional movement, the host state would have been obliged to act diligently towards the individual. The state could not be held responsible if the damages were a consequence of military operations, but its responsibility would have arisen if those armed forces manifestly abused their power.

⁸²³ These awards have been referred to in Crawford J., *State Responsibility - General Part*, Cambridge University Press, Cambridge, 2013, p. 179-180.

⁸²⁴ See *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain*, UNRIAA, Vol. VI, 1920, p. 42-43.

⁸²⁵ See *Home Frontier and Foreign Missionary Society*, p. 43.

⁸²⁶ See *Home Frontier and Foreign Missionary Society*, p. 43.

⁸²⁷ See *Home Frontier and Foreign Missionary Society*, p. 44.

⁸²⁸ See Grant J. P., Barker J. C., *Parry and Grant Encyclopaedic Dictionary of International Law*, 3rd Edition, Oxford University Press, Oxford, 2009, p. 567.

⁸²⁹ See *Spanish Zone of Morocco Claims*, p. 642.

Both these disputes have concerned the alleged lack of due diligence exercised by host states during insurrections and are relevant for the way state responsibility and the due diligence principle have been considered. As highlighted by Crawford, during a revolution and its suppression, a state can be held responsible for the conduct of its organs or entities, as expressly mentioned in ILC Article 10(3). It seems unlikely that the same state could be held responsible also for its negligence in the suppression of a revolt, as stated in *Home Missionaries Society*⁸³⁰. Similarly, the concern in the *Spanish Zone of Morocco Claims* relates to the tribunal's opinion that, during a revolt, the state is responsible if its authorities do not "counter the consequences [of revolutionary events] to the extent possible". In considering similar assertions, it is necessary not to interpret them as rules of attribution, but rather as "an aspect" of the principle of due diligence⁸³¹. The obligation of acting diligently has to be separated from the conditions for holding a state responsible for internationally wrongful actions.

3. The failure of revolutionary movements and states' breach of the full protection and security standard.

ILC Article 10 has not generally been referred to in international jurisprudence⁸³². In investment-related disputes arbitral tribunals have been considering the damages caused by insurrectional movements and their consequences only in the light of BITs provisions. Similarly to the above-mentioned disputes, contemporary arbitral tribunals have focused on host states' failure in protecting foreign investment and acting diligently during the eradication of insurrections, in the specific circumstance revolutionary movements had been defeated by legitimate governments. The most relevant investment disputes are *AAPL* and *Lesi and Astaldi*. None of the investment-related arbitral awards involving African countries I have been able to retrieve has concerned the attribution of responsibility to a state for the conduct of a former insurrectional movement able to establish either a new state or government. Disputes have rather concerned circumstances of rebellion or revolution where the insurrectional movement has not been able to prevail over the legitimate government. The core of these disputes has concerned the conduct of host states and their eventual responsibility for having failed to properly protect foreign investment and to exercise due diligence, a scenario rather similar to *AAPL*.

AAPL has been the first "modern" investment dispute concerning the consequences of the actions of a host state's armed forces in terms of state liability for the breach of the full protection and security standard during an insurrection. The dispute originated from the destruction of *AAPL*'s industrial complex (a farm for the cultivation and export of shrimps to Japan) and the killings of several employees during a counter-insurgency operation carried out by Sri Lankan security forces in an area controlled by rebels⁸³³. In *Lesi and*

⁸³⁰ See Crawford J., *State Responsibility - The General Part*, p. 180.

⁸³¹ See Crawford J., *State Responsibility - The General Part*, p. 180.

⁸³² See Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, p. 95.

⁸³³ The claimant lamented the violation of several provisions of the Sri Lanka-UK BIT, among which that concerning the full protection and security standard (Article 2), and requested adequate compensation for the damages caused by security forces. See

Astaldi, the claimants had concluded a contract for the building of a dam near Algiers, but the armed conflict between the national army and extremist Islamic groups, which affected Algeria in the 90s, prevented the claimants from performing the contract⁸³⁴. The failure to execute the construction works caused the suspension of the works and the termination of the contract and motivated the claimants to resort before an ICSID arbitral panel.

States' defences in the two disputes present differences mainly due to the way states approached the consideration of the events. In *AAPL*, Sri Lanka focused on the security operation carried out by the national army and the alleged role of the insurgency movement in the destruction of the farm. Sri Lanka admitted in several occasions that the operation in the shrimp farm had been carried out by a state organ under specific instructions of the government. The operation was judged "necessary under the circumstances" and represented "a legitimate exercise of sovereignty"⁸³⁵. Nevertheless, the state always maintained that the destruction of the site could not be attributed to its security forces because it had allegedly been caused by the insurgents⁸³⁶. The Sri Lankan government would not have had to compensate the investor if this affirmation had been proven, since the insurrectional movement did not overthrow the legitimate government establishing a new governmental entity and the state could not be held responsible for the conduct of private individuals. Differently, in *Lesi and Astaldi*, Algeria mainly focused on the effectiveness of the security measures implemented. Algeria declared that the preventive measures undertaken had been sufficient, recalling also the complementary role of the Italian government in the fixation of the measures more favourable for the protection of Italian workers in Algeria⁸³⁷. According to the state, the claim was an excuse for the failure in the contract's performance, since it complied, in accordance with its possibilities, with the obligation of protecting and securing the claimant's interests in the area⁸³⁸.

The analysis of arbitral tribunals have inevitably been influenced by the positions taken by disputes' parties. However, both panels have reached some points of contact. In *AAPL*, the tribunal focused on the alleged breach of the full protection and security standard and on states' customary obligation to act with due diligence towards foreign investors and their investment. Discarded the argumentation on Sri Lanka's strict responsibility to protect the foreign investment⁸³⁹, the tribunal had to determine whether the damages suffered by the industrial complex and the killings had concretely been carried out by Sri Lankan security forces and, consequently, had to attribute the responsibility to the state. The tribunal recalled the general rule that a state cannot be held responsible for the damages occurred to foreign investment during an insurrection, unless it failed to provide the protection which is normally assured by international custom or treaty

Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990, para. 3.

⁸³⁴ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, ICSID, Case No. ARB/05/3, Award, November 12, 2008, p. 4 and ff. The same events had already been presented in a previous dispute, *Consortium Groupement L.E.S.I. - Dipenta v. Republic of Algeria*, ICSID, Case No. ARB/03/08, Award, January 10, 2005, para. 14 and ff.

⁸³⁵ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 10.

⁸³⁶ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 34.

⁸³⁷ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 169.

⁸³⁸ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 171.

⁸³⁹ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, paras. 9, 45, 50 and 53.

provisions⁸⁴⁰. In the event the state has failed to offer a proper level of protection, it has to be held responsible for the losses independently from the subject that caused them, be it a state organ or insurrectional forces. In the end, Sri Lanka was held responsible, not on the grounds of its armed forces' destruction of the shrimp farm, but for the state's failure to effectively protect the investment.

In *Lesi and Astaldi*, the tribunal analysed the entire security system implemented by Algeria⁸⁴¹ and concluded that the investment had been effectively protected. The security measures were "reasonable and proportioned", in consideration of both the conflict and the "specificity of the region" where the investment site had been located⁸⁴². Then, as it happened in *AAPL*, the *Lesi and Astaldi* tribunal verified state responsibility for the lack of diligence in protecting foreign investment. The major difference between the two awards concerned the debate over the measures adopted by host states and the ones which should have been implemented. In *Lesi and Astaldi*, the tribunal acknowledged the security measures implemented by the host state and expressed its satisfaction for their compliance with the full protection and security standard, while in *AAPL* the tribunal presented a more critical analysis.

Indeed, in exceptional circumstances, like a revolution, a state has the "exclusive discretion" in deciding the methods to regain control of its territory and repress an insurrectional movement⁸⁴³. As suggested in the dissenting opinion attached to the *AAPL* award, arbitral tribunals should be more careful in "second-guess[ing] the tactics and strategies" a state's armed forces should implement⁸⁴⁴. Sri Lanka could have adopted a different strategy, which would have spared lives and the destruction of the shrimp farm. But, at the same time, the dissenting arbitrator pointed out that the tribunal did not have a complete picture of the revolution's background, making any assumption on the more appropriate approach pure speculation. In his opinion, the tribunal's suggestions were more comparable to "reasonable police precautionary measures", rather than military tactics aimed at eradicating a subversive group⁸⁴⁵. The dissenting arbitrator concluded that holding Sri Lanka responsible for the failure in undertaking precautionary measures was illogical, independently from who really damaged the farm, since the ending result was holding a government liable for a legitimate security operation for which a third party took advantage of⁸⁴⁶.

A very similar argumentation was presented by the Venezuelan Commissioner in *Sambiaggio*. The principles of sovereignty and *par in parem non habet iudicium* render states unaccountable before any third country for matters belonging to their domestic jurisdiction. The Venezuelan Commissioner affirmed the arbitral commission should not have debated about "the merits of the policy of the Venezuelan Government",

⁸⁴⁰ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, para. 72.

⁸⁴¹ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 179. Passive security measures were appointed to local enterprises and consisted in the control of roads, the working site and natural barriers. Active security measures consisted in the reliance on the security services of a group of 250 patriots located in the area and authorised by the Algerian government.

⁸⁴² See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 182.

⁸⁴³ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID, Case No. ARB/87/3, Dissenting Opinion of S. K. B. Asante, June 15, 1990, p. 593-594.

⁸⁴⁴ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, Dissenting Opinion, p. 593-594.

⁸⁴⁵ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, Dissenting Opinion, p. 594.

⁸⁴⁶ See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, Dissenting Opinion, p. 594.

arguing that it constituted an interference in the state's domestic affairs and was against international law⁸⁴⁷. He underlined that the duty of judges simply settling damage claims could not unveil the necessity of discussing a state's "political action"⁸⁴⁸.

The Venezuelan Commissioner and the dissenting arbitrator in *AAPL* correctly reaffirmed the obligation of non-interfering within states' domestic jurisdiction and states' discretionary power in adopting the measures they deem more appropriate to face an insurrection. However, I believe arbitral tribunals are allowed to address states' measures for investment's protection, especially since the protection of foreign investment is such a fundamental purpose for IIAs. In order to determine whether a state has protected an investment and exercised due diligence, it is inevitable for arbitral tribunals to objectively consider a country's conduct and the measures it has adopted, otherwise it would be pointless including a similar obligation if states' behaviour could not be evaluated. However, arbitral tribunals have to be impartial and objective in their analysis and arbitral awards should not be used as "criticism means" for states' choices. In my opinion, the considerations of the tribunal in *AAPL* on the measures Sri Lanka should have implemented were part of a general reasoning. I also believe the *AAPL* tribunal seemed more likely to consider those alternative measures as examples to further explain its reasoning, rather than suggesting the respondent how to act in similar circumstances.

4. State failure and remedies available to foreign investors.

After decolonisation, the abrupt necessity for newly independent African countries to supply the absence of ex mother-countries' governments and aid with new governmental institutions caused the emerging of internal contradictions (previously soothed by the presence of European powers) and of the intrinsic weakness of new state institutions. The Cold War and the force game played by the two super-powers over the continent partially contained this disruptive trend. But, the end of the Cold War represented a turning point also for the "failed states' phenomenon", since in the beginning of the 90s an increasing number of countries experienced failure. The progressive failure of several African states and the deriving institutional "vacuum", favoured the penetration of parastatal entities, warlords or armed groups⁸⁴⁹. Neither international law nor doctrine has been able to effectively address the issue⁸⁵⁰, despite the threats states lacking governmental institutions pose to the Westphalian state system. The lack of a clear and shared

⁸⁴⁷ See *Sambiaggio Case* (Italy v. Venezuela), Italy-Venezuela Mixed Claims Commission (1903), RIAA, vol. X, 1960, p. 509. For a summary of the case, Grant J. P., Barker J. C., *Parry and Grant Encyclopaedic Dictionary of International Law*, 3rd Edition, Oxford University Press, Oxford, 2009, p. 538.

⁸⁴⁸ See *Sambiaggio Case*, p. 510.

⁸⁴⁹ See Cornwell R., *The Collapse of the African State*, within Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security In War-torn African Societies*, p. 62. See also Akpinarli N., *The Fragility of the "Failed State" Paradigm*, Martinus Nijhoff Publishers, Leiden, 2010, p. 16. See also Rotberg R. I., *Failed States, Collapsed States, Weak States: Causes and Indicators*, within Rotberg R. I. ed., *State Failure and State Weakness in a Time of Terror*, Bookings Institution Press, Washington D. C., 2003, p. 9.

⁸⁵⁰ See Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, *Nordic Journal of International Law*, Vol. 73, 2004, p. 4. See also Giorgetti C., *Why should international law be concerned about state failure?*, *ILSA Journal of International & Comparative Law*, Vol. 16, 2010, p. 473. See also Giorgetti C., *A Principled Approach to State Failure*, Koninklijke Brill NV, Leiden, 2010, p. 43.

definition of the stages of state failure, the apparent decrease of these episodes and the consequent decline of interest have caused the hibernation of the academic debate over state failure. For their part, states have not eased the continuation of the debate. Especially the most powerful countries tend to refrain from considering a state as failed, because of the possible implications in terms of international instability.

One of the few clear elements of the concept of state failure is that it implies a progressive and temporary transition process implying different "degrees of failure". Especially while considering the possibility of attributing a certain conduct to a state experiencing failure, the analysis should not only be limited to the concept of "failed state". It would be reasonable to consider also the stages immediately preceding and following that condition. Despite the absence of a shared definition of state failure, one of the most accurate differentiations of these stages of states' lives focuses on the figures of failing states, failed states and collapsed states⁸⁵¹. Failing states have just started their decline phase. In failed states, governmental institutions still possess the ability of ruling the territory and the citizens, but the critical internal instability limits their possibility of effectively governing the territory⁸⁵². Affirming that "a State is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three"⁸⁵³ contributes to maintain the belief that failed states are still subjects of international law and shows the importance of further developing the debate over the issue. In collapsed states, state organs and institutions do not exercise sovereign authority anymore, not being able to comply with the most basic requirements. Central governments are entirely absent or unable to rule and exercise their duties towards the population, which obtains "political goods... through private or *ad hoc* means"⁸⁵⁴.

In *Sambiaggio*, the Umpire referred to a state of anarchy in the attempt of differentiating the effects of state failure from those of a revolution. The definition he gave of "state of anarchy" mirrors that of collapsed state. He affirmed that in the case of a state of anarchy "a government cannot protect foreigners because of the intrinsic inexistence of state organisms"⁸⁵⁵. Article 1 of the Montevideo Convention on the Rights and Duties of States he recalled, affirms that a state "should possess [specific] requirements" in order to be qualified as a subject of international law, like a government and the capacity to enter into relations with other states⁸⁵⁶. Thus, the collapse of state institutions would deprive a state of two of these generally accepted requirements for its existence, even though, for practical reasons, the international community tends to consider failed or collapsed states as still existing according to the "principle of continuity"⁸⁵⁷.

⁸⁵¹ This tripartition has been presented by Rotberg R. I. in *Failed States, Collapsed States, Weak States: Causes and Indicators*, within Rotberg R. I. ed., *State Failure and State Weakness in a Time of Terror*, Bookings Institution Press, Washington D. C., 2003.

⁸⁵² See Rotberg R. I., *Failed States, Collapsed States, Weak States: Causes and Indicators*, within Rotberg R. I. ed., *State Failure and State Weakness in a Time of Terror*, Bookings Institution Press, Washington D. C., 2003, p. 5. See also Giorgetti C., *Why should international law be concerned about state failure?*, p. 476.

⁸⁵³ See Crawford J., *The Creation of States in International Law*, Clarendon Press, Oxford, 2006, p. 700.

⁸⁵⁴ See Rotberg R. I., *Failed States, Collapsed States, Weak States: Causes and Indicators*, p. 9. See also Giorgetti C., *Why should international law be concerned about state failure?*, p. 476.

⁸⁵⁵ See *Sambiaggio Case* p. 512.

⁸⁵⁶ See Article 1 of the Montevideo Convention on the Rights and Duties of States, entered into force on December 26, 1934, which states that "the state as a person of international law should possess the following qualifications: a permanent population; a defined territory; government; and capacity to enter into relations with the other states".

⁸⁵⁷ See Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, p. 9.

State failure is constantly under scrutiny and, for instance, the 2016 Fragile States Index shows that Africa is the continent with the highest rate of states experiencing fragility issues⁸⁵⁸. In the scale ranking from the more unstable countries to the more sustainable, simply considering the categories going from "Very High Alert" to "High Warning", it is possible to notice that 41 out of the 67 positions are occupied by African countries. In 2015, in the same categories, African states were 40 out of 65 states. Only Mauritius has been included in the group of stable countries for the two years I have considered. Among the various indicators relied on by the FFP, the most relevant are those concerning state structure and stability, like the legitimacy of the state, the security apparatus or the presence of factionalised elites. Undoubtedly, other indicators considered by the FFP, like economic growth, the respect of human rights or development, are fundamental for the proper functioning of every country, but I believe that if at the grounds there is not a stable state structure it is unlikely that the other sectors will improve. The Index shows that the highest instability ranks are held by the most resources-rich African countries, a trend creating serious difficulties for foreign investors deciding to enter those markets. Among these countries stand out Sudan, South Sudan, the Central African Republic, Nigeria, the Republic of Congo, the Democratic Republic of Congo, Libya and Ivory Coast, which have a primary role in mining, oil extraction or the production of agricultural goods (like cocoa, bananas or coffee). The abundance of raw materials *per se* attracts foreign investors, but the intrinsic instability of these countries risks to limit or to be the cause of the withdrawal of foreign investment.

The ability for such unstable countries of concluding and effectively implementing international agreements is another issue worth considering⁸⁵⁹. Concerning the conclusion of international agreements, failing and failed states are expected to conclude treaties regarding only the areas where they are still exercising authority. Collapsed states are unable to conclude international agreements because of the lack of national institutions and the inability of being internationally represented during treaty negotiations. The absence of state organs "able to commit the State in a legally binding way", through the conclusion of an international agreement, shows the inability of states to practically exercise their legal capacity, even though it is formally maintained⁸⁶⁰.

Nevertheless, there have been cases where the desire of the "international state community" of maintaining "alive" failed states has made generally acceptable their participation in some international treaties. The most evident example has been Somalia during the conclusion of the Lomé IV and Cotonou Conventions. The European Union was so interested in extending Lomé IV even to Somalia that it overcame the state's collapse to allow its participation in the treaty. The European Council of Ministers even issued a

⁸⁵⁸ The Fragile States Index is yearly drafted by the Fund for Peace (FFP). The indicators usually considered to draft the countries' list are: demographic pressures, refugees and IDPs, group grievance, human flight, uneven development, poverty and economic decline, legitimacy of the state, public services, human rights, security apparatus, factionalised elites and external intervention. See the 2015 Fragile States Index which can be found at the following link: <http://fsi.fundforpeace.org/rankings-2015>. The analysis of the components of each indicator can be retrieved in the 2015 Fragile State Index Book, p. 17. The book can be found at the following link: <http://library.fundforpeace.org/library/fragilestatesindex-2015.pdf>. The version updated to 2016 can be retrieved at the following link: <http://library.fundforpeace.org/library/fragilestatesindex-2016.pdf>.

⁸⁵⁹ The issue has been analysed also in Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, p. 17 and ff.

⁸⁶⁰ See Thürer D., *Failing States*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, p. 3.

declaration stating that "the political accession of Somalia to the Lomé Convention [was accepted] despite the fact that Somalia [had] not been able to ratify the Convention for reasons beyond its control"⁸⁶¹. While negotiating the Cotonou Agreement, European countries prevented a similar situation including Article 93(6) establishing that "the Council of Ministers may decide to accord special support to ACP States party to previous ACP-EC Conventions which, in the absence of normally established government institutions, have not been able to sign or ratify this Agreement". This practice shows that the relevance of international agreements aiming at fostering development or "humanitarian relief" for less developed countries has led to their extension also to failed states, so to allow local populations to benefit from these agreements⁸⁶².

The question is whether a similar solution could be applicable also in relation to IIAs since, as the preamble of these treaties often state, they follow the same purposes of development, growth, cooperation and stability of treaties like the Cotonou Convention⁸⁶³. The existence of a similar practice leaves open the possibility that in the event an international multilateral investment agreement is adopted, it will be extended also to collapsed states. On the contrary, the desire of maintaining some formal stability perpetuating states whose structure does not exist anymore through their participation in international agreements, is inapplicable to the conclusion of BITs. In the case of multilateral agreements, states can be co-opted by other states, while in the hypothesis of a bilateral agreement there would be the lack of a counterpart. Somalia has concluded only two BITs, one with Egypt and the other with Germany, before the outburst of the civil war⁸⁶⁴. Since the 90s, Somalia has not entered into bilateral agreements, since the lack of governmental institutions prevented the conclusion of any treaty. The negative effects of the lack of multilateral investment treaties and the impossibility of concluding bilateral agreements will be mostly experienced by foreign investors. The risks deriving from operating in highly unstable countries will be amplified by the lack of governmental institutions bound to protect them according to standards usually included in investment agreements.

The possibility for failing, failed or collapsed states of effectively implementing the international obligations contracted in IIAs is the other relevant issue, especially in the attempt of attracting FDIs. Nowadays, an increasing number of African states have been experiencing government overthrows, rebellions and various degrees of instability, leading to the conclusion that new failed states will form if there will not be a rapid improvement of national conditions. States like Libya, Nigeria, Ivory Coast or the Democratic Republic of Congo have concluded the highest number of BITs in Africa, but their current status of failing or failed states is raising concerns among foreign investors on the effective ability of their governments of complying with those obligations.

⁸⁶¹ The declaration has been mentioned also in *Somalfruit and Camar v. Ministero delle Finanze and Ministero del Commercio con l'Estero*, ECJ, Case No. C-369/95, Judgement, November 27, 1997, para. 11. The case concerned the import of bananas from ACP countries and the application of the Lomé Convention. See also Akpinarli N., *The Fragility of the "Failed State" Paradigm*, p. 147.

⁸⁶² See Akpinarli N., *The Fragility of the "Failed State" Paradigm*, p. 147.

⁸⁶³ See Akpinarli N., *The Fragility of the "Failed State" Paradigm*, p. 148. The author affirmed that "the international community mostly limits its active reaction to the consequences of the absence of effective government to humanitarian assistance or development policy".

⁸⁶⁴ See the Somalia-Egypt BIT signed on May 19, 1982, and entered into force on April 16, 1983. See also the Somalia-Germany BIT signed on November 27, 1981, and entered into force on February 15, 1985.

The principle of continuity should be applied to both state failure and collapse, since these two conditions represent a hiatus in a state's capacity of complying with international obligations: "state failure does not extinguish statehood"⁸⁶⁵. In the case of failing or failed states, it will be necessary to verify whether the specific institutions for the implementation of IIAs obligations are still operational. In the case of collapsed states, the lack of governmental institutions will oblige to wait for the establishment of a new government or for changes in the state's structure, unless local entities temporarily exercising authority will decide to apply the principle of continuity. For instance, in Somalia, "sub-state entities" decided to conform to the obligations assumed by the former legitimate regime. The 2001 report of the UNHCHR "The Situation of Human Rights in Somalia" recalled the decision of the participants to the Somali National Peace Conference to include in the Transitional National Charter the commitment of complying with human rights safeguarded by international conventions concluded by Siad Barre's regime⁸⁶⁶. Thus, I believe it could be expected from collapsed states that similar sub-national authorities will decide to declare their acceptance of IIAs' obligations. This hypothesis will more reasonably verify in those countries where foreign investment already constitute a significant branch of their economy and they could not afford to lose that part of income.

The issues underlined in relation to the conclusion and implementation of international agreements in circumstances of state failure or collapse show the importance of identifying the remedies available to foreign investors, especially in collapsed states where "security is [normally] equated with the rule of the strong"⁸⁶⁷. Preventively, foreign investors can defend themselves activating insurances against political risks. The purpose of these insurances is not to entirely avoid the intrinsic risk component of investing in highly unstable countries, but rather to financially minimise the negative effects especially in countries possessing risk-worthy resources. Another preventive means is the hiring of PMSCs. The possibility of resorting before arbitral tribunals is a fundamental remedy after an investment has suffered damages. Thus, it will be important ascertaining whether a state is totally collapsed or its institutions are functioning, even though at an inferior level, in order to determine if an investor will be able to enjoy the right of resorting before a court. Failing and failed states can still be represented and supposedly will have institutional structures allowing to convene them before national or international courts. On the contrary, collapsed states, lacking any form of institutionalised body, cannot be officially represented before either international forums or judicial bodies.

The issue has concretely been considered by the British High Court in the *Somalia v. Woodhouse Drake* case, a proceeding involving Somalia and a Swiss investor over a rice cargo purchased by Somalia, during the fights which overthrew Siad Barre's regime⁸⁶⁸. One of the issues before the Court was whether a

⁸⁶⁵ See Giorgetti C., *A Principled Approach to State Failure*, Koninklijke Brill NV, Leiden, 2010, p. 52.

⁸⁶⁶ See the report "The Situation of Human Rights in Somalia", Doc. No. E/CN.4/2001/105, adopted on March 13, 2001, point 7. The document can be found at the following link: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/116/80/PDF/G0111680.pdf?OpenElement>. See also Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, p. 20.

⁸⁶⁷ See Rotberg R. I., *Failed States, Collapsed States, Weak States: Causes and Indicators*, p. 9.

⁸⁶⁸ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, British High Court, Queen's Bench Division, Judgement, March 13, 1992, p. 54-57. The text of the judgement can be found at the following link: www.uniset.ca/other/cs3/1993QB54.html. The dispute arose in the beginning of 1991, a period commonly included within Somalia's collapse, when the state purchased a rice cargo which could not be discharged as planned because the Mogadishu's port was deemed unsafe because of continuous fights following the overthrow of President Siad Barre. In the same period the legitimate government was overthrown and an interim

Somali Ambassador involved in the dispute could be considered as the state's representative entitled to represent the country in the United Kingdom, despite the legitimate government which appointed her had ceased to exist. The Court observed that Somalia did not have a government at the time of the dispute; that the Ambassador was not accredited by an existent national authority and was not holding diplomatic status⁸⁶⁹; and, thus, she could not have been allowed to participate in the dispute. Then, the Court ascertained whether the Somali interim government was the true government effectively ruling the country and the "extent of its international recognition", as well as whether it had relationships with the British government. The High Court recalled the British policy on the recognition of new governments⁸⁷⁰, stating that recognition depended on the level of interaction between the UK and a third country. It also added that the existence and nature of bilateral interactions can depend also from factors external to the will of states of entering dealings, like "lack of occasion, the attitude of the regime to human rights, its relationship to another state"⁸⁷¹. In this light, the High Court had to evaluate whether and how the British government's approach towards Somalia had to be considered⁸⁷². The statements of the British FCO and the government favoured the conclusion that, at the time the dispute arose, Somalia did not have an "effective government", as well as any administrative authority, and that the interim government was "merely one among a number of factions"⁸⁷³. The High Court did not ground its decision on the recognition of Somalia, but rather on the acknowledgement of the absence of an effective government: as highlighted by the judge, "no question of the recognition of a state [was] involved"⁸⁷⁴. Somalia did not have any form of government and none of the groups had been able to establish an effective government. The interim government did not have any authority to operate as or enjoy the properties of the Somali state. Thus, it did not meet the requirements to be considered a plaintiff, to act as Somali government and, consequently, to ask for the payment of part of the profits deriving from the cargo's sale⁸⁷⁵.

government emerged in the second half of 1991, through the conclusion of an agreement between six of the groups acting in the Somali territory. The next year, the Mogadishu area was not pacified yet, the interim government did not control the area and the fate of the cargo was still unclear, leading to the decision of the shipowners (Aleko Maritime Co. Ltd.) of bringing the case of the cargo's sale before a court. The role of the Somali Ambassador before the UN, appointed by the former government, was also considered in the dispute since she was holding the cargo's bills of lading. In 1991, the first degree judge decided that the dispute's parties should have sold the cargo and split profits, and that the bills of lading should have been handed over to the tribunal by the Somali Ambassador in order to facilitate the execution of the court's order. In 1992, a commercial court provisionally allowed the Somali interim government to act as a plaintiff. The same year, the High Court determined that Barre's overthrow caused the "central government [to cease] to exist" and not to be immediately replaced by a new national government, since various groups started to control and rule different parts of the country. Concerning the Ambassador appointed by Barre's regime to the UN, she supported the general's regime and when she finally recognised the absence of a government, after the overthrow, she was hostile towards the new movements.

⁸⁶⁹ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 60.

⁸⁷⁰ Before 1980, "a foreign government which [had] not been recognised... [had] no *locus standi* in the English courts", appointing a decisive influence to recognition practice also on judicial proceedings. The practice established after 1980 is more oriented at considering a new government's recognition as a matter depending from "the nature of the dealings" between the UK and the new entity as well as the governments' ability of ruling entirely or in part the state, and not influencing the determination of the *locus standi* criterion. See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 62-63.

⁸⁷¹ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 63.

⁸⁷² See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 64.

⁸⁷³ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 65.

⁸⁷⁴ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 66.

⁸⁷⁵ See *Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others*, p. 61.

5. State failure and the applicability of provisions on state responsibility.

The ability of foreign investors to resort before arbitral tribunals in circumstances of state failure has also arisen the question of which provisions on state responsibility are applicable to investment disputes involving states experiencing different degrees of failure. In order to answer this question, it is necessary to verify whether host states "remain fully sovereign"⁸⁷⁶. Consequently, separate considerations should be made for failing or failed states and, on the other hand, collapsed countries. The attribution of a conduct to a failing or failed state is possible since it still is partially responsible for the fulfilment of its international obligations⁸⁷⁷. The same consideration does not apply to collapsed states, since the lack of state institutions does not allow these countries to perform the most basic governmental duties. In these circumstances, it seems that the practice of not considering collapsed states responsible for "any breaches" of international obligations, because of the lack of national institutions, has consolidated⁸⁷⁸.

State failure has not been included among the ILC's priorities in the drafting of the Articles on State Responsibility. The ILC Articles do not include any provision dealing with state failure. Thus, the question is whether any of the Articles can be extensively applied also to the circumstance of state failure. Articles 9 and 10 appear to be the provisions more likely to be applied to state failure, but a generally shared definition of state failure is necessary in order to definitively determine whether these provisions are actually applicable and to what specific circumstances (state failure or collapse).

Article 9 addresses the absence or default of official authorities in the specific hypothesis they have temporarily been disabled to execute their duties in areas controlled by persons or groups, likely militia groups or other forms of parastatal organisations. The provision lists three conditions which have to be cumulatively met in order to attribute a conduct to a state⁸⁷⁹. The individuals have to exercise elements of governmental authority; there has to be a situation of "total collapse of the state apparatus" or national authorities are unable to control a part of the territory; and the circumstances required the exercise of governmental authority. Article 9 can be applied only in very specific circumstances and the ILC has narrowed down the range of application to the exceptional circumstances of "revolutions, armed conflicts or foreign occupations"⁸⁸⁰.

At a first reading of the expression "absence or default of official authorities", Article 9 seems to suggest its applicability in circumstances of both state failure and collapse. Nevertheless, the ILC has clarified that for the provision to apply, in the moment state authority has been taken on by private individuals, there has to be "the existence of a Government in office and of State machinery" for the conduct to be attributed to the state⁸⁸¹. This could be the case of a failing, failed or collapsing state, where there still

⁸⁷⁶ See Giorgetti C., *A Principled Approach to State Failure*, p. 191.

⁸⁷⁷ See Giorgetti C., *A Principled Approach to State Failure*, Koninklijke Brill NV, Leiden, 2010, p. 188, 191. See also Rotberg R. I., *Failed States, Collapsed States, Weak States: Causes and Indicators*, within Rotberg R. I. ed., *State Failure and State Weakness in a Time of Terror*, Brookings Institution Press, Washington D. C., 2003, p. 22.

⁸⁷⁸ See Thürer D., *Failing States*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, p. 9.

⁸⁷⁹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 9, paras. 3-6.

⁸⁸⁰ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 9, para. 1.

⁸⁸¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 9, para. 4.

are embryonic institutions even though unable to provide most functions which will be executed by private individuals or groups. Thus, I do not believe that Article 9 can be applied in a circumstance of state collapse where the absence of governmental institutions has been prolonged and there is not a central state apparatus to which responsibility could be attributed.

Frequently, state failure is accompanied by a state of insurrection and general instability where the legitimate government is fought by rebellious movements. However, the conduct of private individuals should be kept separated from that of insurrectional movements, not attributable to states, and should not be equated to that of a *de facto* government, "itself an apparatus of the state"⁸⁸² (for which, in any case, ILC Article 4 would be applicable). Not even the principle of due diligence can be recalled in the circumstance of state collapse, when ILC Articles are not applicable⁸⁸³. The entire prolonged collapse of state institutions does not allow the identification of a subject responsible for the granting of a certain treatment to foreign investment and investors.

It has already been underlined that state failure is often accompanied by internal instability which could end up with the overthrow of the legitimate government and the fight among different revolutionary movements over the conquest of power, as it happened in Somalia or Sierra Leone in the 90s. Thus, in a similar scenario, it seems likely that ILC Article 10, concerning the conduct of insurrectional movements, could be applicable. The previous analysis of Article 10 has shown that the provision speaks both to states and these movements, as well as points out to the necessity of continuity between a revolutionary movement and the new government or state emerging after the revolution. Similarly to what just said for Article 9, the applicability of Article 10 to collapsed states seems more difficult than in relation to failing or failed states. For the applicability of the provision, an insurrectional movement shall necessarily prevail and establish a new government or a new state, since the third paragraph of the provision will not be applicable with the absence of a government and state institutions. In the case of Somalia, during its collapse none of those movements had been able to emerge and establish a government, thus any eventually wrongful conduct could not be attributed to either any of them or the state.

It is difficult to expect that all the three requirements mentioned in Article 9 will be simultaneously met. The high threshold included in Article 9 will more likely orient foreign investors to refer to Articles 4 to 8, in the attempt of proving host states' internationally wrongful conduct. Moreover, it is clear that neither Article 9 nor 10 shall be applied in relation to long-time collapsed states. ILC Articles have been drafted to relate with different circumstances of states' lives, assuming the existence of state institutions and governments, as well as a certain degree of continuity, and do not to deal with non-state forms. Thus, the applicability of these provisions in the hypothesis of state failure has to be necessarily grounded on a case-by-case evaluation, verifying whether a state or a government to which attribute an internationally wrongful conduct still exists.

⁸⁸² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 9, para. 4.

⁸⁸³ See Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, p. 32.

6. The responsibility of host states in relation to the actions of terrorist groups.

The presence of terrorist groups and the frequency of terrorist attacks in a country tend to affect FDI flows, especially in developing countries⁸⁸⁴. UNCTAD surveys have highlighted that multinational companies perceive terrorism as the fourth most serious threat to FDI flows⁸⁸⁵. Similarly, in the MIGA World Investment and Political Risks Reports, investors operating in developing economies have listed terrorism as the seventh cause of concern in their decision of entering those markets⁸⁸⁶. However, not every terrorist attack is likely to have the same effect on FDI flows. There should be a distinction between business-related and non-business-related terrorism. Business-related terrorist attacks, directly targeting sensitive business areas or physical facilities and individuals, can have a direct impact on investment flows, being foreign investors and their investment the primary targets⁸⁸⁷. The risk of being struck by similar attacks will render foreign investors more careful in their choice to invest in a certain country. It could imply increased costs for the maintenance of effective security systems, for political risks insurances premiums, or for the payment of higher wages to motivate the permanence of foreign workers. On the contrary non-business-related terrorist attacks are not expected to have a similar impact on FDI flows, since they are rather aimed at targeting specific sectors of a state's population (ethnic groups, religious groups, or other social categories). These attacks may influence a state's "overall economic activities", but this does not necessarily imply that foreign investors will be directly affected⁸⁸⁸.

There are also cases where companies which have long been operating in a country and considerably invested in a certain market decide to maintain the investment despite the risks, since their withdrawal would be more costly. Certain investment areas, mainly related to the production or extraction of raw materials (like oil, gems, metal or agricultural products), will not likely be abandoned because of the importance of those resources. For instance, the Italian company ENI operating in the oil and gas extraction has decided not to abandon Libya in the last years, unlikely other multinational oil corporations, despite the frequent attacks experienced by its facilities and employees after the overthrow of Gaddafi's regime. For the company, it would be more costly abandoning its 50 years presence in the country, losing considerable profits, than

⁸⁸⁴ See Abadie A., Gardeazabal J., *Terrorism and the World Economy*, European Economic Review, Vol. 52, 2008. See also Bandyopadhyay S., Sandler T., Younas J., *Foreign Direct Investment, Aid and Terrorism*, Oxford Economic Papers, Vol. 25, Oxford University Press, Oxford, 2014, p. 48. See also the article by Bandyopadhyay S., Younas J., *Terrorism: A Threat to Foreign Direct Investment*, which can be found at the following links: www.stlouisfed.org/publications/regional-economist/october-2014/terrorism-a-threat-to-foreign-direct-investment and www.stlouisfed.org/~media/Files/PDFs/publications/pub_assets/pdf/re/2014/d/terrorism.pdf.

⁸⁸⁵ See the UNCTAD World Investment Prospect Survey for the periods 2013-2015 and 2014-2016. The documents can be respectively found at the following links: http://unctad.org/en/PublicationsLibrary/webdiaeia2013d9_en.pdf and http://unctad.org/en/PublicationsLibrary/webdiaeia2015d4_en.pdf.

⁸⁸⁶ See the 2012 and 2013 MIGA World Investment and Political Risks Reports. The documents can be respectively found at the following links: www.miga.org/documents/WIPR12.pdf and www.miga.org/documents/WIPR13.pdf

⁸⁸⁷ See Powers M., Seung-Whan C., *Does Transnational Terrorism Reduce Foreign Direct Investment? Business-Related Versus non-Business-Related Terrorism*, Journal of Peace Research, Vol. 49, Issue 3, 2012, p. 409-410.

⁸⁸⁸ See Powers M., Seung-Whan C., *Does Transnational Terrorism Reduce Foreign Direct Investment? Business-Related Versus non-Business-Related Terrorism*, p. 407.

tolerating the damages caused by militias or terrorist groups⁸⁸⁹. Similarly, in Nigeria, the terrorist group Boko Haram has been targeting oil production facilities and pipelines⁸⁹⁰, but multinational companies operating in the Niger Delta Region have not abandoned the area, instead opting for a reinforcement of their security systems.

The practice of targeting highly visible multinational corporations' facilities or employees originates from terrorists' purpose of attracting the interest of both host states and investors' mother-countries⁸⁹¹. Nowadays, for instance, kidnappings of foreign workers in Libya by local militias or groups now affiliated to the Islamic State or Al-Qaida have dramatically increased, as well as episodes of foreign workers' abductions in Nigeria by Islamist groups⁸⁹². In the recent *Lesi and Astaldi* award, the problem of foreign workers' kidnappings and terrorist attacks has been highlighted by the arbitral tribunal while considering the security issues experienced by foreign operators who were building infrastructures for the provision of potable water to Algiers⁸⁹³. Generally, attacks to investment facilities are not aimed at gaining their control, but rather at stealing raw materials and disrupting "the production and economic processes"⁸⁹⁴. The immediate consequences of these attacks are significant losses for host states and foreign investors, as well as foreign investors' reconsiderations about abandoning host states or relocating their investment in more secure areas. Furthermore, increasing visibility by targeting foreign investors could also have the effect of increasing the population's consensus towards terrorist groups' actions, especially if the target is a company whose presence is already criticised by locals (like oil companies in the Niger Delta Region⁸⁹⁵). It is also possible that consensus towards terrorist groups would even increase in the circumstance a state is forced to invest more in security measures, divesting from other fundamental areas sensitive for local populations like health, education or the building of infrastructure.

⁸⁸⁹ See www.ilsole24ore.com/art/finanza-e-mercati/2015-12-23/eni-vertice-roma-la-libica-noc-063810.shtml?uid=ACzologyB&refresh_ce=1 and <http://www.wsj.com/articles/libyas-war-rages-but-eni-keeps-pumping-oil-1428428079>.

⁸⁹⁰ See www.theguardian.com/world/2014/mar/08/nigeria-state-war-islamist-insurgency.

⁸⁹¹ See Oladimeji M. S., Oresanwo A. M., *Effects of Terrorism on the International Business in Nigeria*, International Journal of Humanities and Social Science, Vol. 4, Issue 7, May, 2014, p. 248.

⁸⁹² See the article *The kidnap fear*, available at www.economist.com/news/middle-east-and-africa/21572232-foreign-firms-may-become-scared-send-their-people-northern-nigeria. See also the article *Libya Violence: Foreign Oil Workers 'Kidnapped'*, available at: www.bbc.com/news/world-africa-31802393. See also the article *Libia, rapiti quattro italiani*, available at www.repubblica.it/esteri/2015/07/20/news/quattro_italiani_rapiti_in_libia_sono_dipendenti_della_bonatti_eni_mellitah-119440908. See also the article *Three Foreign Workers Kidnapped in Nigeria's Delta Region*, available at www.reuters.com/article/us-nigeria-violence-kidnapping-idUSKCN0JC1SG20141128.

⁸⁹³ See *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, ICSID, Case No. ARB/05/3, Award, November 12, 2008, para. 176.

⁸⁹⁴ See Oladimeji M. S., Oresanwo A. M., *Effects of Terrorism on the International Business in Nigeria*, International Journal of Humanities and Social Science, Vol. 4, Issue 7, May, 2014, p. 248.

⁸⁹⁵ One of the most recent and relevant cases has been the lawsuit brought by several Nigerian farmers against Royal Dutch Shell before the District Court of The Hague for the alleged environmental disaster caused by oil spill originating from the company's facilities. See, for instance, *Barizaa Manson Tete Doooh v. Royal Dutch Shell Plc.*, Den Haag District Court, Case No. C/09/337058, Judgement, January 30, 2013. See also *Friday Alfred Akpan v. Royal Dutch Shell Plc.*, Den Haag District Court, Case No. C/09/337050, Judgement, January 30, 2013. See also *Fidelis Ayoro Oguru and Alali Efangaa v. Royal Dutch Shell Plc.*, Den Haag District Court, Case No. C/09/330891, Judgement, January 30, 2013. The documents can be found at the following link: www.rechtspraak.nl. For a summary of the case see, for instance, the article *Slippery Justice for Victims of Oil Spills* by Akinbobola Y., published in 2013, which can be found at the following link: www.un.org/africarenewal/magazine/august-2013/slippery-justice-victims-oil-spills.

The threats posed by terrorism and the negative effects terrorist attacks can have on FDI flows, in terms of both discouraging and damaging foreign investment, have influenced states to include references to terrorism in recent BITs. Foreign investors have been enabled to exercise their right to ask host states for a specific treatment when investment have been damaged in the host country in circumstances listed in BITs. The losses occurred to foreign investment have to be a consequence of national or international conflicts, as well as acts of domestic instability, which take place in the territory of the host country. Among the events usually listed in these provisions there is the inclusion of war, armed conflict, national emergency, civil disturbance, revolution, revolt, insurrection, riot or civil strife, but these are not exhaustive lists, since they usually include the expression "other similar events", leaving the door open for the inclusion of circumstances negatively affecting the investment. Few BITs have been including also events like "terrorism"⁸⁹⁶, "civil war, natural disaster"⁸⁹⁷, "other catastrophe"⁸⁹⁸, "vandalism"⁸⁹⁹, "acts of God"⁹⁰⁰ and "force majeure"⁹⁰¹, representing a minority practice.

There have been investment disputes originating from the operations of terrorist groups in host states, but arbitral tribunals have referred to the issue only in an incidental way. In *AAPL*, the insurrectional movement Liberation Tigers of Tamil Eelam (LTTE), which opposed the legitimate government during the civil war, was listed as a domestic terrorist group by several countries for its combat methods. In the above-mentioned *Lesi and Astaldi*, the Armed Islamic Group (AIG) operating during the Algerian Civil War was considered a terrorist group by Algeria and France, where it carried out terrorist attacks. In both disputes, the terrorist groups had been mentioned by host states in the attempt of attributing them the responsibility for the damages occurred to the investment. Arbitral tribunals focused on whether host states had failed to accord the protection and security owed to foreign investment according to the BITs concluded with investors' mother countries⁹⁰². They did not consider responsibility of host states in relation to the actions of terrorist groups. They did not consider whether terrorists groups were *de facto* state organs, whether host states directed and controlled or acknowledged and adopted those groups' conduct.

The difficulty of identifying episodes of, for instance, adoption of a terrorist group's conduct by a state establishing its "direct responsibility for acts of international terrorism"⁹⁰³, highlights the possibility of attributing states the responsibility for either their inability of acting diligently (in the prevention of terrorist

⁸⁹⁶ See Article 6 of the Madagascar-China BIT. See also Article 4(1)(b) of the Cameroon-US BIT. See also Article 6 of the Madagascar-Mauritius BIT.

⁸⁹⁷ See Article 7 of the South Africa-Canada BIT signed on November 27, 1995, but not entered into force yet. See also Article 5(3) of the Nigeria-Germany BIT signed on March 28, 2000, and entered into force on September 20, 2007.

⁸⁹⁸ See Article 3(3) of the DRC-Germany BIT.

⁸⁹⁹ See Article 5(1) of the Algeria-Sweden BIT signed on February 15, 2003, and entered into force on April 1, 2005.

⁹⁰⁰ See Article 5(1) of the Libya-Austria BIT signed on June 18, 2002, and entered into force on January 1, 2004.

⁹⁰¹ See Article 5(1) of the Libya-Austria BIT.

⁹⁰² See *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, paras. 79-82. See also *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, para. 177.

⁹⁰³ See Trapp K. N., *State Responsibility for International Terrorism: problems and prospects*, Oxford University Press, Oxford, 2011, p. 161. See also Vark R., *State Responsibility for Private Armed Groups in the Context of Terrorism*, p. 191. The article can be found at the following link: www.juridicainternational.eu/public/pdf/ji_2006_1_184.pdf.

attacks towards foreign investors as well as the prosecution of terrorists), or for their inaction or toleration of terrorism.

The possibility of verifying these two scenarios is seriously affected by state failure. The crisis of national institutions has undoubtedly favoured illegal associations and showed a direct correlation between state weakness and the proliferation of terrorist groups. Some examples are Al-Shabaab in Somalia and Kenya⁹⁰⁴, Al-Qaeda or Islamic State affiliated groups in Libya or Tunisia⁹⁰⁵, Boko Haram in Nigeria⁹⁰⁶, Chad and Mali⁹⁰⁷. Moreover, states like Libya⁹⁰⁸, Sudan⁹⁰⁹ or Somalia⁹¹⁰, for both their geographical location and their high instability, have proven optimal territories where to base training centres for terrorist groups operating nationally, but also in other countries and regions. The lack of controlling national institutions and the climate of fear characterising the states where terrorist groups are located are the ideal to operate undisturbed. However, there are scholars suggesting that terrorist groups better operate in states not having experienced a total collapse. The environment of an entirely collapsed state would be detrimental also for terrorist groups' activities because of the continuous instability, "clannism, local distrust, corruption"⁹¹¹. In similar scenarios, states could adduce the decay of national institutions as an excuse for their unawareness of terrorist groups' activities or their failure to prevent terrorist attacks⁹¹².

For this reason, a more direct state intervention to update bilateral and regional investment treaties to include specific provisions ruling the terrorism issue would be desirable, so to provide investors with more complete and definite protection mechanisms. The academic debate should also rekindle in order to reach concrete conclusions about the attribution of responsibility to states in relation to terrorist groups' activities and, on the other hand, about "the standard of care that should be met"⁹¹³ to comply with the principle of due diligence. I believe that the current increase of terrorist activities and attacks in Africa against foreign investors and investment, especially in countries with high levels of FDIs which are also experiencing failure

⁹⁰⁴ See, for instance, the article *Selling Somalia: We Need Indomitable Investors, not Aid, Says Foreign Minister*, available at www.theguardian.com/global-development/2015/sep/10/somalia-foreign-minister-indomitable-investors-not-aid-abdusalam-omer-chatham-house. See also the article *Qualche chiarimento su al-Shabaab, il Kenya e la Somalia*, available at www.limesonline.com/qualche-chiarimento-su-al-shabaab-il-kenya-e-la-somalia/62396.

⁹⁰⁵ See, for instance, the article *Jihadist from Tunisia Died in Strike in Libya, U.S. Official Says*, available at www.nytimes.com/2015/07/03/world/africa/jihadist-from-tunisia-died-in-strike-in-libya-us-official-says.html?_r=0. See also the article *Tunisia Closes Border with Libya after Bus Bombing*, available at www.aljazeera.com/news/2015/11/officials-confirm-tunis-attack-suicide-blast-151125111756773.html.

⁹⁰⁶ See, for instance, the article *Nigeria Has a New Government, but Boko Haram is Deadlier than Ever*, available at www.theguardian.com/commentisfree/2015/nov/20/boko-haram-nigeria-muhammadu-buhari.

⁹⁰⁷ See www.diplomatie.gouv.fr/en/country-files/chad/events/article/cameroon-nigeria-chad-boko-haram-20120.

⁹⁰⁸ Recently, the Tunisian government has been extremely concerned by the frequent incursions of terrorist groups located in Libya within its borders, a presence which has motivated its decision of building a physical barrier in the attempt of discouraging these raids. See, for instance, the article *Tunisia Builds Anti-Terror Barrier along Libya Border*, available at www.bbc.com/news/world-africa-35515229.

⁹⁰⁹ See the report by Dagne T., *Africa and the War on Terrorism*, CRS Report for Congress, 17 January, 2002, p. 8. The document can be found at the following link: <http://fpc.state.gov/documents/organization/7959.pdf>.

⁹¹⁰ See, for instance, the article *Terrorism Havens: Somalia*, available at www.cfr.org/somalia/terrorism-havens-somalia/p9366#p1.

⁹¹¹ See Menkhaus K., *Terrorism, Security, and the State*, within Anderson D. M. ed., Cheeseman N. ed., Scheibler A. ed., *Routledge Handbook of African Politics*, Routledge, London, 2013, p. 395.

⁹¹² See Becker T., *Terrorism and the State*, Hart Publishing, Portland, 2006, p. 132.

⁹¹³ See Becker T., *Terrorism and the State*, p. 133.

(like Libya), will likely reawaken the debate since it is also in states' interest not to lose the source of profits represented by foreign investment.

7. Acts of violence of private individuals against land owners during the land reform in Zimbabwe.

Disputes involving African countries and concerning the jeopardising of the physical security of foreign investors and their investment caused by the actions of private individuals are even rarer than disputes concerning the damages caused by either insurrectional movements or individuals or groups under the instruction, direction and control of a state. *Funnekotter v. Zimbabwe* and *Wena Hotels v. Egypt* are the disputes I have been able to retrieve dealing with the conduct of private individuals and allowing some considerations about the general rule on the conduct acknowledged and adopted by a state⁹¹⁴.

ILC Article 11, concerning the rule on acknowledgement and adoption of conduct by a state, could play a significant role in investment arbitration cases, but arbitral tribunals have generally been referring to the rule "by analogy"⁹¹⁵. The tribunal in *Mondev* only focused on the general principle underlying Article 11 to highlight that a "State is not responsible for the acts of private parties"⁹¹⁶. *Funnekotter* is an example of an investment dispute where an arbitral tribunal has been asked to evaluate whether a certain conduct had been acknowledged and adopted by the host state, but did not comply with the request. The arbitral panel lost the opportunity to clarify which state behaviours could be considered as acknowledgment and adoption of a conduct by determining whether Zimbabwe actually acknowledged and adopted land occupants' conduct.

In fact, the tribunal immediately considered the alleged breach of Article 6 of the Zimbabwe-Netherlands BIT and asserted that if the lack of compensation would have shown the existence of an unlawful expropriation, it would not have been necessary to address the other claims⁹¹⁷. The arbitral tribunal noticed that "the Claimants had all effectively been deprived of their properties at a much earlier date, either [through the implementation of domestic legislation] or through the invasion of their farms by war veterans and settlers"⁹¹⁸. The tribunal agreed that the land occupations carried out by war veterans and the subsequent Zimbabwean government's orders and reforms were undisputable events⁹¹⁹. But, once the analysis of the merits of the dispute clarified that Zimbabwe breached its obligation to pay due compensation to the claimants for the expropriations, it decided that it would not have been necessary to consider whether the other BIT's provisions or international rules invoked by the claimants had been violated⁹²⁰.

⁹¹⁴ The analysis of the background of the two disputes can be retrieved in Annex 1, attached to the present dissertation.

⁹¹⁵ See Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, p. 96.

⁹¹⁶ See *Mondev International LTD. v. United States of America*, ICSID (NAFTA), Case No. ARB/99/2, Award, October 11, 2002, para. 115. See also the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 11, paras. 2-3.

⁹¹⁷ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 98.

⁹¹⁸ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 34.

⁹¹⁹ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 90.

⁹²⁰ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 107.

The central question the tribunal should have answered was whether Zimbabwe had acknowledged and adopted the war veterans' land occupations. A state necessarily has to assume responsibility for a specific conduct: the adoption of a wrongful conduct as its own is essential to attribute a private conduct to the state⁹²¹. Furthermore, it is necessary to evaluate the "extent" to which the state has acknowledged and adopted a certain conduct: whether it adopted the conduct entirely or in part, and the "unequivocal" nature of the adoption, in order to establish which actions can be attributed to the state⁹²². The ILC has pointed out that the acknowledgement and adoption of a conduct might be either express or can be derived from the state's conduct⁹²³, but these two moments have to be clear. Zimbabwe always denied having an active role of support towards land invaders. It will be fundamental to verify whether its concrete actions could suggest otherwise.

National authorities had started the land reform with the objective of expropriating a significant part of privately owned lands for agricultural purposes. Nevertheless, right after the failure of the first constitutional reform, Zimbabwe added the purpose of ruling and justifying the unlawful land occupations. If Zimbabwe's line of conduct had been maintained on the level of condemning those actions and continuing the reformation process, doubts on the state's conduct would not have raised. But, over time, the state progressively adjusted its policies so to focus on the legitimisation of the conduct of private individuals. I believe the toleration of those occupations judged unlawful by national courts and the Zimbabwean Supreme Court, along with the initial disregard for the Supreme Court's request of either removing or amending national legislation, showed the contradiction of Zimbabwe's declarations. In my opinion, the subsequent decision of the government of amending the land reform introducing the Rural Law Occupiers Act, so to include the protection of these individuals from court orders, is further proof of the fact that Zimbabwe approved that conduct and did nothing to contrast it. What could have been defined as a form of support of conduct culminated in the 2005 Constitutional reform stating that occupied territories "were acquired by and vested in the State with full title", an act that in my opinion corresponded to an adoption of conduct.

In the light of these considerations, I believe that the respondent's progressive adoption of provisions to legitimise the occupations and protect the land invaders were a form of adoption of the wrongful conduct. The mere state inaction *vis-à-vis* the wrongful conduct could have been a sign of endorsement, not arising the state's responsibility. But, focusing the land reform especially on the specific issue of land invasions and adopting measures for their legitimisation, in my opinion, can be qualified as an assumption of responsibility for that specific conduct.

⁹²¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 11, para. 6.

⁹²² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 11, para. 8.

⁹²³ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 11, para. 9.

8. Acknowledgement and adoption of conduct in *Wena Hotels*.

Egypt's behaviour towards the seizures of the claimant's hotels in Cairo and Luxor executed by the Egyptian Hotel Company (EHC), at the core of *Wena Hotels v. Egypt*, has raised the question whether it could be qualified as an acknowledgement and adoption of EHC's conduct⁹²⁴. The arbitral tribunal had to determine whether Egypt had breached the Egypt-UK BIT's obligations of protecting and securing the investment, granting fair and equitable treatment to the foreign investor, and lawfully expropriating the investment⁹²⁵. Once the tribunal was persuaded that the respondent had violated those obligations, it did not verify also whether the state either instigated or took part into the hotel's seizures, and the eventuality of attributing it the responsibility for the seizures⁹²⁶.

One of the hypothesis advanced by commentators, concerns the possibility that the tribunal could have attributed the seizures to Egypt applying ILC Article 11, establishing a parallel with the *Tehran Hostages Case*⁹²⁷. According to this interpretative line, the fact that Egypt tolerated the seizures and management changes operated by EHC could somehow have been compared to Iranian authorities' toleration of the occupation of the US embassy⁹²⁸. This theory has been grounded on the affirmation of the *Wena Hotels* tribunal that "Egypt [had] failed to impose any substantial sanctions on EHC (or its senior officials responsible for the seizures), suggesting its approval of EHC's actions"⁹²⁹. Even though the tribunal in *Wena Hotels* agreed that there "was substantial evidence" to conclude that Egypt had not applied effective sanctions, it did not further investigate the state's approval of the seizures and the possible implications in terms of state responsibility.

In the light of ILC Article 11, the arbitral tribunal's use of the word "approval" seems to allow the assumption that Egypt was not merely acknowledging or supporting EHC's actions, and the tribunal was further qualifying the state's behaviour. The lack of express official approval to EHC's conduct and the Minister of Tourism's affirmation that he was "furious" and defined the seizures "wrong"⁹³⁰ could be an indicator of the state's desire to dissociate from the wrongful conduct. But, it also reminds of the possibility that a state can be held responsible also when its responsibility can be "inferred"⁹³¹. It is worth remembering that the requirements of Article 11 cannot be met in the hypothesis the state only gave "a mere implicit approval consisting in a failure to react appropriately, combined with official condemnations of the conduct"⁹³². Thus, the question needing an answer is whether the terms "approval" and "adoption" can be equated, in relation to the events presented in *Wena Hotels*.

⁹²⁴ See Schicho L., *State Entities in International Investment Law*, p. 224-226.

⁹²⁵ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, Case No. ARB/98/4, Award, December 8, 2000, para. 131.

⁹²⁶ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 131.

⁹²⁷ See Schicho L., *State Entities in International Investment Law*, p. 225.

⁹²⁸ See Schicho L., *State Entities in International Investment Law*, p. 225.

⁹²⁹ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 82.

⁹³⁰ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 90.

⁹³¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 11, para. 9.

⁹³² See Schicho L., *State Entities in International Investment Law*, p. 225.

The failure to remove EHC's occupants from the hotels' premises and to sanction the entity could be interpreted as hints of Egypt's approval of the two seizures. However, it should be questioned whether the "seizure and [the] operation of a "mere" commercial" activity could be compared with the occupation of the US embassy and the Iranian government's adoption of the occupants' conduct (acts arising state responsibility), characterising the *Tehran Hostages Case*⁹³³. The inviolability of diplomatic premises represents a fundamental rule of international law and its violation is so serious, that the comparison with the events at the core of *Wena Hotels* somehow diminishes the gravity of the latter dispute's events.

Besides these general considerations on the comparability of the events characterising the two disputes, I believe that the analysis of the events presented in *Wena Hotels* allows the conclusion that Egypt was not responsible for having acknowledged and adopted EHC's conduct. Indeed, Egypt had failed to properly react to the seizures of the hotels, as well as to effectively investigate and prosecute the perpetrators⁹³⁴, but those were acts of negligence, insufficient to verify the acknowledgement and adoption of that conduct by the respondent. Anyway, even if there truly was a form of support to EHC behind Egypt's conduct, which is doubtful since negligence is not an incontrovertible proof of support of an unlawful conduct, it was insufficient to attribute responsibility to the state. In my opinion, the state's role in this dispute cannot be compared to the intertwining of private individuals' actions and the state's response characterising *Funnekotter v. Zimbabwe*.

⁹³³ See Schicho L., *State Entities in International Investment Law*, p. 225.

⁹³⁴ Both parties agreed that there was an investigation which was later closed, but they disagreed on the investigation's timeline. According to the tribunal "Egypt failed to present the Tribunal with any information about the investigation", thus it did not "know whether an investigation was conducted and, if so, whether the investigation was closed because the prosecutor determined that [the felons were innocents], because of lack evidence, or because of complicity by other government officials". See *Wena Hotels Ltd. v. Arab Republic of Egypt*, paras. 74 and 116.

5. The defences to responsibility typically invoked by African countries.

SECTION I. Force majeure.

1. Force majeure in investment disputes.

Force majeure has been frequently invoked by states⁹³⁵, even though its tight formulation seems to suggest the contrary⁹³⁶. States have frequently invoked force majeure "as a principle of customary international law"⁹³⁷, leading to the recognition of force majeure as both a general principle of international law and a customary rule⁹³⁸. In the past, there have been rare references to the force majeure customary rule in disputes involving African countries⁹³⁹. Neither arbitral tribunals nor parties have taken the customary rule into consideration, as they have only relied on contractual provisions and host states' laws. However, I believe it is still relevant considering the few cases available in order to be able to foresee possible similar future scenarios.

IAs concluded by African states generally do not include provisions on circumstances precluding wrongfulness. The only references to force majeure are usually included in treaty provisions allowing foreign investors to ask host states for a specific treatment in the case their investment have been damaged in specific circumstances listed in BITs (the so-called "compensation for losses clauses"). These provisions include non-exhaustive lists of events such as war, armed conflict, national emergency, civil disturbance, revolution, revolt, insurrection, riot or civil strife. Only a minority of BITs have been referring to events like "force majeure"⁹⁴⁰, "natural disaster"⁹⁴¹, "acts of God"⁹⁴² or "other catastrophes"⁹⁴³. Thus, in the absence of

⁹³⁵ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 23, para. 1.

⁹³⁶ See Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, British Institute of International and Comparative Law, 2007, p. 154.

⁹³⁷ See Crawford J., *State Responsibility - General Part*, p. 295.

⁹³⁸ See Hentrei S., Soley X., *Force Majeure*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, point 3.

⁹³⁹ See *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, p. 357 and ff. See also *Mohamed A. Al-Kharafi & Sons Co.v. State of Libya*, p. 125 and 331. See also *RSM Production Corporation v. Central African Republic*, paras. 145-147. See also *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria*, paras. 125, 133 and 135. *LAFICO v. Burundi* has represented an exception to this general trend, because of the arbitration clause of the agreement concluded between Libya and Burundi for the improvement of technical and economic cooperation between the two states. The clause included among applicable rules: Burundian law, the rules and principles applicable in international economic relations and relevant rules of international law. When the tribunal considered the measures adopted by Burundi against the claimant, due to an alleged "imperative state of necessity", it only referred to possible defences grounded on international law. The tribunal underlined that the respondent had not "indicated which rule of international law would have justified its position". Then, it attempted to determine which international rule could have constituted the state's more proper defence, completely disregarding whether Burundian law included a provision on force majeure. See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, *ad hoc* Arbitral Tribunal, Arbitral Sentence, March 4, 1991, para. 64.

⁹⁴⁰ See Article 5(1) of the Libya-Austria BIT.

⁹⁴¹ See Article 7 of the South Africa-Canada BIT signed on November 27, 1995, but not entered into force yet. See also Article 5(3) of the Nigeria-Germany BIT signed on March 28, 2000, and entered into force on September 20, 2007.

⁹⁴² See Article 5(1) of the Libya-Austria BIT signed on June 18, 2002, and entered into force on January 1, 2004.

treaty provisions dealing with circumstances precluding wrongfulness, arbitral tribunals appointed with treaty-based claims will likely refer to customary international law.

Force majeure has been invoked mostly in contract-based investment disputes. The apparent lack of treaty-based disputes dealing with force majeure seems to support the belief that "the relevance of force majeure to treaty-based arbitration [is] remote"⁹⁴⁴.

Generally, business contracts concluded between foreign investors and host states' authorities or state-related entities include force majeure clauses⁹⁴⁵, presenting similar features⁹⁴⁶. This trend can be observed in few disputes involving African countries, namely *RSM v. Central African Republic*⁹⁴⁷, *ICC Nos. 3099 and 3100/1979*⁹⁴⁸ and *National Oil Corp. v. Libyan Sun Oil Co.*⁹⁴⁹. A common element characterising those contracts is the lack of definition of force majeure. They generically refer to force majeure as a means to relieve a party from responsibility, without defining it⁹⁵⁰. At the most, a couple of provisions refer to the circumstances allowing the invocation of force majeure. Among those events, it is possible to list "Acts of God, insurrection, riots, war, and any unforeseen circumstances and acts beyond the control of such Party"⁹⁵¹, "natural or man-made calamities, by mass disorders"⁹⁵² or "earthquake, war, floods, etc..."⁹⁵³. Force majeure can also be invoked in circumstances of "changes in laws and resolutions" of the host state⁹⁵⁴ and the "action of state authorities or any other condition beyond the control of the Party whose obligations are affected by it, which the Parties could not anticipate, while making this Agreement, and which the Parties are unable to prevent by using reasonable methods available to them"⁹⁵⁵.

⁹⁴³ See Article 3(3) of the DRC-Germany BIT.

⁹⁴⁴ See Sornarajah M., *The International Law on Foreign Investment*, p. 466.

⁹⁴⁵ See Augenblick M., Rousseau A. B., *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, *The Journal of World Investment & Trade*, Vol. 13, 2012.

⁹⁴⁶ For a further analysis of contractual force majeure clauses see, for instance, *Himpurna California Energy Ltd. (Bermuda) v. PT. Perusahaan Listrik Negara (Indonesia)*, para. 194. See also *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID, Case No. ARB/05/8, Award, September 11, 2007, para. 85. See also *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award, December 16, 2003, para. 3.6.3. In *Himpurna*, a case involving Indonesia, the force majeure clause of the contract stated that a force majeure event would not have excused late payments from the respondent to the claimant. In *Parkerings v. Lithuania*, the contract concluded between the claimant and the municipality of Vilnius included a liability clause stating that a violation of the contract as a consequence of a force majeure event would have triggered their liability. In *Nykomb v. Latvia*, the contract the claimant had concluded with a Latvian state-company mentioned several circumstances of force majeure and affirmed that the party which violated the contract, as a consequence of force majeure, would have not been held liable.

⁹⁴⁷ In *RSM v. Central African Republic*, the contract concluded between the claimant and the respondent included a provision expressly dealing with circumstances of force majeure which excluded contractual violations when the existence of a "cause and effect between the events and the force majeure invoked" was proved. See *RSM Production Corporation v. Central African Republic*, ICSID, Case No. ARB/07/02, Decision on Jurisdiction and Responsibility, December 7, 2010, para. 147.

⁹⁴⁸ In *ICC Nos. 3099 and 3100/1979*, the parties had concluded a contract establishing that a party was not bound to compensate the damaged party if a force majeure event was the cause of the failure to comply with the contract, unless the party invoking the defence was directly connected with the force majeure event. See *Case Nos. 3099 and 3100*, ICC, Award, May 30, 1979. The award can be found at the following link: www.trans-lex.org/203100.

⁹⁴⁹ In *National Oil Corp. v. Libyan Sun Oil Co.*, the contract listed the typical force majeure events and stated that the contract would have been extended if a force majeure event occurred and for the same duration of the event in its force majeure clause. See *National Oil Corp. v. Libyan Sun Oil Co.*, ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985. The award can be found at the following link: www.trans-lex.org/204462.

⁹⁵⁰ See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, para. 3.6.7.

⁹⁵¹ See *National Oil Corp. v. Libyan Sun Oil Co.*, ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985.

⁹⁵² See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, para. 3.6.8.

⁹⁵³ See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, para. 3.6.3.

⁹⁵⁴ See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, para. 3.6.3.

⁹⁵⁵ See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, para. 3.6.8.

These contracts also generally recognise the possibility that any failure in performing the contract due to force majeure would be excused⁹⁵⁶. Consideration is also given to the hypothesis losses or damages are experienced by one of the parties excluding the obligation to pay compensation if the failure in complying with contractual obligation derived from a force majeure event, unless the party invoking the defence has been directly involved in the fault or negligence⁹⁵⁷. In one of the contracts, there is also a time reference establishing that the contract will be extended for a period equal to the duration of the force majeure event⁹⁵⁸.

National legislations assume a central role⁹⁵⁹. The role of national legislations is even more relevant in disputes where arbitral tribunals rely on both domestic laws and contractual clauses on force majeure⁹⁶⁰. Investment contracts not defining force majeure events are a common circumstance, thus, arbitral tribunals can alternatively refer to host states' domestic legislations⁹⁶¹. National laws on force majeure frequently present features similar to the customary international rule⁹⁶².

Arbitral tribunals have long debated the applicability of the customary rule on force majeure in contract-based disputes. The parties to a dispute are free to choose applicable law. Thus, they should explicitly clarify whether they intend to apply the rules on force majeure included in a contract or host state's law and to exclude the applicability of international law. Not clarifying whether international law should be applied would leave room for arbitral panels' decision of still referring to it, if national legislations do not rule that circumstance, prevailing over the latter only in the hypothesis of "conflicting national rules"⁹⁶³. In

⁹⁵⁶ See *National Oil Corp. v. Libyan Sun Oil Co.*, ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985. See also *Case Nos. 3099 and 3100*, ICC, Award, May 30, 1979. The contract relevant in *Himpurna*, contrasted with this practice since its force majeure clause ruled that any late payment, due to the occurrence of a force majeure event, from the state-owned company for the energy provided by the claimant would have not been excused. See *Himpurna California Energy Ltd. (Bermuda) v. PT. Perusahaan Listrik Negara (Indonesia)*, para. 194.

⁹⁵⁷ See *Case Nos. 3099 and 3100*, ICC, Award, May 30, 1979.

⁹⁵⁸ See *National Oil Corp. v. Libyan Sun Oil Co.*, ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985.

⁹⁵⁹ Examples of national legislations can be found in *RSM v. Central African Republic*, *National Oil Corp and Al-Kharafi v. Libya*. In *RSM*, the tribunal recalled the part of the CAR's Civil Code establishing that the payment of compensation and interests is not due if a debtor has been prevented from complying with his obligations, "owing to force majeure or of unforeseeable circumstances". See *RSM Production Corporation v. Central African Republic*, para. 145. In *National Oil Corp*, the parties to the dispute referred to the provision of the Libyan Civil Code specifically dealing with force majeure, as well as to the Libyan Supreme Court's jurisprudence. The Libyan Code stated that "the effect of force majeure is to release the obligor from his obligation under the agreement and force majeure is established when an event meeting the three following conditions [unforeseeability, irresistibility and externality] occurs". See *National Oil Corp. v. Libyan Sun Oil Co.* In *Al-Kharafi*, the Court referred to both Egyptian law and the Egyptian Civil Cassation's practice. The latter affirmed that, normally, the failure in complying with contractual obligations rises a contracting party's "liability... for non performance". An exception is represented by the case the party has been able to prove the failure in fulfilling contractual obligations could be "attributed to a force majeure or foreign reason or to the fault of the other contracting party". See *Mohamed A. Al-Kharafi & Sons Co. v. State of Libya*, Court of Arbitration of the Unified Agreement for the Investment of Arab Capital in the Arab States, Final Arbitral Award, March 22, 2013, p. 125 and 331.

⁹⁶⁰ Additionally, in *Parkerings*, the tribunal recalled a resolution adopted by the government, concerning the "Approval of Rules for Release from Liability due to Irresistible Forces (force majeure)". Force majeure was defined as "extraordinary circumstances that cannot be foreseen or avoided, or removed by using any means". The resolution also excused entities from the obligation to compensate contractual counterparties if force majeure events occurred. See *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 86.

⁹⁶¹ For instance, in *ICC Nos. 3099 and 3100/1979*, the contract did not include a definition of force majeure and the tribunal had to rely on the state's jurisprudence and doctrine. Similarly, in *Parkerings*, for a definition of force majeure, the contract expressly included a reference to Lithuanian national legislation. See *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 85.

⁹⁶² See Crawford J., *State Responsibility - General Part*, p. 295.

⁹⁶³ See *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID, Case No. ARB/00/5, Award, September 23, 2003, para. 102. The tribunal in *LETCO v. Liberia* had to decide if only Liberian law or also principles of international law could have been applied, once the parties had decided that the dispute should have been judged on the grounds of Liberian law. In the end, the tribunal relied on the contract and Liberian law. But, its conclusions seemed to suggest the convenience

this sense, it seems that international law would be recognised a sort of "corrective and supplemental function"⁹⁶⁴. In similar circumstances, as suggested by the *Klöckner* annulment committee, the first step can consist in determining applicable state rules and their content and, only after that, recurring to international law would be possible⁹⁶⁵. Furthermore, as highlighted by the *Wena Hotels* tribunal, international law's role can be more or less extended on a case-by-case basis⁹⁶⁶. Arbitral tribunals can have "a certain margin and power for interpretation", also because ICSID Article 42(1) does not clearly separate the "respective scope of international and domestic law"⁹⁶⁷.

Contract-based tribunals mostly tend to focus on alleged contractual violations and on legal provisions included in investment contracts. On the contrary, treaty-based tribunals can be expected to have a broader point of view and to consider international law, in this specific case the customary rule on force majeure. However, it is necessary to prove that the relevant circumstances and force majeure have influenced not only contractual obligations, but also treaty ones⁹⁶⁸, since according to general practice treaty-based and contract-based claims are separately considered by arbitral tribunals⁹⁶⁹.

2. Force majeure in circumstances of political instability.

The customary rule on force majeure applies in circumstances of "natural or physical event", "human intervention" or even a "combination of the two"⁹⁷⁰. War, riots, turmoil are among the circumstances which can be described as human intervention. There is considerable arbitral practice where the non-performance of contractual obligations, as a consequence of similar events, has been justified invoking the existence of force majeure. The ILC has highlighted the existence of a consolidated jurisprudence considering force majeure as a circumstance precluding wrongfulness also in relation to "attacks by rebels", having damaged foreigners⁹⁷¹. But, at the same time, the ILC has explicitly excluded the possibility of invoking force majeure as a

of analysing national legislation in relation to the general principles of public international law, even in the hypothesis the parties had already agreed on applicable law. See *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID, Case No. ARB/83/2, Award, March 31, 1986, within Rayfuse R. ed., ICSID Reports, Vol. 2, 1995, p. 358. See also Sornarajah M., *Resistance and Change in the International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2015, p. 127.

⁹⁶⁴ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICISD, Case No. ARB/98/4, Decision on Annulment, February 5, 2002, para. 38. See also *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, para. 102. The tribunal established that Venezuelan law would have been applicable, while international law would have been applied only to fill in the lacunae of national legislation, prevailing over the latter only in the hypothesis of "conflicting national rules". The tribunal did pose the question whether the role of international law in ICSID practice should "go beyond the corrective and supplemental functions of international law". Nevertheless, it refused to clarify the issue, stating it would have been pointless in that dispute since it was a contract-based dispute.

⁹⁶⁵ See *Klockner v. Republic of Cameroon*, ICSID, Case No. ARB/81/2, Decision on Annulment, December 21, 1983, para. 69.

⁹⁶⁶ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Annulment, para. 38.

⁹⁶⁷ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Annulment, para. 39.

⁹⁶⁸ See Sornarajah M., *The International Law on Foreign Investment*, p. 465.

⁹⁶⁹ The tribunal in *Parkerings* discussed this issue. It was a contract-based dispute judged by a treaty-based arbitral tribunal considering the dispute according to the Lithuania-Norway BIT. The claimant affirmed some measures introduced by the host state corresponded to a force majeure event which prevented the contract's execution. Nevertheless, the tribunal affirmed the claim did not "reach the status of a BIT breach", since a contractual violation could "not automatically result in a violation of the Respondent's international law obligations under the BIT". The force majeure claim was led back to an alleged violation of the obligation of the state not to act arbitrarily, but the tribunal could not verify that. See *Parkerings-Compagniet A.S. v. Republic of Lithuania*, para. 310.

⁹⁷⁰ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 23, para. 3.

⁹⁷¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 23, para. 7.

consequence of critical political or economic conditions affecting the fulfilment of international obligations⁹⁷².

In relation to foreign investment, the customary rule on force majeure has to be distinguished from force majeure contractual clauses, excusing the non-performance of contractual obligations⁹⁷³. Regarding contract-based disputes, the ILC's affirmation that force majeure cannot be invoked in circumstances of political or economic crisis has not taken root. *LETCO* has been one of the first arbitral awards dealing with force majeure and establishing a different practice. In the 80s, Liberia was suffering a period of political instability that culminated in an overthrow. According to the arbitral tribunal, the political and economic consequences of the legitimate president's overthrow could be qualified as force majeure events in accordance with the concession agreement⁹⁷⁴.

The most relevant investment disputes deal with force majeure as a consequence of the unstable socio-political conditions of host states. The analysis of those disputes has shown that contractual force majeure clauses have been invoked or referred to by either host states⁹⁷⁵ or arbitral tribunals⁹⁷⁶. One last case scenario concerns the hypothesis of investors invoking the rule. *RSM v. Central African Republic* has become one of the most relevant disputes dealing with force majeure⁹⁷⁷. The dispute originated after the claimant's failure to perform the contract concluded with the respondent for the research and exploitation of hydrocarbons. The grave civil and political turmoil occurring in the CAR (ultimately culminated in a war and an overthrow) allegedly prevented the contract's execution and urged the claimant to invoke force majeure demanding the contract's extension for the duration of the force majeure period.

Host states have also referred to the three conditions of unforeseeability, irresistibility and externality characterising force majeure in their argumentations⁹⁷⁸. In *RSM*, the CAR considered all three conditions since the provision of the contract ruling the circumstances in which the invocation of force majeure was

⁹⁷² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 23, para. 3.

⁹⁷³ See Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, p. 514.

⁹⁷⁴ See *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID, Case No. ARB/83/2, Award, March 31, 1986, within Rayfuse R. ed., ICSID Reports, Vol. 2, 1995, p. 365. See also *RSM Production Corporation v. Central African Republic*, para. 184.

⁹⁷⁵ In *Autopista v. Venezuela*, the contract concluded between the dispute's parties for the improvement and maintenance of Venezuelan highway system originated a huge wave of protests mainly against the tolls' increase. According to the contract, the claimant would have repaid its investment through the collection of highway tolls and Venezuela should have raised those tolls. Nevertheless, the violent protests against the tolls' increase allegedly prevented Venezuela from complying with its contractual obligations and motivated the invocation of the force majeure clause. See *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID, Case No. ARB/00/5, Award, September 23, 2003.

⁹⁷⁶ *Toto v. Lebanon*, concerned a contract concluded between the dispute's parties, for the building of a highway between Beirut and Damascus. The construction works had allegedly been jeopardised by Lebanon with several delays in the handing over of the construction site and in its protection and by the situation of grave national instability which interested Lebanon in the beginning of the 2000s. See *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon*, ICSID, Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009.

⁹⁷⁷ See *RSM Production Corporation v. Central African Republic*, ICSID, Case No. ARB/07/02, Decision on Jurisdiction and Responsibility, December 7, 2010.

⁹⁷⁸ In *Autopista*, Venezuela focused only on events' foreseeability stating that, when the contract was concluded, neither party could have foreseen that the attempt of raising the tolls would have generated a similar wave of protests among citizens⁹⁷⁸. The state affirmed the protests against the planned tolls' increase "constituted a classic force majeure event and excused the Republic's contractual undertaking to increase the tolls to such levels". Venezuela's defence focused on the necessity of determining the foreseeability of those violent protests and not of "whether the mere "prospect of political opposition" was foreseeable". See *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, paras. 85(b) and 111.

admissible recalled unforeseeability, irresistibility and externality, as well as the existence of a connection between an event and the existence of force majeure⁹⁷⁹. The contract included, among the possible events allowing the invocation of force majeure, "earthquake, strike, riot, insurrection, civil commotion, sabotage, acts of war or conditions attributable to war"⁹⁸⁰. According to the CAR, the unforeseeability requirement could not be met since the existence of a situation which could have threatened the investment had been well-known by the investor right after the conclusion of the contract. Irresistibility corresponded to the "impossibility of implementing some means for the execution of the contract", but the claimant had not presented any specific analysis of this alleged irresistibility. About externality, the claimant could not meet the requirement having contributed to the occurring of the situation of impossibility of fulfilling contractual obligations. The respondent's considerations were not grounded on its internal instability.

Arbitral panels have, as well, analysed the events in the light of those requirements. The *RSM* tribunal initially affirmed the jurisprudential and the contract's definition of force majeure corresponded⁹⁸¹. Then, the analysis moved to the verification of whether the conditions had been met. Concerning unforeseeability, the internal instability experienced by the CAR was negligible and did not prevent the correct execution of the exploration contract⁹⁸². This was true, at least, until the investor attempted to let external operators enter the host country for the execution of seismic evaluations, changing "the impact of force majeure"⁹⁸³. The state's internal insecurity caused foreign companies' refusal to enter the country and carry out the seismic evaluations, characterising the "irresistible force" requirement. Generally, companies operating in the oil field rely on the expertise of specialised companies for more detailed feasibility studies and the tribunal also recognised the scant number of similarly qualified companies. Thus, the claimant did everything in its power to overcome the difficulties deriving from the continuous refusals of these specialised external companies to carry out the seismic evaluations. Regarding externality, the tribunal underlined that the political and social turmoil within the CAR "could not have been attributed to a foreign company like RSM". In the end, the tribunal ascertained the existence of force majeure because all three requirements had been met.

In other disputes, arbitral panels have not explicitly considered whether the events constituting the background of the dispute could be defined as force majeure events, according to the customary international rule⁹⁸⁴. Nevertheless, events like assassinations, terrorist bombings, international conflicts and a civil war

⁹⁷⁹ See *RSM Production Corporation v. Central African Republic*, ICSID, Case No. ARB/07/02, Decision on Jurisdiction and Responsibility, December 7, 2010, para. 147.

⁹⁸⁰ See *RSM Production Corporation v. Central African Republic*, para. 147.

⁹⁸¹ See *RSM Production Corporation v. Central African Republic*, para. 179.

⁹⁸² See *RSM Production Corporation v. Central African Republic*, para. 180.

⁹⁸³ See *RSM Production Corporation v. Central African Republic*, para. 180.

⁹⁸⁴ In *Toto v. Lebanon*, the force majeure defence had not been invoked by either of the parties. It was the tribunal that seemed to implicitly refer to the existence of force majeure in relation to the claimant's argumentation that there had been an anomalous delay in two local court's proceedings and to the demand for compensation for the damages occurred to its equipment and changes to the original projects. The tribunal recognised that two proceedings involving the claimant before the Lebanese Conseil d'Etat had suffered serious delays, but the tribunal disagreed that those delays constituted a denial of justice, in the light of BIT. In fact, in that period, assassinations, terrorist bombings, a war with Israel and a civil war affected the country and its legal system's ability of properly functioning. Those events, coupled with Toto's lack of initiative in speeding those proceeding, motivated the tribunal's conclusion it had no jurisdiction to decide whether those delays violated the fair and equitable standard. Even though there was not

affecting a host country and the proper functioning of its legal system, and consequently the investment, seem to allow the conclusion that they are unpredictable, irresistible and external to the state, and can be qualified as force majeure circumstances⁹⁸⁵.

3. States' new legislative measures as force majeure.

The introduction of new legislative or economic measures by host states is *per se* a relevant issue for foreign investors. The introduction of new legislative measures changing and affecting the investment framework existing at the time of the conclusion of a contract has been qualified in several investment disputes as a cause for the non-performance of contractual obligations and for the invocation of force majeure. These disputes have mainly derived from host states' reactions to circumstances of instability due to either political or economic negative events⁹⁸⁶. There is also the case of arbitral awards dealing with adverse financial conditions⁹⁸⁷. Concerning the African continent, there have been disputes where the worsening of socio-political conditions urged the invocation of a circumstance of force majeure⁹⁸⁸.

any explicit reference to force majeure, it seems reasonable to affirm that the tribunal believed those events of internal instability were, to a certain extent, unpredictable, irresistible and external to the state, justifying in this way the proceedings' delays. See *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon*, ICSID, Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009, paras. 139 and ff., 165 and 168.

⁹⁸⁵ Also in *Autopista*, the investment was jeopardised by violent protests, riots and civil unrest, but in that case, the tribunal considered those events in the light of the requirements of force majeure's clause, concluding that they had not been met. The tribunal's reasons for rejecting the invocation of force majeure have been stated in *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID, Case No. ARB/00/5, Award, September 23, 2003, paras. 107, 114, 121, 125 and 128.

⁹⁸⁶ It is possible to refer also to a couple of arbitrations involving the Indonesian government, namely *Karaha Bodas* and *Himpurna*, there was the intertwining of both political and economic adversities. The claimants concluded contracts with an Indonesian state-owned company operating in the gas and oil fields for the exploration, exploitation and sale of gas resources to the state-owned company. The following rising Asian financial crisis and the overthrow of the Indonesian regime caused serious economic and political instability which moved Indonesian authorities (that had also been advised by the IMF) to suspend the energy contracts. See Brunner C., *Force Majeure and Hardship under General Contract Principles*, Kluwer Law International, Netherlands, 2009, p. 446. See also Rubins N., *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, American University International Law Review, Vol. 2, Issue 20, 2005, p. 362 and 374. See also Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, p. 466.

⁹⁸⁷ In *ICC Nos. 3099 and 3100/1979*, the claimant was an Algerian state enterprise (seller) and the respondent an African state enterprise (buyer) that had concluded two contracts for the sale of crude oil and refined oil products. The dispute arose after the respondent had failed to pay for the purchases and refused to pay for the deriving additional penalties and damages. Such failure had been allegedly due to currency exchange controls which motivated the state's national central bank not to authorise the payment, despite the fact that the capitals had been available. See *Case Nos. 3099 and 3100*, ICC, Award, May 30, 1979. The award can be found at the following link: www.trans-lex.org/203100. It is possible to consider also *Nykomb v. Latvia* where Latvenergo (a company entirely owned by Latvia) and Windau (a company owned for the 51% by Nykomb) concluded a contract for the building of a cogeneration plant for the production of electric power and heat from natural gas, which should have been purchased and distributed by Latvenergo⁹⁸⁷. Electricity delivery price was calculated through the sum of two elements, both determined through the application of national laws and regulations: the electricity tariffs set by Latvian authorities and the so-called "multipliers". The dispute arose over the "multipliers component" of delivery price because, in the claimant's opinion, the multipliers paid to Windau were inferior to those which should have been actually paid. See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award, December 16, 2003, para. 1.1.

⁹⁸⁸ *National Oil Corp.*, judged by the ICC Arbitration Court, originated from the worsening of diplomatic bilateral relations of the parties' mother countries. The parties had concluded a contract for the execution of an oil exploration and exploitation programme in Libya⁹⁸⁸. After the contract's conclusion, the respondent suspended its performance on the grounds of force majeure, as a consequence of the alleged impossibility for its employees to enter Libya, following an order of the US government invalidating US passports for travels to Libya. Since the beginning of the 80s, following a series of terrorist attacks believed to be supported by Gaddafi's regime the US suspended its relations with Libya, instituted an embargo and adopted sanctions against the state. See *National Oil Corp. v. Libyan Sun Oil Co.*, ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985. The award can be found at the following link: www.trans-lex.org/204462.

Force majeure has been invoked by either foreign investors whose investment have been jeopardised by the introduction of new measures or states having adopted controversial measures. The analysis of these disputes allows the acknowledgement of the effects of state regulation in the fields of energy and infrastructure. They also help to observe the circumstances in which such regulations can negatively affect foreign investment, as well as the possibility of invoking a defence such as force majeure, especially in the optic of determining the obstacles foreign investors could face in a host country. One of the most relevant outcomes of this analysis is that arbitral tribunals tend to define the most radical measures introduced by states as altering the original investment framework, in a manner entirely contrary to the spirit of foreign investment's protection. In similar circumstances, arbitral tribunals likely tend to allow defences grounded on force majeure against changes in host states' legislations, while they may reject argumentations trying to support radical changes in domestic laws⁹⁸⁹.

The tribunal in *ICC Nos. 3099 and 3100/1979* has been the only to consider the events motivating the invocation of force majeure in the light of the three requirements of unforeseeability⁹⁹⁰, irresistibility and externality. The arbitral panel did not interpret each requirement, but immediately analysed the dispute's circumstances. The fact that the state's Central Bank had not made capitals available could not be considered an external event, otherwise any state intervention into the functioning of a state-company would jeopardise the correct execution of a contract and would constantly be invoked by the state-company as an excuse for failing to perform the contract. Finally, the tribunal considered a report of the Central Bank referring to the serious economic crisis that had been affecting the country the same year the dispute arose and it determined that it should have been up to the defendant to obtain the necessary guarantees from the bank that the payment was possible, since the latter knew or should have known that there had been an ongoing economic crisis. The force majeure defence was not accepted, since the defendant failed to meet the requirements.

⁹⁸⁹The most complete interpretation of the force majeure clause has been given by the *Nykomb* tribunal. The tribunal affirmed force majeure could not be interpreted as excusing the adoption of measures having the effect of inevitably changing the initial conditions of investment, instead of covering the exclusion of a party's responsibility for its failure in complying with contractual obligations. The force majeure clause could not be interpreted as freeing a party from its obligations and, in this specific case, as leaving the investor completely unprotected. Moreover, the letter of the contract and the conclusions of the Latvian Supreme Court, in a case similar to *Nykomb*, clarified that the clause did not allow the state to change its laws on multipliers the way it did. In the legal opinion attached to the award, T. Wälde stated that "inability to pay or unwillingness to pay cannot be justified by force majeure". The UNCITRAL arbitral tribunal, in *Karaha Bodas*, focused on the interpretation of the expression "a government related event is an event of force majeure" included in the contract's force majeure clause. The arbitral panel concluded that the adoption of acts, such as the presidential decree that had suspended the contract, did not constitute a contractual violation but are rather force majeure events which prevented the claimant from complying with its contractual obligations. The *Himpurna* tribunal considered the relationship between the possibility of invoking force majeure and the existence of an economic crisis. The panel carried out a case-by-case analysis and concluded that the economic hardship experienced by Indonesia was not sufficient to determine the necessity of renegotiating contractual obligations. The only result of allowing a renegotiation would have corresponded to favouring international uncertainty, as the Asian financial crisis in 1997 had great magnitude, but it was not unforeseeable and could have been overcome. See Wälde T. W., *In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v. The Republic of Latvia - Legal Opinion*, *Transnational Dispute Management*, Vol. 2, Issue 5, November, 2005, para. 62. See also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, US District Court for the Southern District of Texas. See also *Himpurna California Energy Ltd. (Bermuda) v. PT. Perusahaan Listrik Negara (Indonesia)*, paras. 203, 209 and 210. See also Sornarajah M., *The International Law on Foreign Investment*, p. 466.

⁹⁹⁰The tribunal strictly interpreted the requirement of unforeseeability. The exchange regulations which prevented the Central Bank to execute the payment had been in force long before the conclusion of the contracts and, thus, the Central Bank's behaviour could not be defined as unforeseeable. See Augenblick M., Rousseau A. B., *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, p. 66.

Differently from the other disputes presented in this section, *National Oil Corp.* has concerned regulative acts adopted by the foreign investor's home state, the US, which prevented the investor from complying with contractual obligations. The tribunal believed the circumstances listed in the contractual clause were rather extensive, especially in the light of the formulation "any unforeseen circumstances and acts beyond the control of such Party". In the tribunal's opinion, the parties' decision of including a specific force majeure clause depended on their desire of making applicable a provision which was not Libyan law. According to this clause, the contract's non-performance could have been excused in the sole hypothesis it would have been impossible for one of the parties to fulfil contractual obligations. Thus, the contract did not define the concept of "impossibility to perform". In the end, the arbitral tribunal rejected the force majeure defence because the respondent was not impeded to execute the contract. The American company could have hired non-US citizens, overcoming the problems relating to the passports restrictions. In fact, the respondent should have proved the absence of possible alternative strategies for the contract's performance in order for the irresistibility requirement to be met⁹⁹¹. The force majeure defence should have not been invoked at all, since the negative effects of acts or measures adopted by a foreign investor's home country "will not fall under the principle" of force majeure⁹⁹².

SECTION II. State of necessity.

1. Characteristic elements of necessity.

State of necessity has been one of the circumstances precluding wrongfulness most frequently invoked also in investment-related disputes⁹⁹³, generally, by states having failed to offer adequate levels of protection and security. The main difference between necessity and other circumstances precluding wrongfulness, like force majeure or distress, is that the former "does not involve conduct which is involuntary or coerced"⁹⁹⁴. There still is a component of "free choice"⁹⁹⁵. The invoking party has to voluntarily breach an international obligation, in order to protect other interests⁹⁹⁶. This has to happen "in a manner necessary to protect an essential interest in grave and imminent peril"⁹⁹⁷ not constituting a danger to individuals, but to the essential interests of the country invoking it⁹⁹⁸.

⁹⁹¹ See Augenblick M., Rousseau A. B., *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, p. 69.

⁹⁹² See Dolzer R., Schreuer C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012.

⁹⁹³ See Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, p. 160. See also Sloane R. D., *On the Use and Abuse of Necessity in the Law of State Responsibility*, Boston University School of Law Working Paper, No. 11-16, 2011, p. 55 and 59. See also Tanzi A., *State of Necessity*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law, p. 3.

⁹⁹⁴ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 25, para. 2.

⁹⁹⁵ See Tanzi A., *State of Necessity*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law, p. 2.

⁹⁹⁶ See Crawford J., *State Responsibility - General Part*, 2013, p. 307.

⁹⁹⁷ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, Muchlinski P. ed., Ortino F. ed., Schreuer C. ed., *International Investment Law*, Oxford University Press, Oxford, 2008, p. 462. See also Crawford J., *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 178.

⁹⁹⁸ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries at Article 25, para. 2.

States' practice of referring to circumstances precluding wrongfulness to justify failures in complying with investment treaties' obligations shows that the ascertainment of state responsibility under IIAs "is not a self-contained notion"⁹⁹⁹. States always refer to the customary necessity rule and its codification in ILC Article 25. The most part of investment disputes where states have grounded their defences on the existence of a state of necessity can be divided in two categories. There are disputes where necessity has been invoked in relation to national instability (generally involving African countries) and other cases relating to grave economic crisis (involving almost exclusively Argentina after the 2001 economic crisis). There, states have generally referred to the general rules of public international law as well as to the related jurisprudence of international tribunals¹⁰⁰⁰, despite the difficulties of applying such rules to investor-state disputes. International jurisprudence has been referred to in order to prove state of necessity has become a customary international rule "precluding wrongfulness of the measures adopted in its context and exempting the State from international responsibility"¹⁰⁰¹.

Both states and arbitral tribunals¹⁰⁰² generally agree that state of necessity is a part of customary international law and reflects "the current status" of customary international law¹⁰⁰³. Arbitral tribunals agree that ILC Article 25 reflects¹⁰⁰⁴, represents¹⁰⁰⁵, restates¹⁰⁰⁶ or is an expression¹⁰⁰⁷ of the state of customary international law on necessity. At the same time, there have been cases where ILC Articles have been considered a representation of consolidated jurisprudence on state of necessity, rather than customary rules or their codification¹⁰⁰⁸. The above-mentioned disputes, among others, have favoured the transition of the state of necessity rule to a circumstance precluding wrongfulness¹⁰⁰⁹. Even scholars agree that ILC Article 25

⁹⁹⁹ See Sornarajah M., *The International Law on Foreign Investment*, p. 454.

¹⁰⁰⁰ The cases most frequently recalled by states have been the *Neptunus*, *Compañía de Ferrocarriles de Venezuela*, *Russian Indemnity*, *Dickinson Car Wheel Company*, *Société Commerciale de Belgique*, *Gabčíkovo-Nagymaros Project* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. See *National Grid Plc. v. Argentine Republic*, para. 205. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 294. See also *Sempra Energy International v. Argentine Republic*, para. 333. See also Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, p. 493.

¹⁰⁰¹ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 294. See also *Sempra Energy International v. Argentine Republic*, para. 333. See also *Continental Casualty Company v. Argentine Republic*, para. 160.

¹⁰⁰² See Tanzi A., *State of Necessity*, p. 2.

¹⁰⁰³ See *Sempra Energy International v. Argentine Republic*, para. 333. See also *National Grid Plc. v. Argentine Republic*, paras. 206 and 255. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 249. See also *BG Group Plc. v. Republic of Argentina*, para. 391. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 294. See also *Continental Casualty Company v. Argentine Republic*, para. 160.

¹⁰⁰⁴ See *CMS Gas Transmission Company v. Argentine Republic*, ICSID, Case No. ARB/01/8, Award, May 12, 2005, para. 315. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID, Case No. ARB/01/3, Award, May 22, 2007, para. 303. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 245. See also *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Award, September 28, 2007, para. 344.

¹⁰⁰⁵ See *National Grid Plc. v. Argentine Republic*, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008, para. 256.

¹⁰⁰⁶ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010, para. 258. See also *Continental Casualty Company v. Argentine Republic*, ICSID, Case No. ARB/03/9, Award, September 5, 2008, note 238.

¹⁰⁰⁷ See *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Award, September 28, 2007, para. 344.

¹⁰⁰⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID, Case No. ARB/01/3, Award, May 22, 2007, para. 303. See also *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Award, September 28, 2007, para. 344.

¹⁰⁰⁹ See *CMS Gas Transmission Company v. Argentine Republic*, ICSID, Case No. ARB/01/8, Award, May 12, 2005, paras. 315 and 317. For the most emblematic case, see *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, paras. 51-52.

represents a restatement of customary international law which seems to allow the possibility of debating on its "precise boundaries"¹⁰¹⁰.

The necessity doctrine grounds on the "idea of prevention against the risk of suffering certain damages"¹⁰¹¹. One of the consequences of including necessity among circumstances precluding wrongfulness is to "avoid an overly rigid application [of a state's obligations]... in circumstances where there are conflicting values"¹⁰¹². The basis of the international rule on necessity and its boundaries present a certain level of vagueness¹⁰¹³. States, doctrine and jurisprudence tend to agree on the definition of state of necessity, a general "abstract" one¹⁰¹⁴. State of necessity tries to balance the most crucial interests of very different subjects: generally states, but in the investment field also foreign investors. The customary rule leaves states a discrete appreciation margin, especially in the identification of serious and imminent perils. Doctrine and arbitral jurisprudence agree on the concrete risk states will breach their international obligations attempting to avoid any attribution of responsibility for their conduct¹⁰¹⁵. Thus, a much more objective definition of such perils is needed. States invoking state of necessity cannot be the "sole judge of whether the conditions for necessity are met"¹⁰¹⁶.

The state of necessity rule should be applied only in a limited number of specific cases due to its peculiar nature, as generally agreed on by scholars, state practice and jurisprudence¹⁰¹⁷. Arbitral panels tend to qualify state of necessity as a "most exceptional remedy"¹⁰¹⁸ which has to "be addressed in a prudent manner to avoid abuse"¹⁰¹⁹ because of its "unilateral"¹⁰²⁰ and "far-reaching nature", demanding the establishment of very strict requirements¹⁰²¹. Nevertheless, states have too frequently attempted to rely on their discretionary power to determine which events could be qualified as serious and imminent threats and to invoke necessity¹⁰²². The ILC has pursued the objective of limiting states' abuse in invoking state of necessity¹⁰²³ by introducing demanding conditions to be cumulatively met¹⁰²⁴. The purpose is avoiding states'

¹⁰¹⁰ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 474.

¹⁰¹¹ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 248.

¹⁰¹² See Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, within Crawford J. ed., Pellet A. ed., Olleson S. ed., *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 490.

¹⁰¹³ See Crawford J., *State Responsibility - General Part*, 2013, p. 305.

¹⁰¹⁴ See Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, p. 490.

¹⁰¹⁵ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 248.

¹⁰¹⁶ See Crawford J., *State Responsibility - General Part*, 2013, p. 311. See also *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, ICSID, Case No. ARB/05/6, Award, April 22, 2009, para. 105.

¹⁰¹⁷ See Tanzi A., *State of Necessity*, p. 4. See also Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, p. 490.

¹⁰¹⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 304.

¹⁰¹⁹ See *CMS Gas Transmission Company v. Argentine Republic*, para. 317. See also *Sempra Energy International v. Argentine Republic*, para. 345. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 304. See also *BG Group Plc. v. Republic of Argentina*, para. 410. See also Tanzi A., *State of Necessity*, p. 4.

¹⁰²⁰ See Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, p. 490.

¹⁰²¹ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 462.

¹⁰²² See *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 410. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 248. See also Heatcote S., *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, p. 490.

¹⁰²³ See *Continental Casualty Company v. Argentine Republic*, para. 167.

¹⁰²⁴ See *CMS Gas Transmission Company v. Argentine Republic*, para. 330. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 311. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 248. See also *Sempra Energy International v. Argentine Republic*, para. 355. See also *National Grid Plc. v. Argentine Republic*, para. 262.

invocation of necessity to escape the fulfilment of their international obligations, favouring the stability of the international legal framework¹⁰²⁵. There have been tribunals considering the defence "admissible... in theory", but it was rarely accepted "because of its exceptional nature" and the high thresholds which the invoking party was expected to meet¹⁰²⁶. Besides the ICJ's jurisprudence, arbitral tribunals have also considered the declarations of ILC's members and the interpretations of state of necessity by Special Rapporteurs Ago and Crawford. Accordingly, the circumstances characterising a state of necessity generally concern all those threats to states' stability (at the socio-political-economic levels) and integrity¹⁰²⁷.

Some scholars are convinced the high threshold included in ILC Article 25 will almost never allow the invocation of necessity¹⁰²⁸. They also have expressed the concern that in a scenario of economic crisis, the opportunity of relaxing Article 25's requirements should be evaluated. On the one hand, states would be able to invoke state of necessity, while on the other hand there could be an abuse since almost every economic crisis could be defined so grave to justify a defence grounded on necessity. A rational consideration of the intrinsic instability of national and global economies does not seem to suggest that there should be a relaxation over the customary rule. Otherwise, its abuse will become normal and will probably contribute to a generalised crisis of customary international law. A careful study of the possibility of balancing the provision's requirements with the possibility for states of effectively invoking it seems the most appropriate approach.

2. The invocation of necessity during national instability.

African countries have been invoking the state of necessity rule in investment disputes concerning the regulative measures adopted by national governments in circumstances of national instability. The two most relevant disputes have been *LAFICO v. Burundi* and *Funnekotter v. Zimbabwe*¹⁰²⁹. In both cases, host states attempted to defend their failure to comply with their obligations towards foreign investors referring to the alleged existence of a state of necessity.

¹⁰²⁵ See *CMS Gas Transmission Company v. Argentine Republic*, para. 317. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 258.

¹⁰²⁶ See *National Grid Plc. v. Argentine Republic*, para. 257.

¹⁰²⁷ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 246. The scholars affirmed "state of necessity is identified by those conditions in which a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory".

¹⁰²⁸ See Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, p. 22.

¹⁰²⁹ In *LAFICO*, Burundi declared that the measures adopted towards HALB and the Libyan managers (consisting in the liquidation of HALB, in preventing Libyan managers of HALB from operating and deporting them). In *Funnekotter*, Zimbabwe claimed the existence of a "state of necessity or emergency" relieving its responsibility of complying with the Zimbabwe-Netherlands BIT for the 5 years period during which unlawful land occupations had started and had eventually been legitimated through the Land Reform. The gravity of the events had allegedly "suspended [the] respondent's obligation to evaluate compensation" until the end of the critical period. Zimbabwe declared its failure to compensate the claimants was justifiable in accordance with Zimbabwean law, Article 7 of the BIT concerning the treatment to be accorded in case of losses (an issue which will be considered in the following paragraphs) and the customary international rule on state of necessity. See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, para. 64. See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, ICSID, Case No. ARB/05/6, Award, April 22, 2009, para. 102.

The *LAFICO* tribunal affirmed the respondent did not justify the adopted measures on the grounds of existing international rules. Thus, the tribunal attempted to apply the defences which could have been invoked by the state, namely Article 61 VCLT, ILC Articles 23 or 25 (respectively dealing with supervening impossibility of performance, force majeure and state of necessity)¹⁰³⁰. Concerning the formulation of ILC Article 25, scholars have highlighted the lack of a general definition of "essential interest"¹⁰³¹. Such definition "depends on all the circumstances in which the State is placed in different specific situations" and requires a case-by-case analysis¹⁰³². With these premises, the protection of national peace and security is a circumstance which can rightly be defined as an essential interest needing protection. The *LAFICO* tribunal had to consider that specific hypothesis, but the case-by-case analysis of the dispute's events brought it to the conclusion that the other conditions set in Article 25, besides the existence of an essential interest, had not been met. According to the tribunal, the measures undertaken by the respondent did not seem the "only means to protect an essential interest... against a grave and imminent peril"¹⁰³³. Furthermore, the tribunal clarified that a grave and imminent peril, as mentioned in Article 25, could not be a consequence of the presence of the Libyan managers of HALB. The tribunal added that necessity could not have been invoked also because Burundi directly contributed to the worsening of the events, unilaterally obstructing the correct execution of the cooperation project¹⁰³⁴.

The *Funnekotter* tribunal considered the existence of a state of necessity from the double perspective of national¹⁰³⁵ and international law. Zimbabwe referred to the international rule in the attempt of justifying the expropriations executed in the public interest and the failure in compensating the claimants for those expropriations, as well as to "to face the situation resulting from the invasion of commercial farms"¹⁰³⁶. Ultimately, Zimbabwe's failure to explain the reasons for the absence of calculation and payment of compensation motivated the tribunal's conclusion that the defence had to be rejected.

In the *Gabčíkovo-Nagymaros* case, the ICJ affirmed that "the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met"¹⁰³⁷. However, in *Funnekotter*, the tribunal apparently "neglected" the state's argumentation on the existence of a state of necessity, not considering the requirements of the rule¹⁰³⁸. The fact that the tribunal replied that Zimbabwe "never explain[ed] why such a state of necessity prevented it from calculating and paying the compensation due to the farmers in

¹⁰³⁰ In the previous section, the differences between Article 61 of the VCLT, Articles 23 or 25 of the ILC Articles on state responsibility, as well as the tribunal's reasoning in relation to force majeure have been analysed.

¹⁰³¹ See the *Second Report on State Responsibility*, by James Crawford, Special Rapporteur, No. A/CN.4/498/Add.2, released on April 30, 1999, para. 281. The report can be found at the following link: http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf.

¹⁰³² See the *Second Report on State Responsibility*, by James Crawford, para. 281.

¹⁰³³ See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, para. 56.

¹⁰³⁴ See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, para. 70.

¹⁰³⁵ It firstly excluded the applicability of national legislation since national authorities had never declared a state of emergency during the five years when the unlawful conduct of private individuals had taken place.

¹⁰³⁶ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 106.

¹⁰³⁷ See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, para. 51.

¹⁰³⁸ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, within Hofmann R., Tams C. J., *International Investment Law and General International Law*, Nomos, Baden-Baden, 2011, p. 145.

conformity with the BIT¹⁰³⁹, before rejecting the claim, seems to imply that the failures in relation to compensation could not allow the invocation of the defence.

3. Necessity in economic crisis.

The invocation of state of necessity in investment disputes originating from economic crisis has mostly characterised disputes involving Argentina after the 2001 economic crisis. Scholars have pointed out that the Argentinean economic crisis has probably established a new practice which will multiply the episodes of states implementing "necessary" emergency measures, most likely violating IIAs obligations and triggering a new wave of investment-related disputes¹⁰⁴⁰. This rising practice and, particularly, the way states and arbitral tribunals have dealt with state of necessity can prove relevant also for the present study on the African continent. Those disputes have concerned sensitive areas also for African countries, like the gas, electricity or water sectors. Furthermore, the present global economic instability combined with the already precarious economic conditions experienced in last decades by the most part of African countries increase the possibility these countries will attempt to invoke state of necessity to justify their failure in protecting foreign investment in circumstances of economic crisis. A similar trend could have the effect of rendering the international rule a rather common defence ground for states, contravening to the spirit of the rule aiming at its use only in limited circumstances¹⁰⁴¹.

The disputes involving Argentina had similar backgrounds. Even though the claimants operated in different sectors like the production and transport of gas (*CMS, LG&E, Enron, BG* and *Sempra*), water (*Suez*), electricity (*National Grid*) or in the insurance field (*Continental Casualties*), they were similarly affected by the emergency measures adopted by Argentinean authorities attempting to reduce the crisis' negative effects. Arbitral tribunals' analysis of the emergency measures for the preservation of national security and public order led them to determine that the economic crisis had had negative repercussions also on the social and political levels. The high socio-political instability generated by the economic crisis motivated the adoption of measures which ultimately destabilised original investment frameworks¹⁰⁴². In

¹⁰³⁹ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 106.

¹⁰⁴⁰ See Kent A., Harrington A. R., *The Plea of Necessity Under Customary International Law: A critical review in light of the Argentine cases*, within Brown C. ed., Miles K. ed., *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge University, 2011, p. 247. See also Van Aaken A., Kurtz J., *The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?*. The article can be found at the following link: http://ccsi.columbia.edu/files/2014/01/FDI_3.pdf. See also Stone Sweet A., *Investor-State Arbitration: Proportionality's New Frontier*, Yale Law School Faculty Scholarship Series, Paper 69, 2010, p. 19.

¹⁰⁴¹ See Kent A., Harrington A. R., *The Plea of Necessity Under Customary International Law: A critical review in light of the Argentine cases*, p. 247. See also Van Aaken A., Kurtz J., *The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?*. See also Stone Sweet A., *Investor-State Arbitration: Proportionality's New Frontier*, p. 19.

¹⁰⁴² In the 90s, Argentina had started a general privatisation programme sanctioned by the adoption of specific national legislations, like the Gas Law or the Water Decree, which favoured massive FDI flows. Nevertheless, between 1999 and 2000, Argentina registered the first signals of an upcoming economic crisis and introduced the first regulative measures. Those measures consisted in the renegotiation of previous concession agreements or the suspension of tariffs increase whose duration was progressively extended, entirely modifying the original investment frameworks. In 2001, the initial adjustments proved ineffective and the state was forced to drastically intervene. The main emergency measures, included in the Emergency Law, eliminated the direct convertibility between pesos and US dollars, the right to calculate tariffs in dollars and allowed the state to renegotiate public utility contracts. Among other emergency measures there was the 2002 Reform Law which, for instance, forbade "electricity transmission and public utility

every dispute, Argentina affirmed it had not violated treaty obligations, but in the case the tribunals would have concluded otherwise, it alternatively grounded its defence on necessity as a consequence of the serious economic and social crisis¹⁰⁴³. For their part, claimants usually argued that the emergency measures had jeopardised their investment, causing sensitive losses¹⁰⁴⁴.

All arbitral tribunals¹⁰⁴⁵ agreed that the laws applicable to the disputes would have been BITs provisions concerning either the treatment to be accorded to foreign investors in specific circumstances or non-precluded measures (the latter provisions will be discussed in the following section of the present chapter), customary international law and Argentinean law¹⁰⁴⁶. A further common point related to the recognition of the exceptional gravity of the economic crisis, even though there were doubts about the magnitude and effects drafted by Argentina. The crisis was of exceptional hardship and "in such context it was unlikely that business could have continued as usual"¹⁰⁴⁷. Nevertheless, it had not jeopardised the "very existence of the state and its independence"¹⁰⁴⁸ and could not have allowed the preclusion of wrongfulness of the state's conduct¹⁰⁴⁹. Only in one case, the tribunal agreed with Argentina that the economic crisis had

companies from suspending or modifying compliance with their obligations under their concessions and licenses". See *National Grid Plc. v. Argentine Republic*, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008, paras. 59-60

¹⁰⁴³ Argentina stated that the gravity of the economic crisis had jeopardised the very "existence of the State and its independence", since there were situations of "widespread unemployment and poverty, with dramatic consequences for health, nutrition and social policy" and "public institutions were also no longer functioning". Argentina pointed out it was a right of every state to adopt the measures deemed necessary to solve situations of emergencies and that BITs did not prevent state parties to achieve that purpose. Argentina added the economic crisis had not been due to its conduct, but had its origins in previous crisis (in Indonesia, Russia, Mexico and Brazil) and that the emergency measures had been addressed to the protection of its essential interests. In addition, only the measures adopted before the crisis peak directly affected the claimants, while the measures implemented after that moment had a more general nature. Argentina also referred to the *Gabčíkovo-Nagymaros* case and, specifically, to the ICJ's affirmation that the customary rule on state of necessity "precludes the wrongfulness of an act not in conformity with an international obligation". Argentina frequently restated that ILC Article 25 reflected the customary rule on necessity and that it had always met the requirements included in that provision. Accordingly, the economic crisis was an alleged imminent and grave peril affecting an essential interest of the state; it had been caused by exogenous factors and the state did not have any role in its development; the emergency measures had been adopted in the attempt of limiting the crisis' negative effects as the only possible means to protect the economic interests at stake; and finally those measures did not damage third states' interests. See *Sempra Energy International v. Argentine Republic*, paras. 326, 327 and 346. See also *BG Group Plc. v. Republic of Argentina*, paras. 392, 394 and ff. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 250. See also *CMS Gas Transmission Company v. Argentine Republic*, paras. 244 and 312. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, paras. 77 and 290. See also *National Grid Plc. v. Argentine Republic*, para. 79. See also *Continental Casualty Company v. Argentine Republic*, paras. 53 and 59. See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, para. 51.

¹⁰⁴⁴ See *Sempra Energy International v. Argentine Republic*, para. 93. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 75. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 254. See also *BG Group Plc. v. Republic of Argentina*, para. 401.

¹⁰⁴⁵ The affinities among these awards, concerning applicable law and the tribunals' reasoning, have been partially due to the composition of arbitral panels. For instance, two out of three arbitrators in *Sempra* had previously arbitrated in *CMS*, thus favouring the development of similar conclusions.

¹⁰⁴⁶ See *CMS Gas Transmission Company v. Argentine Republic*, para. 122. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 209. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 99. See also *Sempra Energy International v. Argentine Republic*, para. 325. See also *National Grid Plc. v. Argentine Republic*, para. 85. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 258. See also *BG Group Plc. v. Republic of Argentina*, para. 94.

¹⁰⁴⁷ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 306. See also *CMS Gas Transmission Company v. Argentine Republic*, para. 320. See also *Sempra Energy International v. Argentine Republic*, para. 348.

¹⁰⁴⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 306. See also *Sempra Energy International v. Argentine Republic*, para. 348.

¹⁰⁴⁹ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 306. See also *CMS Gas Transmission Company v. Argentine Republic*, para. 320. See also *Sempra Energy International v. Argentine Republic*, para. 348.

endangered the state's essential interests representing an "extremely serious threat to its existence, its political and economic survival"¹⁰⁵⁰.

The distribution of the crisis' economic burden between the state and the investors is an issue which should have deserved a deeper analysis, but it was considered only in *CMS*. The tribunal concluded that in the presence of an economic crisis as grave as that which stroke Argentina, foreign investors could not "be overburdened with all the costs of the crisis", but at the same time, the grave economic conditions originating from the crisis could not be expected not to affect the investors¹⁰⁵¹. To prevent the occurrence of these two circumstances, host countries should aim for the ending of the temporary critical situation and compensate the investors. Then, the tribunal ascertained that a part of the losses suffered by the claimant had been due to the undertaken risks, but the other part was attributable to the measures adopted by the state which had contributed to the hardship experienced by the claimant¹⁰⁵².

Arbitral panels reached the common conclusion that the gravity of the economic crisis was "not sufficient to allow a plea of necessity to relieve a state of its treaty obligations"¹⁰⁵³. The acceptance of the existence of a state of necessity in a framework of rather frequent economic crisis experienced by the most part of states "would threaten the very fabric of international law and indeed the stability of the system of international relations", allowing states not to fulfill their international obligations¹⁰⁵⁴. In *BG*, the tribunal went even further referring to the origins of economic crisis and affirming that "a country is always ultimately responsible of its economic policy and of its consequences, at least politically and economically"¹⁰⁵⁵. Then, it concluded that the solution could have been state intervention with the adoption of different economic measures, years before the outburst of the economic crisis¹⁰⁵⁶. A similar approach could have avoided the adoption of the emergency measures from 2001 which, despite having being praised by economists and international organisations like the IMF, had severe negative effects for foreign investors.

Another relevant point has been the debate on the relationship between human rights and international investment law. Argentina introduced a new argument grounded on the protection of human rights, to support its thesis on the extreme gravity of the economic crisis and the legitimate decision of invoking necessity. The state debated that the human right to water was a fundamental right and, differently from other sectors concerning "commodities and services" the tribunal should have granted the state "a broader margin of discretion", since the measures it had introduced were aimed at protecting its citizens' right to water¹⁰⁵⁷. Concerning the argumentation on the right to access to water and the hypothesis that the right would have prevailed over BITs obligations, the tribunal concluded that the state was equally bound by both human rights and BITs obligations, which anyways were not "inconsistent, contradictory, or mutually

¹⁰⁵⁰ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 257.

¹⁰⁵¹ See *CMS Gas Transmission Company v. Argentine Republic*, para. 244.

¹⁰⁵² See *CMS Gas Transmission Company v. Argentine Republic*, para. 248.

¹⁰⁵³ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 258.

¹⁰⁵⁴ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 258.

¹⁰⁵⁵ See *Continental Casualty Company v. Argentine Republic*, para. 235.

¹⁰⁵⁶ See *Continental Casualty Company v. Argentine Republic*, para. 236.

¹⁰⁵⁷ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 252.

exclusive"¹⁰⁵⁸. However, it further added that similar argumentations were not supported either in the BITs or international law¹⁰⁵⁹.

Certain events, like economic crisis and national or international conflicts, can negatively affect both foreign investors and host states' citizens. In my opinion, states have obligations towards all of them, but, at the same time, they should decide which interests have primary relevance for the country. Studies should be carried out with the purpose of determining how the rights and interests of these two groups should relate and whether there are specific circumstances allowing the interests' of one of them to temporarily prevail over the other. Human and investors' rights are not mutually exclusive and this is why I believe that in specific circumstances (which should be clearly identified by states or international bodies) the protection of one party should be considered primary and the attention of national authorities should be focused on solving the most threatening situation. This does not mean that a state should be excused for the possible wrongfulness of its conduct towards foreign investors, but it is about recognising a parallel set of rights. This is why Argentina's attempt of avoiding any form of responsibility and refusing to compensate the investors cannot be accepted.

4. Arbitral panels' further considerations about the invocation of state of necessity in economic crisis.

During the economic crisis, Argentina had to intervene to reduce the crisis' negative effects; it had a duty to attempt to avoid any further exacerbation of internal economic conditions¹⁰⁶⁰. However, the fact that events "were [not] out of control or had become unmanageable"¹⁰⁶¹, allowed arbitral tribunals to conclude that the economic crisis was not of such magnitude to constitute an imminent and grave peril¹⁰⁶². The gravity of the crisis was not of such proportions to affect the "very existence of the state and its independence"¹⁰⁶³. The emergency measures adopted by Argentina, compared to the measures adopted by other states in similar circumstances, showed that different approaches are possible and that the measures implemented after 2001 had not been the only means available to protect its interests¹⁰⁶⁴. Tribunals generally disagreed that to solve a crisis of such magnitude there had been only one means available, since states usually have multiple possible

¹⁰⁵⁸ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 262.

¹⁰⁵⁹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 262.

¹⁰⁶⁰ See *Sempra Energy International v. Argentine Republic*, para. 349. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 307.

¹⁰⁶¹ See *Sempra Energy International v. Argentine Republic*, para. 349. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 307.

¹⁰⁶² See *CMS Gas Transmission Company v. Argentine Republic*, para. 328.

¹⁰⁶³ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 306. See also *Sempra Energy International v. Argentine Republic*, para. 348.

¹⁰⁶⁴ See *CMS Gas Transmission Company v. Argentine Republic*, para. 328. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 308. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 260.

approaches¹⁰⁶⁵. Moreover, the essential interests of third states, with whom Argentina had concluded BITs, were not harmed by those emergency measures¹⁰⁶⁶.

Argentina, third countries and international organisations (for instance, in a report drafted by the IMF¹⁰⁶⁷) recognised the crisis had originated from both exogenous and endogenous elements¹⁰⁶⁸. The interaction of "domestic and international factors" due to the existence of a global economy were the precondition of the 2001 economic crisis and Argentina's adoption of emergency measures significantly contributed to its worsening¹⁰⁶⁹. In fact, the mere existence of global factors would have spread a crisis of equal gravity to a larger number of countries worldwide, instead of being circumscribed only to Argentina¹⁰⁷⁰. Moreover, the surfacing of such huge economic crisis could not be attributed to the doing of a singular administration, but rather derived from the negative consequences of long period of inappropriate economic interventions¹⁰⁷¹. In the end, the most part of arbitral panels rejected Argentina's defence grounded on the rule of necessity because the respondent had not met ILC Article 25's conditions.

Another basis for rejecting Argentina's counterclaim on the existence of a state of necessity related to the affirmation ILC Article 25 "exclusively [relates] to international obligations between sovereign states", thus the necessity defence would have failed independently from its rejection or acceptance¹⁰⁷². Argentina would have scarcely benefited from Article 25's invocation, since investors would have still been entitled to compensation under the BIT¹⁰⁷³. The ILC's affirmation that the defence was inadmissible if a treaty obligation excluded the possibility of relying on it led arbitral panels to the conclusion that that was not the case and Argentina had been entitled to adopt the emergency measures. Even in the hypothesis the host state had invoked the necessity defence, according to the BIT it would have been still bound to compensate the investor¹⁰⁷⁴. In the end, Argentina failed to meet the requirements set in Article 25 because the emergency measures had lured the investor to accept them and believe they would have only been temporary. Additionally, state authorities threatened investors wishing to resort to arbitration, forced investors to cease open proceedings before arbitral tribunals and introduced a contractual revision mechanism not aimed at restoring initial investment conditions¹⁰⁷⁵.

Arbitral tribunals have also frequently remarked that their analysis would not have included any political judgment of the emergency measures implemented by Argentina. Their judgments would have been limited to the legal analysis of emergency measures' consequences, in relation to the possibility of precluding

¹⁰⁶⁵ See *Sempra Energy International v. Argentine Republic*, para. 350.

¹⁰⁶⁶ See *CMS Gas Transmission Company v. Argentine Republic*, para. 328. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 310. See also *Sempra Energy International v. Argentine Republic*, para. 352. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 261.

¹⁰⁶⁷ See *National Grid Plc. v. Argentine Republic*, paras. 259-260.

¹⁰⁶⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 311.

¹⁰⁶⁹ See *CMS Gas Transmission Company v. Argentine Republic*, para. 328. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 311. See also *Sempra Energy International v. Argentine Republic*, para. 354.

¹⁰⁷⁰ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 264.

¹⁰⁷¹ See *Sempra Energy International v. Argentine Republic*, para. 351.

¹⁰⁷² See *BG Group Plc. v. Republic of Argentina*, paras. 407-408.

¹⁰⁷³ See *BG Group Plc. v. Republic of Argentina*, para. 408.

¹⁰⁷⁴ See *BG Group Plc. v. Republic of Argentina*, para. 409.

¹⁰⁷⁵ See *BG Group Plc. v. Republic of Argentina*, para. 411.

their alleged wrongfulness¹⁰⁷⁶. The *Enron* tribunal added that it was only competent to highlight that multiple solutions could have been adopted by the state and not to practically suggest which ones would have been more appropriate¹⁰⁷⁷. In *Sempra*, the tribunal remarked the importance of arbitral panels only focus on determining whether the host state's choice was the only available, rather than questioning the state's economic choices¹⁰⁷⁸. In *Suez*, the tribunal pointed out that Argentina could have adopted more flexible measures avoiding the breach of treaty obligations to safeguard its essential interests¹⁰⁷⁹. Scholars have doubted the impartiality of arbitral panels' conclusions about the emergency measures. The disputes involving Argentina highlighted arbitral tribunals' increasing practice of speculating on the measures implemented by host states¹⁰⁸⁰, intruding into the domestic jurisdiction of states involved in arbitral disputes.

Argentina's state of necessity defence was accepted only in one case, *LG&E*¹⁰⁸¹. Differently from the other awards, the *LG&E* award did not compare the economic crisis to other similar crisis, but it rather analysed the peculiar elements of the crisis from both a social and an economic point of view¹⁰⁸². This more detailed study of the dispute's background, defined as a "qualitative approach"¹⁰⁸³, radically changed the tribunal's approach towards the events, influencing also its decision of accepting necessity as precluding Argentina's wrongful conduct. The opposite conclusions of *CMS* and *LG&E*, despite the common background, have been due to different interpretations of the events from which the disputes originated and "to the content of the applicable law", namely the applicability of either ILC Article 25 or BITs provisions on non-precluded measures (an issue which will be considered in the following Section)¹⁰⁸⁴. According to some scholars, the *LG&E* award differentiates because normally other arbitral tribunals which interpreted the "only way" concept did not give any "deference whatsoever to Argentina's policy choices and, essentially, vitiate the necessity defence as a matter of law"¹⁰⁸⁵. On the contrary, the *LG&E* tribunal showed some "deference"

¹⁰⁷⁶ See *CMS Gas Transmission Company v. Argentine Republic*, para. 318.

¹⁰⁷⁷ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 309.

¹⁰⁷⁸ See *Sempra Energy International v. Argentine Republic*, para. 351.

¹⁰⁷⁹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 260.

¹⁰⁸⁰ See Alvarez J. E., Khamsi K., *The Argentine Crisis and Foreign Investors*, in Sauvart K. P. ed, *Yearbook on International Investment Law and Policy 2008-2009*, Oxford University Press, Oxford, 2009, p. 383.

¹⁰⁸¹ About the existence of an imminent and grave peril, the tribunal affirmed that the state has to experience an extremely grave danger, an evaluation which needs to be as objective as possible, and determined to be happening in a short time. About the "only way" requirement, the tribunal agreed that the concept, for being accepted, implied the necessity that the state was unable to rely on different means, even more onerous, than that breaching its international obligations. About the "essential interest" condition, the tribunal agreed that it had to be interpreted as referring, not only to the interests directly relating to the state's existence, but also to "economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation". "Essential interests" is not a category of conditions *a priori* determinable and immutable, but they should be determined on a case-by-case basis. About the impairment of third states' interests, necessarily the interests impaired while invoking necessity have to be "less important than the interest sought to be preserved through the action". The tribunal argued that there had not been undisputable evidence of Argentina's direct role in the development of the crisis. The tribunal acknowledged that a general state intervention was needed and that the emergency legislation could have been differently articulated, but it did not affect third states' essential interests. Thus, the state necessity defence was accepted since Argentina was able to prove to have met Article 25's requirements. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, paras. 250-253.

¹⁰⁸² See Kent A., Harrington A. R., *The Plea of Necessity Under Customary International Law: A critical review in light of the Argentine cases*, p. 251.

¹⁰⁸³ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 143.

¹⁰⁸⁴ See Vinuales J. E., *State of Necessity and Peremptory Norms in International Investment Law*, Law and Business Review of the Americas, Vol. 14, 2008, p. 83.

¹⁰⁸⁵ See Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, University of Pennsylvania Law School, Faculty Scholarship, Paper 193, 2008, p. 20. See also Burke-White W. W., Von Staden A., *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, Yale Journal of International Law, Vol. 35, 2010, p. 298.

to the state's emergency plan when it decided not to discuss whether those measures had been the most desirable for the crisis' solution¹⁰⁸⁶.

5. Critical aspects of awards dealing with the necessity defence in economic crisis.

The above-mentioned awards have not been exempted from criticism and in some cases they have been challenged before annulment committees. These committees have questioned the previous rejections of Argentina's defence probably contributing to the development of a new practice about the interpretation of the customary necessity rule in relation to economic crisis. They have also differently interpreted the relationship between state of necessity and BITs rules¹⁰⁸⁷.

The interpretation of the "only way" concept, the possible damages to third states' essential interests and the alleged contribution of Argentina to the economic crisis have been the object of conflicting point of views. This has brought some annulment committees to partially annul the previous awards¹⁰⁸⁸.

The expression "only way" allowed multiple interpretations beyond the literal one and the state's argumentation that an economic crisis allowed the adoption of different corrective measures was accepted¹⁰⁸⁹. In *Enron*, the tribunal did not specify whether there was an applicable test to determine the optimal solution a state should implement and the entity that should apply it. Thus, the annulment committee questioned whether it should be the tribunal or the state to establish the reasonableness of the measures adopted by the country. Even though it was not competent to discuss those matters, it underlined that a tribunal dealing with similar issues should effectively address also those aspects if it wishes to correctly apply ILC Article 25¹⁰⁹⁰.

Another key point has concerned the frequent contributions of consultants who are not jurists and the consideration of their reasoning as if they have legal grounds. The *Enron* annulment committee questioned the tribunal's decision to include in its reasoning the opinion of the claimants' consultant (a professor of economics) who discussed the emergency measures adopted by Argentina and identified possible alternative ones. The fact that the opinion was given by an expert who did not have knowledge of international law and

¹⁰⁸⁶ See Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, p. 20.

¹⁰⁸⁷ See Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, *Duke Journal of Comparative and International Law*, Vol. 23, 2012, p. 152.

¹⁰⁸⁸ In the *Enron* award, the arbitral panel interpreted the concept of "only way" in the light of the emergency measures. Then, it concluded the emergency measures had not been the only ones available and that Argentina could have implemented alternative measures. Nevertheless, the tribunal refused to list the more appropriate measures, since its purpose was judging the dispute from a legal point of view. The annulment committee stated that the tribunal had failed to "address a number of issues... essential to" correctly consider the "only way" requirement. See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, ICSID, Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, paras. 361 and 368.

¹⁰⁸⁹ In this light, the expression could have also covered the circumstance where there were no "alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law". Accordingly, a state could not invoke necessity in the hypothesis different possibilities existed, which do not imply a breach of international law. Furthermore, states cannot be supposed to know in advance whether the measures they are going to implement will be effective and will not damage foreign investors. See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 370.

¹⁰⁹⁰ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 373.

expressed a purely economic point of view of the crisis represented the core of the problem. His argumentations on the alternative measures available to Argentina did not take into account international law and, specifically, the requirements of Article 25¹⁰⁹¹. According to the committee, the reliance on that opinion caused the tribunal to fail to apply the customary rule on necessity as reflected in Article 25, establishing a ground for the award's annulment¹⁰⁹². Even in the case the interpretation of "only way" could be accepted, the tribunal would still have failed to state reasons for its conclusions.

Even scholars have criticised arbitral tribunals' analysis of the economic crisis and the rules applicable to the disputes for their "poor legal reasoning" and "contradictory holdings"¹⁰⁹³. The *Enron* annulment committee has suggested what, in my opinion, is the best approach which consists of three steps and can be extended to other disputes dealing with similar circumstances¹⁰⁹⁴. Experts' opinions should be taken into consideration along with other available proof. Then, arbitral panels should further analyse such elements in relation with the requirements of legal provisions, in this case ILC Article 25. Only after these two steps are consequentially followed, the panel would be able to conclude whether a host state has actually contributed to the occurrence of a situation of necessity. According to a general rule, the theory of precedent does not apply to investment arbitration, but it is a rather common practice for arbitral tribunals to refer to precedents. Thus, tribunals' conclusions not considering also the legal side, besides the economic one, can represent a threat "for the security of foreign investments and the legitimacy of international investment law and present policy concerns for states"¹⁰⁹⁵.

Inconsistencies in the interpretation of the rule on state of necessity can also contribute to a considerable weakening of the ICSID regime, which could even end up in the collapse of the ICSID system¹⁰⁹⁶. More in general, the inconsistencies of "almost every aspect of the legal interpretation of Article 25", provided by arbitral tribunals, can negatively affect the reliance and functioning of dispute settlement mechanisms¹⁰⁹⁷.

Arbitral awards not only present significant interpretative diversities, but they do not even answer fundamental questions, like the absence of an accurate shared definition of grave and imminent peril, the lack of explanation on how the necessity of safeguarding essential interests could be applied to disputes

¹⁰⁹¹ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 374.

¹⁰⁹² See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 377.

¹⁰⁹³ See Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, University of Pennsylvania Law School, Faculty Scholarship, Paper 193, 2008, p. 2. See also Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 462. See also Vinuales J. E., *State of Necessity and Peremptory Norms in International Investment Law*, p. 85.

¹⁰⁹⁴ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 394.

¹⁰⁹⁵ See Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, *Duke Journal of Comparative and International Law*, Vol. 23, 2012, p. 152. See also Burke-White W. W., Von Staden A., *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, *Yale Journal of International Law*, Vol. 35, 2010, p. 299. See also Alvarez J. E., Khamsi K., *The Argentine Crisis and Foreign Investors*, p. 385.

¹⁰⁹⁶ See Stone Sweet A., *Investor-State Arbitration: Proportionality's New Frontier*, p. 19.

¹⁰⁹⁷ See Chubb K., *The "State of Necessity Defense": A Burden, not a Blessing to the International Investment Arbitration System*, p. 550.

involving private individuals, or even the failure in properly demonstrating the way the state directly contributed to the crisis¹⁰⁹⁸.

Further inconsistencies have probably originated from the practice of some arbitral tribunals of considering state of necessity from the point of view of both the customary international rule and BITs provisions dealing with non-precluded measures. It has not been infrequent that arbitral tribunals have intertwined the analysis of the two provisions using the same terminology associated with the necessity rule also to BITs provisions on non-precluded measures.

The consequences of the application of the customary necessity rule to the international investment field arise further doubts also because of the presence of treaty obligations and "the hybrid nature of investor state arbitration"¹⁰⁹⁹. The ILC Articles "serve general purposes... not the interests of investor-state arbitration or even of investment generally"¹¹⁰⁰. There are scholars arguing that this inconsistency of arbitral awards dealing with the customary necessity rule derives from the fact that the defence has ultimately been "incorporated into contexts for which it was never intended"¹¹⁰¹. In this light, ILC Articles necessarily have to be adapted to the different "context" of international investment law¹¹⁰². However, the specific formulation of Article 25 seems to have left some interpretative margins for the interpretation of the doctrine¹¹⁰³.

A parallel consequence of applying the necessity rule in disputes against private investors could reveal problematic. It seems Article 25 has been drafted to be applied to circumstances and state obligations in force between these subjects¹¹⁰⁴. Arbitral panels addressing the issue would probably contribute to clarify the role of individuals in the dispute settlement mechanism and the applicability of similar customary rules in such disputes. States are subjects of international law and direct recipients of international obligations, while private individuals are qualified as objects¹¹⁰⁵. In addition, treaty investment obligations are negotiated between states and investors are the mere recipients of rights and guarantees. For instance, both states and individuals are usually recognised the same rights in resorting before investment arbitral tribunals. This shows that, despite the fact states are the only subjects able to enforce IIAs, individuals are also directly recognised the right of resorting before arbitral tribunals.

Thus, by virtue of the normally recognised status of states and individuals, the arising question is whether it is possible to allow both of them to resort to "defence[s] deriving from international law", a regime applicable to the relations between states¹¹⁰⁶. There are scholars affirming that states including

¹⁰⁹⁸ See Chubb K., *The "State of Necessity Defense": A Burden, not a Blessing to the International Investment Arbitration System*, *Cardozo Journal of Conflict Resolution*, Vol. 14, 2013, p. 548 and ff.

¹⁰⁹⁹ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 129.

¹¹⁰⁰ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, Muchlinski P. ed., Ortino F. ed., Schreuer C. ed., *International Investment Law*, Oxford University Press, Oxford, 2008, p. 522. See also Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, *Duke Journal of Comparative and International Law*, Vol. 23, 2012, p. 152.

¹¹⁰¹ See Sloane R. D., *On the Use and Abuse of Necessity in the Law of State Responsibility*, p. 59.

¹¹⁰² See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 522.

¹¹⁰³ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 474.

¹¹⁰⁴ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 129.

¹¹⁰⁵ See Brownlie, p. 65.

¹¹⁰⁶ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 131.

arbitration clauses in IIAs with the possibility for investors to directly implement them do not act in their "capacity as subject[s] of international law"¹¹⁰⁷. The initiation of a legal proceeding before an arbitral panel establishes a peculiar legal relationship between the investor and the host state: it cannot be defined as a private law relationship and the investor cannot be qualified as a subject of international law either¹¹⁰⁸. States and investors tend to confront on the same "neutral level"¹¹⁰⁹. Furthermore, in arbitral investment disputes applicable law is normally included in either BITs or dispute solution rules. The scenario emerging from the peculiar relationship between host states and foreign investors has motivated scholars to agree on the admissibility of invoking circumstances precluding wrongfulness, such as state of necessity or force majeure, and on the practice of arbitral tribunals of allowing these references¹¹¹⁰.

At the same time, investors' direct enjoyment of IIAs rights highlights the question whether the reference of these arbitral tribunals only to the essential interests of the states having concluded BITs should be coupled with the consideration of foreign investors' essential interests¹¹¹¹. Governments can always implement multiple solutions for economic crisis and ILC Article 25 does not specifically require that they will adopt the more virtuous or damaging, as long as the obligation does not affect the essential interests of third states is guaranteed¹¹¹².

6. IIAs and necessity pleas.

States invoking the existence of a state of necessity in investment disputes have also attempted to ground such defence on BITs provisions concerning the treatment to be accorded to foreign investors in circumstances of instability. The practice of relating the international rule on necessity to both customary international law and treaty obligations has been typical especially of Argentina in the disputes originated after the economic crisis. Since similar provisions are included also in BITs concluded by African countries, I believe noteworthy to consider the contents and scope of these provisions, in order to determine whether they effectively include references to the customary rule on state of necessity.

These treaty provisions establish host states' obligation to assure foreign investors a specific treatment in the case their investment have been damaged, but only in specific circumstances which are generally listed in the provisions. The losses occurred to the foreign investment can be a consequence of national or international conflicts, as well as acts of domestic instability, which take place in the territory of the host country. On the one hand, there are the events taking place at the international level and interesting

¹¹⁰⁷ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 136.

¹¹⁰⁸ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 136.

¹¹⁰⁹ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 136.

¹¹¹⁰ See Franke F., *The Custom of Necessity in Investor-State Arbitration*, p. 137.

¹¹¹¹ See Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*, within Weiler T. ed., *Investment treaty Arbitration and International Law*, Huntington, New York, 2008, Chapter 8.

¹¹¹² See Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*.

the relations between host countries with other states, like "war"¹¹¹³ or "armed conflict"¹¹¹⁴. On the other hand, there are events concerning the domestic stability of the host country, like "national emergency"¹¹¹⁵, "civil disturbance"¹¹¹⁶, "revolution"¹¹¹⁷, "revolt"¹¹¹⁸, "insurrection"¹¹¹⁹, "riot"¹¹²⁰ or "civil strife"¹¹²¹. More recently, "civil war"¹¹²², "terrorism"¹¹²³, "natural disaster"¹¹²⁴, "other catastrophes"¹¹²⁵, "vandalism"¹¹²⁶, "acts of God"¹¹²⁷ and "force majeure"¹¹²⁸ have been included in the events mentioned in these provisions¹¹²⁹.

These provisions on "compensation for losses" evolve around the treatment which should be granted to foreign investors and do not concern "restitution, indemnification, compensation or other settlement". References to restitution or compensation are present in almost every BIT concluded by African states, but compensation is not mandatory. Host states are only bound to assure the investor a certain treatment. Host countries can decide whether to compensate and to what extent foreign investors but, in the case they will opt for the compensation, these specific provisions will be applicable only to rule the treatment of the foreign investor. Concerning the qualification of the treatment that states are expected to assure foreign investors, BITs always refer to the national treatment and the most favoured nation treatment. In some BITs, the level of treatment is further qualified by referring also to the non-discrimination principle¹¹³⁰. Almost every

¹¹¹³ See Article 5 of the Ivory Coast-Belgium BIT signed on April 1, 1999, but not entered into yet. See also Article 10(3) of the Guinea Bissau-Portugal BIT. See also Article 7 of the Nigeria-Netherlands BIT. See also Article 7 of the Namibia-Finland BIT.

¹¹¹⁴ See Article 4(4) of the Ghana-Bulgaria BIT signed on October 20, 1989, but not entered into yet. See also Article 4(1) of the Gambia-Morocco BIT signed February 20, 2006, but not entered into yet. See also Article 7 of the Uganda-Netherlands BIT. See also Article 5 of the Botswana-Mauritius BIT.

¹¹¹⁵ See Article 5 of the Burkina Faso-Ghana BIT signed on May 18, 2001, but not entered into yet. See also Article 7 of the Gambia-Netherlands BIT. See also Article 5 of the Chad-Lebanon BIT. See also Article 5(1) of the Zimbabwe-Indonesia BIT signed on February 10, 1999, but not entered into yet.

¹¹¹⁶ See Article 4(1) of the Ghana-Cuba BIT signed on November 2, 1999, but not entered into yet. See also Article 6(1) of the Senegal-India BIT. See also Article 7(1) of the Nigeria-Spain BIT signed on July 9, 2002, and entered into force on January 19, 2006. See also Article 6(1) of the Namibia-Austria BIT.

¹¹¹⁷ See Article 4 of the Egypt-Ghana BIT. See also Article 4(5) of the Mali-Algeria BIT. See also Article 6 of the Ethiopia-Denmark BIT signed on April 24, 2001, and entered into force on August 21, 2005. See also Article 5 of the Mauritania-Lebanon BIT signed on June 15, 2004, and entered into force on April 30, 2006.

¹¹¹⁸ See Article 5 of the Guinea-Ghana BIT signed on May 18, 2001, but not entered into yet. See also Article 4 of the Senegal-Egypt BIT signed on March 5, 1998, but not entered into yet. See also Article 7(4) of the Sudan-Belgium BIT. See also Article 4(2) of the Morocco-Sweden BIT.

¹¹¹⁹ See Article 4(4) of the Ghana-China BIT. See also Article 5 of the Senegal-Morocco BIT. See also Article 5(1) of the Ethiopia-Kuwait BIT. See also Article 4 of the Algeria-Malaysia BIT signed on January 27, 2000, but not entered into yet.

¹¹²⁰ See Article 5 of the Mauritius-Ghana BIT. See also Article 4(2) of the Senegal-Argentina BIT signed on April 6, 1993, and entered into force on February 1, 2010. See also Article 4 of the Tunisia-Hungary BIT. See also Article 5(1) of the Libya-Croatia BIT.

¹¹²¹ See Article 5(4) of the Rwanda-US BIT. See also Article 4 of the Mozambique-Italy BIT.

¹¹²² See Article 4 of the Cape Verde-Italy BIT.

¹¹²³ See Article 6 of the Madagascar-China BIT. See also Article 4(1)(b) of the Cameroon-US BIT. See also Article 6 of the Madagascar-Mauritius BIT.

¹¹²⁴ See Article 7 of the South Africa-Canada BIT signed on November 27, 1995, but not entered into force yet. See also Article 5(3) of the Nigeria-Germany BIT signed on March 28, 2000, and entered into force on September 20, 2007.

¹¹²⁵ See Article 3(3) of the DRC-Germany BIT.

¹¹²⁶ See Article 5(1) of the Algeria-Sweden BIT signed on February 15, 2003, and entered into force on April 1, 2005.

¹¹²⁷ See Article 5(1) of the Libya-Austria BIT signed on June 18, 2002, and entered into force on January 1, 2004.

¹¹²⁸ See Article 5(1) of the Libya-Austria BIT.

¹¹²⁹ I have verified that the inclusion of the latter group of events does not constitute a consolidated practice among African BITs, since the number of treaties referring to those circumstances is rather scant.

¹¹³⁰ Morocco is the state having concluded the highest number of BITs referring to the principle of non discrimination. See, for instance, Article 5 of the Morocco-Bulgaria BIT signed on May 22, 1996, and entered into force on February 19, 2000. See also Article 5 of the Morocco-Senegal BIT. See also Article 5 of the Morocco-Cameroon BIT signed on January 24, 2007, but not entered into force yet. See also Article 5 of the Morocco-Chad BIT. See also Article 4(2) of the Morocco-Argentina BIT. See also Article 5 of the Morocco-Guinea BIT signed on May 2, 2002, but not entered into force yet. See also Article 4(2) of the Morocco-Hungary BIT. See also Article 5 of the Morocco-Poland BIT signed on October 24, 1994, and entered into force on July 9, 1999. See also

African BIT recognises that the treatment granted by "compensation for losses" clauses should not be "less favourable"¹¹³¹ or should be "at least equal"¹¹³² to both or either the national treatment or the most favoured nation treatment.

Since treaties establishing regional organisation do not include any provision on the treatment which should be assured to foreign investors in case of losses or compensation¹¹³³, additional investment protocols have been attempting to fill in the gaps. The ECOWAS Community Investment Code is the only case where a provision similar to those included in BITs concerning the treatment of foreign investors in case of losses is included in a protocol's text¹¹³⁴. Originally, SADC investment-related protocols did not include any reference to the obligation of host states to grant a certain treatment to investors from other Member States. However, Article 9 of the SADC Model BIT Template introduces some modifications¹¹³⁵. Concerning the extension of the provision on the treatment so to rule also the compensation for losses, the Investment Agreement for the COMESA Common Investment Area is the only document having integrated the provision with a reference to Member States' obligation to compensate investors for damages or losses¹¹³⁶. Investment agreements

Article 5 of the Morocco-Romania BIT. For other examples, see Article 5(4) of the Rwanda-USA BIT. See also Article 4(3) of the Burundi-Belgium BIT. See also Article 5 of the Benin-Mauritius BIT. See also Article 5(4) of the Burkina Faso-Benin BIT. See also Article 4(1) of the Guinea-Burkina Faso BIT signed on March 25, 2003, and entered into force on August 26, 2004. See also Article 5(4) of the Mauritania-Burkina Faso BIT signed on May 18, 2005, but not entered into force yet. See also Article 5 of the Egypt-CAR BIT.

¹¹³¹ See, for instance, Article 6 of the Madagascar-Mauritius BIT. See also Article 6(1) of the Tanzania-Finland BIT. See also Article 7 of the Algeria-Iran BIT signed on October 19, 2003, and entered into force on December 5, 2005. See also Article 5 of the Mozambique-Portugal BIT signed on May 28, 1996, and entered into force on October 31, 1998. See also Article 7 of the Malawi-Netherlands BIT signed on December 1, 2003, and entered into force on November 1, 2007. See also Article 5 of the Ethiopia-Yemen BIT signed on April 15, 1999, and entered into force on April 15, 2000. See also Article 5 of the Djibouti-China BIT signed on August 18, 2003, but not entered into force yet. See also Article of the Gabon-Spain BIT signed on March 2, 1995, and entered into force on December 12, 2001.

¹¹³² See Article 5 of the Morocco-Bulgaria BIT. See also Article 5 of the Morocco-Poland BIT. See also Article 5(4) of the Mauritania-Burkina Faso BIT. See also Article 7(4) of the Sudan-Belgium BIT. See also Article 7(4) of the Ethiopia-Belgium BIT. See also Article 7(4) of the DRC-Belgium BIT. See also Article 5(4) of the Uganda-Belgium BIT. See also Article 4(4) of the Zambia-Belgium BIT.

¹¹³³ The reference is to the treaties establishing UMA, ECCAS, IGAD, ECOWAS, EAC, COMESA, SADC, OIC and Arab League.

¹¹³⁴ See Paragraph 66 of Chapter 6 of the Community Investment Code for the ECOWAS Region. The provision states that "investors of either Party who suffer within the territory of the other Party damage in relation to their investments, returns or business activities in connection with the investment, owing to the outbreak of hostilities or a state of national emergency such as revolution, revolt, insurrection or riot, shall be accorded treatment no less favourable than that accorded to investors of such Party or to investors of any third country, as regards to any measure to be taken by the other Party including restitution, compensation, or other valuable consideration. In case payments are made under the present Article, the payments shall be effectively realisable, freely convertible, and freely transferable".

¹¹³⁵ See Article 9 of the SADC Model Bilateral Investment Treaty Template. The provision states that "a State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State. Investors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State".

¹¹³⁶ See Article 21 of the Investment Agreement for the COMESA Common Investment Area. The provision states that "COMESA investors whose investments in the territory of the Member States suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which Member States accord to their own investors or to investors of any third State. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. Without derogating from the provisions of paragraph (1) of this Article, any investor who, in any of the situations referred to in that paragraph, suffers losses in a Member State resulting from: (a) requisitioning of their property by the forces or authorities of the Member States, acting under and within the scope of the legal provisions relating to their competences, duties and command structures; or (b) destruction of their property by the forces or authorities of the Member States, which was not caused in combat action or was not required by the necessity of the situation or observance of any legal requirement; shall be

adopted by the OIC¹¹³⁷ and the Arab League¹¹³⁸ include provisions on "compensation for damages" immediately dealing with investors' compensation. These agreements do not consider compensation only as a secondary instance.

7. Reasons not to confuse "compensation for losses" clauses with a codification of the necessity customary rule.

I believe the analysis of the texts of BITs, Model BITs and regional organisations' investment protocols has unequivocally demonstrated that these provisions cannot be interpreted as referring to the customary rules on necessity or force majeure. They have not been intended as clauses excluding states' responsibility in specific circumstances. The analysis of IIAs texts has shown that provisions on "compensation for losses" do not refer in any way to state responsibility and its exclusion. These provisions have been drafted with the purpose of offering foreign investors explicit guarantees about the treatment and the possibility of receiving compensation for having suffered losses. Provisions on the treatment and compensation in case of losses can be applied in circumstances of state of necessity or force majeure, but they differ.

Even arbitral tribunals in disputes where host states have been invoking provisions on the treatment and compensation in case of losses as clauses precluding the wrongfulness of their conduct, in alternative to customary international rules like state of necessity, have agreed that this is not the correct interpretation of these provisions. In *Funnkottter*, Zimbabwe grounded its defence also on Article 7 of the Zimbabwe-Netherlands BIT, concerning the treatment host states should guarantee to foreign investors and their

accorded restitution, or adequate compensation not less favourable than that which the Member States accord to their own investors or to investors of any third State. For the purposes of this Article, state of emergency excludes natural disaster".

¹¹³⁷ See Article 13 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the OIC. The provision states that "the investor shall be entitled to compensation for any damage resulting from any action of a contracting party or one of its public or local authorities or its institutions in the following cases: (a) Violation of any of the rights or guarantees accorded to the investor under this Agreement; (b) Breach of any of the international obligation or undertakings imposed on the contracting party and arising under the Agreement for the benefit of the investor or the non-performance of whatever is necessary for its execution whether the same is intentional or due to negligence; (c) Non-execution of a judicial decision requiring enforcement directly connected with the investment; (d) Causing, by other means or by an act or omission, damage to the investor in violation of laws in force in the state where the investment exists. The compensation shall be equivalent to the damage suffered by the investor depending on the type of damage and its quantum. The compensation shall be monetary if it is not possible to restore the investment to its state before the damage was sustained. The assessment of monetary compensation shall be concluded within 6 (six) months from the date when the damage was sustained and shall be paid within a year from the date of agreement upon the amount of compensation or from the date when the assessment of the compensation has become final".

¹¹³⁸ See Article 10 of the Unified Agreement for the Investment of Arab Capital in the Arab States. The provision states that "The Arab investor shall be entitled to compensation for damages which he sustains due to any one of the following actions by a State Party or one of its public or local authorities or institutions: (a) Undermining any of the rights and guarantees provided for the Arab investor in this Agreement or any other decision issued pursuant thereto by a competent authority; (b) Breach of any international obligations or undertakings binding on the State Party and arising from this Agreement in favour of the Arab investor or failing to take the necessary steps to implement them, whether deliberately or through negligence; (c) Preventing the execution of an enforceable legal judgment which has a direct connection with the investment; (d) Causing damage to the Arab investor in any other manner, whether by deed or prevention, by contravening the legal provisions in force within the State in which the investment is made". The amount of compensation shall be equivalent to the damage sustained by the Arab investor according to the type and amount of damage.

investment¹¹³⁹. The tribunal rejected Zimbabwe's interpretation that Article 7 dealt with state of necessity, thus "reliev[ing the state from] responsibility for complying with otherwise applicable provisions of the BIT"¹¹⁴⁰. I agree with the tribunal's conclusion that similar provisions guarantee foreign investors' right to a specific treatment in case a state of "war or other armed conflict, revolution, a state of national emergency" occurs and cannot be interpreted as clauses excluding the wrongfulness of states' conduct¹¹⁴¹.

Similar BITs provisions have been invoked by Argentina in several disputes arising out of the 2001 economic crisis¹¹⁴². Since African BITs compensation for losses clauses present similar characteristics to the BITs concluded by Argentina, it seems likely that the considerations made in relation to either group of BITs can be extended to the other.

According to Argentina's interpretation, those provisions concerning the treatment or compensation to be granted to foreign investors in cases of losses are not aimed at either "reduc[ing] the obligations of the host state to investors but rather to reinforce such obligations"¹¹⁴³ or including circumstances of economic crisis¹¹⁴⁴. Similar treaty provisions constitute a "special regime applicable in situations of emergency" granting investors a no less favourable treatment¹¹⁴⁵ and that, consequently, they had to be considered as *lex specialis*¹¹⁴⁶. They represent a codification in a treaty of the customary rule on necessity¹¹⁴⁷. And the national emergency triggering the application of similar provisions has to be interpreted as a situation of danger or

¹¹³⁹ Article 7 of the Zimbabwe-Netherlands BIT states that "nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned".

¹¹⁴⁰ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 102.

¹¹⁴¹ See *Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe*, para. 104.

¹¹⁴² The state invoked Article 4(3) of the Argentina-US BIT (in *CMS, Enron, LG&E, Sempra* and *El Paso*), Article 4 of the Argentina-UK BIT (in *National Grid, Suez* and *BG*) and Article 5(3) of the Argentina-France BIT (in *Suez*). Article 4(3) of the Argentina-US BIT states that "nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favourable treatment, as regards any measures it adopts in relation to such losses". Article 4 of the Argentina-UK BIT states that "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 or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party 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 its own investors or to investors of any third State. Resulting payments shall be freely transferable". Article 5(3) of the Argentina-France BIT states that "investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own investors or to investors of the most-favoured nation".

¹¹⁴³ See *CMS Gas Transmission Company v. Argentine Republic*, para. 342. These provisions rather legitimise the measures adopted by a state in response to events like national emergencies as long as the foreign investor was treated in a certain way if he had suffered losses. The term "losses" used in similar provisions has a broad meaning, including "any kind of harm" deriving from conflict and "situation of risk or disaster on a national level". Concerning the part of the provision referring to compensation, it could not be interpreted as a "demand for payment of compensation" because it only referred to the treatment to be accorded to investors. See *BG Group Plc. v. Republic of Argentina*, paras. 370-372.

¹¹⁴⁴ The fact that the economic crisis endangered also the lives of Argentinean citizens further justifies including economic crisis among those referred to in the compensation for losses clause. See *Sempra Energy International v. Argentine Republic*, para. 357. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 315.

¹¹⁴⁵ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 267. See also *El Paso Energy International Company v. Argentine Republic*, ICSID, Case No. ARB/03/15, Award, October 31, 2011, para. 558.

¹¹⁴⁶ See *CMS Gas Transmission Company v. Argentine Republic*, para. 344.

¹¹⁴⁷ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 315.

disaster irrespective of its cause calling for immediate action at the national level"¹¹⁴⁸. Nevertheless, these treaty provisions do not list the requirements of the measures the state could implement in order to face the emergency situation.

I agree with arbitral tribunals rejecting similar argumentations because they go "against the plain meaning of [BITs] texts"¹¹⁴⁹. These provisions rather impose a minimum treatment and compensation for investors having suffered losses¹¹⁵⁰. Assuming that "BIT provisions mean what they say"¹¹⁵¹, if contracting states want to include provisions specifically dealing with the preclusion of wrongfulness in circumstances of necessity or force majeure, they should proceed in that way¹¹⁵². Furthermore, there is not any BIT provision excluding the necessity defence or, more generally, referring to contracting parties' possibility of invoking it¹¹⁵³. These cannot be interpreted as a defence for the exclusion of wrongfulness from states' conduct. They do not represent an "escape clause" from treaty obligations¹¹⁵⁴. Extending the reasoning of the *National Grid* tribunal, there are no BITs provisions "which eliminate or restrict the necessity defence" and provisions concerning the treatment to be accorded in case of losses only "foresee and regulate one of the instances which may occur in a state of necessity"¹¹⁵⁵.

8. Consequences of invoking state of necessity.

The application of ILC Article 27, concerning the consequences of invoking a circumstance precluding wrongfulness, to investment disputes has been debated in almost every dispute arising out of Argentina's economic crisis. The provision has been referred to only in relation to state of necessity and not to other circumstances excluding wrongfulness, such as force majeure. Foreign investors demanding the application of Article 27 generally affirmed that it would have been applicable particularly in the part concerning compensation for the damages caused by Argentinean conduct even in the hypothesis arbitral

¹¹⁴⁸ See *National Grid Plc. v. Argentine Republic*, para. 77.

¹¹⁴⁹ See *El Paso Energy International Company v. Argentine Republic*, para. 559.

¹¹⁵⁰ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 320. See also *Sempra Energy International v. Argentine Republic*, para. 363. See also *National Grid Plc. v. Argentine Republic*, para. 210. See also *BG Group Plc. v. Republic of Argentina*, para. 382. See also *El Paso Energy International Company v. Argentine Republic*, para. 559. Tribunals also rejected the argumentation that "economic emergency measures taken in circumstances of particular gravity" should be excluded from the scope of treaty provisions dealing with the treatment to be granted to investors experiencing losses. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 321. See also *Sempra Energy International v. Argentine Republic*, para. 363. The two awards were released few months apart and, even though the composition of the arbitral panels was different, the argumentations and the expressions of the arbitrators in *Sempra* were almost identical to those of the previous award.

¹¹⁵¹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 271.

¹¹⁵² See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 271.

¹¹⁵³ See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 262.

¹¹⁵⁴ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 321. See also *Sempra Energy International v. Argentine Republic*, para. 363. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 271. See also *BG Group Plc. v. Republic of Argentina*, para. 381.

¹¹⁵⁵ See *National Grid Plc. v. Argentine Republic*, para. 210.

tribunals agreed state of necessity could be invoked¹¹⁵⁶. Arbitral tribunals focused on both paragraphs of Article 27, concerning the temporality of the defence and compensation.

Article 27(a) establishes that the compliance with an international obligation continues for the state invoking a circumstance precluding wrongfulness and it is bound to respect it once the circumstance has ceased to exist. It is fundamental to unequivocally ascertain the end of a circumstance of state of necessity or force majeure¹¹⁵⁷. In the disputes involving Argentina, arbitral panels remarked the host state would have still been bound to respect its international obligations once the state of necessity terminated, even if the state's defence was accepted¹¹⁵⁸. Circumstances precluding wrongfulness suspend international obligations only temporarily, thus a state can still be held responsible for instance for the emergency measures adopted to face an economic crisis¹¹⁵⁹. But, in those disputes, the Argentinean Emergency Law did not seem to respect the condition of temporality set in Article 27(a) and that raised some doubts on the legal consequences¹¹⁶⁰.

According to Article 27(b), the invocation of a circumstance precluding wrongfulness does not constitute a prejudice to the compensation for any damage suffered as a consequence of the events urging the state to invoke the provisions on the exclusion of wrongfulness. Arbitral tribunals in Argentina-related cases shared and reported Crawford's interpretation of Article 27(b). Accordingly, the provision does not specify the "circumstances in which compensation should be payable"¹¹⁶¹, and, more specifically, it does not expressly refer to the circumstance of losses suffered by foreign investors as a consequence of the measures adopted by states in a state of necessity¹¹⁶². However, as stated in *Gabčíkovo-Nagymaros*, there is a general international rule which requires "the state which has committed an internationally wrongful act" to compensate the damaged state¹¹⁶³. Arbitral panels underlined that the formulation of Article 27(b) does not exclude the possibility of paying compensation for past events and that it could be accepted the idea that

¹¹⁵⁶ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 302. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 225. See also *Sempra Energy International v. Argentine Republic*, para. 343. See also *National Grid Plc. v. Argentine Republic*, para. 232. See also *BG Group Plc. v. Republic of Argentina*, para. 389. In their opinion, Article 27(b) clarified that "Argentina's obligations... [were] not extinguished" and the claimants should have been compensated. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 225.

¹¹⁵⁷ The tribunals in *CMS* and *LG&E* have been the only to consider the duration of the economic crisis. In the first dispute, the tribunal stated the crisis had ended between the end of 2004 and the beginning of 2005. In the second, the tribunal determined that the economic crisis had "lasted from 1 December 2001 until 26 April 2003". See *CMS Gas Transmission Company v. Argentine Republic*, para. 250. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 245. The second timeline has been accepted also by the tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, para. 263. See also *El Paso Energy International Company v. Argentine Republic*, ICSID, Case No. ARB/03/15, Award, October 31, 2011, para. 670.

¹¹⁵⁸ See *CMS Gas Transmission Company v. Argentine Republic*, para. 382.

¹¹⁵⁹ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 463.

¹¹⁶⁰ See *Sempra Energy International v. Argentine Republic*, para. 392. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 343. They have also grounded their argumentations about the temporary nature of circumstances precluding wrongfulness on the ICJ's jurisprudence and on cases such as *Rainbow Warriors* and *Gabčíkovo-Nagymaros*. See *CMS Gas Transmission Company v. Argentine Republic*, para. 390. See also *Sempra Energy International v. Argentine Republic*, para. 355. See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, paras. 51-52.

¹¹⁶¹ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 260. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 345.

¹¹⁶² See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 260.

¹¹⁶³ See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, para. 152.

Argentina would have paid compensation after the solution of the crisis. In fact, in the agreement on the License concluded with the claimant, the parties had discussed and accepted the possibility¹¹⁶⁴.

Arbitral tribunals' insistence on the necessity of compensating investors, even in the hypothesis the necessity defence was accepted, has been motivated by the purpose of "avoiding the imposition of an economic burden on an innocent party (the investor)"¹¹⁶⁵, thus aligning to the ICJ's jurisprudence¹¹⁶⁶. However, the awards' analysis has shown that there still are divergent opinions about the obligation of paying compensation when a state of necessity has been verified¹¹⁶⁷. Annulment committees contributed to this general uncertainty affirming ILC Article 27 would have been applicable if the necessity defence was accepted, but since the defence had been rejected, the provision could not be applied¹¹⁶⁸. Lacking Argentina's liability, the state was not any more obliged to compensate the investors¹¹⁶⁹.

SECTION III. Non-precluded measures.

1. The right of African states to adopt non-precluded measures.

States' practice has gone in the direction of including so-called "non-precluded measures clauses" in IIAs. These clauses usually state that treaties "shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order and morals, 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"¹¹⁷⁰. The analysis of African states' obligation to assure protection and security to foreign investment would be incomplete without considering the intertwining of the obligation of protecting foreign investment with the necessity to intervene in order to prevent events which could harm host states' security interests or public order. The risk connected with the introduction of this kind of provisions in investment agreements is the concrete possibility that foreign investors' guarantees of receiving a certain level of protection will be jeopardised by these clauses. The latter provisions will tend to increase states' discretionary powers towards foreign investors and their investment, allowing them to intervene in a broader range of specific issues to the detriment of FDI flows.

¹¹⁶⁴ See *Sempra Energy International v. Argentine Republic*, paras. 394 and ff. See *CMS Gas Transmission Company v. Argentine Republic*, para. 390.

¹¹⁶⁵ See Kent A., Harrington A. R., *The Plea of Necessity Under Customary International Law: A critical review in light of the Argentine cases*, p. 251.

¹¹⁶⁶ See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, para. 48.

¹¹⁶⁷ In *Sempra*, the conclusion was that it would have been fundamental to consider also the critical situation of Argentina, while evaluating the due compensation for the claimant because Argentina was found responsible for the breach of the Treaty. Differently, in *LG&E*, the tribunal declared the claimants should have been compensated for the losses incurred only in the circumstance they were unrelated to the economic crisis. See *Sempra Energy International v. Argentine Republic*, para. 397. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 265.

¹¹⁶⁸ See *CMS Gas Transmission Company v. Argentine Republic*, Decision of the *Ad Hoc* Committee, para. 145.

¹¹⁶⁹ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, ICSID, Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, para. 414.

¹¹⁷⁰ See Article 10(1) of the Senegal-US BIT.

Bilateral and regional African investment treaties including non-precluded measures clauses on the maintenance of public order or security interests have been mainly concluded between the 90s and the 2000s. Prior to the 90s, states did not perceive the adoption of non-precluded measures as an issue needing explicit regulation. It was not intended as a means to restate the centrality of national governments' sovereignty or to highlight that foreign investment protection cannot overcome states' right to rule in certain sensitive matters. Initially, only a scant number of BITs included non-precluded measures clauses whose inclusion was mainly encouraged by more developed states. Nowadays, African states are including such provisions more frequently, even in the BITs they conclude between themselves¹¹⁷¹. Also African regional organisations have started to include these clauses in investment protocols, showing the primary relevance attributed to the issue of states' right to adopt measures to safeguard public order or security interests.

The main result of non-precluded measures clauses has been states' practice of further limiting the applicability of protection standards included in BITs. Such measures would grant states the possibility of introducing new regulations for the protection of public order or security interests without raising their responsibility for breaches of BITs obligations. The objective of these clauses is to counterbalance foreign investors' increased guarantees of protection by assuring host states a broader discretionary margin of action in exceptional circumstances¹¹⁷².

An increasing number of countries judge IIAs' guarantees "too broad" and the inclusion of non-precluded measures represents their attempt of reducing the favourable legal framework for foreign investors¹¹⁷³. Similarly, the increasing number of arbitral awards favouring investors' claims over host states' argumentations is urging states to progressively modify their approach towards their discretionary decision power. Arbitral awards can have negative effects especially for developing countries which do not have the means to easily recover from particularly severe awards granting foreign investors significant compensations¹¹⁷⁴. Thus, states perceive the urgency of intervening to partially limit the developing guarantees assured to foreign investors, as a consequent mistrust towards the system of guarantees established in international investment law and the need of protecting public order and security interests. Indeed, these non-precluded measures clauses can damage investors. On the other hand, there are scholars arguing that BITs "have the potential to usurp the ability [especially] of developing countries to address legitimate economic, social, and political upheavals"¹¹⁷⁵. At the same time, the inclusion of such clauses in

¹¹⁷¹ The BITs concluded by Mauritius are an example of the change of states' practice. Before 2000, no one of those BITs referred to the protection of security interests. More recent treaties, concluded after 2000, show how Mauritius changed its approach towards the protection of its right to safeguard domestic fundamental interests, including non-precluded measures clauses in BITs.

¹¹⁷² See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 398.

¹¹⁷³ See Newcombe A., *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?*, within De Mestral A. ed., Lévesque C. ed., *Improving International Investment Agreements*, Routledge, Abingdon, Oxon, 2013, p. 268.

¹¹⁷⁴ See Mayeda G., *International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards*, Mac Jill International Journal of Sustainable Development Law and Policy, Vol. 4, Issue 2, 2008, p. 229.

¹¹⁷⁵ See Mayeda G., *International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards*, p. 229.

BITs represents the attempts of states of introducing "politics into the market"¹¹⁷⁶. The logic behind these provisions is to restate the idea that public order and national security interests are such essential elements for the survival of a state that they should be given more consideration even among the guarantees for foreign investors normally included in BITs.

Non-precluded measures clauses clearly weaken the guarantees usually included in BITs to protect foreign investors and their investment¹¹⁷⁷. These clauses have often been controversially interpreted (an issue which will be discussed in the following paragraphs) as excuses allowing states not to properly protect foreign investors, since they allow the adoption of provisions which can be contrary to the obligations included in BITs¹¹⁷⁸. Non-precluded measures clauses cannot be used as means to avoid the fulfilment of international obligations¹¹⁷⁹. The reference to the concept that nothing will preclude a state from adopting such measures is only temporary and cannot be intended as "lifting or eliminating the underlying obligations"¹¹⁸⁰. These measures rather represent "exceptions to a BIT's substantive provisions"¹¹⁸¹.

2. Non-precluded measures necessary for the maintenance of public order.

Non-precluded measures clauses allow states to adopt measures necessary for the maintenance of public order, health or morality. The typical formulation of the clauses included in African BITs states that "nothing in [these Agreements] shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order"¹¹⁸². In some cases, states have "reinforced" these provisions adding that they do not violate principles such as the national treatment or the most favoured nation treatment, since they do not constitute a less favourable treatment¹¹⁸³.

There have been cases of states, like the US, reversing their practice of referring also to public order in non-precluded measures clauses. During the 80s and 90s, the BITs concluded with African countries

¹¹⁷⁶ See Vandeveld K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, Berkeley Journal of International Law, Vol. 11, Issue 2, 1993, p. 164.

¹¹⁷⁷ See Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, University of Pennsylvania Law School, Faculty Scholarship, Paper 193, 2008, p. 6. See also Vandeveld K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, Berkeley Journal of International Law, Vol. 11, Issue 2, 1993, p. 170-182.

¹¹⁷⁸ See Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, Duke Journal of Comparative and International Law, Vol. 23, 2012, p. 160. See also Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 311. See also Vandeveld K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, Berkeley Journal of International Law, Vol. 11, Issue 2, 1993, p. 171.

¹¹⁷⁹ See Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*, within Weiler T. ed., *Investment treaty Arbitration and International Law*, Huntington, New York, 2008, Chapter 8.

¹¹⁸⁰ See Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*, Chapter 8.

¹¹⁸¹ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 386.

¹¹⁸² See, for instance, Article 14(2) of the Egypt-Finland BIT concluded on March 3, 2004, and entered into force on February 5, 2005.

¹¹⁸³ See Article 3(3) of the Niger-Algeria BIT. See also Article 4(4) of the Angola-Germany BIT signed on October 30, 2003, and entered into force on March 6, 2007. See also Article 3(2) of the Madagascar-China BIT signed on November 25, 2001, and entered into force on June 1, 2007. See also the Protocol of the Morocco-Germany BIT signed on August 6, 2001, and entered into force in 2004. See also Article 3(6) of the Algeria-Mali BIT signed on signed on July 11, 1996, and entered into force on February 16, 1999.

included a provision not precluding the possibility for a contracting party to adopt measures "for the maintenance of public order and morals, 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"¹¹⁸⁴. The reference to public order has disappeared from the newer treaties concluded with African countries grounded on the 2004 and 2012 US Models BIT. Both Models include provisions exclusively concerning security interests¹¹⁸⁵ and the only reference to public order has been included in the documents regarding the interpretation of the obligation of not carrying out unlawful expropriations¹¹⁸⁶. For instance, the Rwanda-US BIT does not include any reference to the maintenance of public order because it was concluded after the adoption of the 2004 US Model BIT¹¹⁸⁷.

States have been including provisions allowing them to adopt measures deemed necessary for the protection of public order so to broaden their ruling power in the field of foreign investment. However, several states have been limiting the broadness of their discretionary power by subjecting their right to adopt these measures to the condition of respecting the principles of non-discrimination, non-arbitrariness¹¹⁸⁸ and reasonableness¹¹⁸⁹. The formal absence of any limit in non-precluded measures clauses could raise concern among foreign investors. Potentially, it could also sensitively reduce FDI flows, in the case national institutions are not believed capable of assuring a proper level of protection and the measures are adopted with the hidden objective of limiting foreign investors' rights.

Some states have also intertwined their right to adopt non-precluded measures with the full protection and security standard, including the two elements in the same provision and conceptually linking them. These provisions usually state that contracting parties "shall at all times ensure fair and equitable treatment and subject to strictly necessary measures to maintain the public order, provide full protection and security". Full protection and security is used as a threshold for the adoption of non-precluded measures, in the sense that even measures which would normally constitute a breach of the standard can be adopted by a state in the name of necessity. According to some scholars, relating non-precluded measures clauses and full protection

¹¹⁸⁴ All the provisions stated that the "treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order and morals, 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". See Article 10(1) of the Senegal-US BIT. See also Article 10(1) of the Cameroon-US BIT signed on February 26, 1986, and entered into force on April 6, 1989. See also Article 10(1) of the Congo Brazzaville-US BIT. See also Article 10(1) of the Zaire-US BIT signed on August 3, 1984, and entered into force on July 28, 1989.

¹¹⁸⁵ See Article 18 of the 2004 and 2012 Model BIT. Both articles state that "nothing in this Treaty shall be construed: to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary 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". The 2004 Model BIT can be found at the following link: www.state.gov/documents/organization/117601.pdf. While, the 2012 Model BIT can be found at the following link: www.state.gov/documents/organization/188371.pdf.

¹¹⁸⁶ See Annex B(4)(b) of both Models concerning the interpretation of Article 6 on investment expropriation. The statement affirms that "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".

¹¹⁸⁷ See Article 18 of the Rwanda-US BIT concerning "Essential Security" whose formulation entirely reflect that of Article 18 of the Model BIT.

¹¹⁸⁸ See Article 3(2) of the Chad-Benin BIT signed on May 18, 2001. See also Article 2(2) of the Burkina Faso-Chad BIT signed on May 18, 2001. See also Article 14(2) of the Ethiopia-Finland BIT. See also Article 14(2) of the Namibia-Finland BIT signed on October 31, 2002, and entered into force on May 21, 2005. See also the Protocol of the Uganda-Switzerland BIT. See also Article 2(3) of the Ethiopia-Germany BIT.

¹¹⁸⁹ See Article 14(3) of the Uganda-Eritrea BIT signed on June 30, 2001, but not entered into force yet.

and security serves the purpose of avoiding the adoption of measures which, in normal circumstances, would constitute a violation of the standard¹¹⁹⁰. Belgium is the country having ratified the highest number of BITs following this approach with African countries¹¹⁹¹. Also Mauritius¹¹⁹² and Morocco¹¹⁹³ have been establishing a significant practice. The BITs concluded by Mauritius represent only a small part in the state's practice, while the ones concluded by Morocco could be interpreted as drafting a new pattern in the state's practice towards the matter.

Investment disputes where the host government invoked non-precluded measures clauses have more often concerned the protection of security interests rather than the preservation of public order. Of the latter group of awards, the protection of public order has been mainly considered in the disputes originating from the Argentinean economic crisis where US' investors were involved, in the light of Article 11 of the Argentina-US BIT on non-precluded measures.

Argentina declared that the measures adopted to face the national emergency had been aimed at protecting national public order. It attempted to reinforce the defence grounded on the "necessary nature of the [emergency] measures it had implemented" during the economic crisis, also remarking its right to preserve public order¹¹⁹⁴. Argentina argued that the protection of public order had motivated the introduction of price control measures because of the risks deriving from the "sudden economic catastrophe [and the continuous] strikes involving millions of workers, fatal shootings, the shutdown of schools, businesses, transportation, energy, banking and health services, [and] demonstrations across the country"¹¹⁹⁵. The state also added that among the events allowing the government to intervene according to Article 11 of the BIT it is possible to include "violent internal upheavals, disturbances, looting and crimes, extended social tension, or the likelihood of the fundamental order falling apart and the government losing actual control over the territory of the State"¹¹⁹⁶.

¹¹⁹⁰ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 331-332.

¹¹⁹¹ See also Article 3(2) of the Uganda-Belgium BIT signed on February 1, 2005, but not entered into force yet. See also Article 3(2) of the Algeria-Belgium BIT signed on April 24, 1991, and entered into force on February 13, 1992. See also Article 3(2) of the Burkina Faso-Belgium BIT signed on May 18, 2001, and entered into force on August 18, 2003. See also Article 3(2) of the Libya-Belgium BIT signed on February 15, 2004, and entered into force on December 8, 2007.

¹¹⁹² See Article 3(b) of the Mauritius-Madagascar BIT. See also Article 2(3) of the Mauritius-Benin BIT signed on May 18, 2001, but not entered into force yet. See also Article 3(2) of the Mauritius-Belgium BIT signed on November 30, 2005, and entered into force on January 26, 2006. See also Article 2(2) of the Egypt-CAR BIT signed on February 7, 2000, but not entered into force yet.

¹¹⁹³ See Article 2(2) of the Morocco-Ukraine BIT signed on November 24, 2001, but not entered into force yet.. See also Article 2(2) of the Senegal-Morocco BIT signed on November 15, 2006, but not entered into force yet. See also Article 2(2) of the Morocco-Indonesia BIT. See also Article 3(2) of the Morocco-Chad BIT signed on December 4, 1997, but not entered into force yet. See also Article 2(3) of the Morocco-Finland BIT. See also Article 2(2) of the Morocco-Romania BIT signed on January 28, 1994, and entered into force on February 3, 2000. See also Article 2(2) of the Morocco-Pakistan BIT signed on April 16, 2001. See also Article 4(1) of the Morocco-Croatia BIT signed on September 29, 2004, but not entered into force yet. See also Article 2(2) of the Morocco-China BIT signed on March 27, 1995. See also Article 3(2) of the Morocco-Hungary BIT signed on December 12, 1991, and entered into force on February 3, 2000. See also Article 2(2) of the Morocco-Equatorial Guinea BIT signed on July 5, 2005, but not entered into force yet. See also Article 2(2) of the Morocco-Denmark BIT signed on May 22, 2003, but not entered into force yet. See also Article 3(3) of the Morocco-Argentina BIT signed on June 13, 1996, and entered into force on February 19, 2000. See also Article 2(2) of the Morocco-Turkey BIT signed on April 8, 1997, and entered into force on May 30, 2004. See also the Protocol of the Morocco-Germany BIT.

¹¹⁹⁴ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 216.

¹¹⁹⁵ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 216.

¹¹⁹⁶ See *Continental Casualty Company v. Argentine Republic*, para. 172.

Arbitral panels differently interpreted public order¹¹⁹⁷ and the events which can be included in the definition. On the one hand, Argentina was seen as having "several responses at its disposal to maintain public order" and those concerning tariffs calculation and adjustment were a "legitimate way of protecting its social and economic system"¹¹⁹⁸. On the other hand, the claimant's interpretation of public order was judged too narrow, in a way that would exclude the possibility of applying Article 11 of the BIT to circumstances of economic crisis, since it seemed more oriented at preserving "fundamental societal value, such as morality"¹¹⁹⁹. One tribunal stated that the more appropriate synonym for "public order" is "public peace", a broader concept allowing to affirm that the threats to state's stability can also originate from "actual or potential insurrections, riots and violent disturbances of the peace"¹²⁰⁰. Furthermore, it recognised that the last affirmation defined the "ordinary and principal meaning" of both "ordre public" and "orden público" (the term used in the Spanish version of the BIT)¹²⁰¹.

The opinions of legal advisors of the disputing parties have further helped to spread some light on the definition of public order. In my opinion, their reasonings could be applied to the general definition of public order. Both parties' legal advisors agreed that the inclusion of a reference to public order in a non-precluded measures clause allows host states to intervene to protect either their nationals or private property in circumstances of national instability without breaching BITs obligations¹²⁰². The legal advisors further debated on the wideness of the concept of "public order". According to a narrower interpretation, the concept concerns "actions taken to ensure internal security, often involving the temporary curtailment of individual liberties" and the more common actions a state can implement are "imposing martial law, establishing curfews, implementing measures to quell coup attempts or insurrections"¹²⁰³. The opponents to this theoretical approach invoked a wider interpretation of the concept in order to adapt it to the modern challenges to the "existence of the state", and economic crisis, as the ones experienced by Latin American countries, can pose severe threats¹²⁰⁴.

The concept of "public order" has been referred to also in international trade law. Thus, the analysis of how the concept has been dealt with could help in determining whether there are some elements applicable also to international investment law. The term "public order" has been used in treaties such as the

¹¹⁹⁷ For their part, in the interpretation of public order, the claimants in *LG&E* referred to state's police powers aiming at protecting public health and safety; while in *Continental Casualty*, the claimant referred to the measures which should guarantee policies, laws and morals typically defining a society. *Continental Casualty* went even further comparing "public order" to the French concept of "ordre public" and adding that the latter corresponded to the "common law concept of public policy". Eventually, *LG&E* added that the measures adopted by Argentina had not been aimed at preventing the economic collapse which was threatening the respondent. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 221. See also *Continental Casualty Company v. Argentine Republic*, para. 171.

¹¹⁹⁸ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 239.

¹¹⁹⁹ See *Continental Casualty Company v. Argentine Republic*, para. 174.

¹²⁰⁰ See *Continental Casualty Company v. Argentine Republic*, para. 174.

¹²⁰¹ See *Continental Casualty Company v. Argentine Republic*, para. 174.

¹²⁰² See *Sempra Energy International v. Argentine Republic*, Opinion of Alvarez J. E., para. 58. See also *Camuzzi International S.A. v. Argentine Republic*, Witness statement of Slaughter A.-M. And Burke-White W., para. 25.

¹²⁰³ See *Sempra Energy International v. Argentine Republic*, Opinion of Alvarez J. E., para. 48.

¹²⁰⁴ See *Camuzzi International S.A. v. Argentine Republic*, Witness statement of Slaughter A.-M. And Burke-White W., paras. 33-34.

GATS where Article XIV (a) deals with general exceptions¹²⁰⁵ and according to its footnote: "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". This affirmation underlines the importance of inquiring the "degree of severity" of a threat¹²⁰⁶, as well as the level of states' discretionary margin of interpretation on what constitutes a threat to national public order. The reporting panel in the WTO *Internet Gambling* case affirmed the interpretation of "public order" is a sensitive issue which varies "in time and space" also in relation to factors mainly relating to "social, cultural, ethical and religious values"¹²⁰⁷. The panel supported its thesis also referring to the terminological analysis of "public order" concluding that as the dictionary suggests, "public order refers to the preservation of the fundamental interests of a society, as reflected in public policy and law"¹²⁰⁸. The panel's interpretation of "public order" grounds its roots in civil law systems and, thus, mainly concerns the "preservation of rule of law" in circumstances of national social instability¹²⁰⁹.

Accepting the conclusions of investment arbitral tribunals, the above-mentioned legal experts' opinions and the conclusions of the WTO panel in *Internet Gambling*, it seems reasonable to agree that the events characterising the 2001 economic crisis legitimised Argentina to adopt necessary measures since the economic crisis had had repercussions also on physical security¹²¹⁰ and could be qualified as falling within the above-mentioned contextualisation of "public order"¹²¹¹. In my opinion, interpreting "public order" as mainly concerning protection against physical disturbance, but in a way which can also be extended so to include the safeguarding of a state's social and economic system, could have relevant effects also for African countries. A similar way of interpreting the concept would allow its application, not only to the circumstance of socio-political disorders, but also to the concrete hypothesis of economic difficulties experienced by states, particularly after the grave economic global crisis of the last years and after the numerous destabilising recent insurrections which are also threatening states' economic stability. More economically or politically unstable African countries could refer to those precedents in disputes which could eventually arise.

3. Non-precluded measures for the protection of national security interests.

African BITs including non-precluded measures clauses also recognise states' right to adopt measures to safeguard their security interests¹²¹². These treaty provisions present a negative formulation. They typically state that BITs provisions cannot be intended as preventing or limiting the power of contracting

¹²⁰⁵ Article XIV (a) states that "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: necessary to protect public morals or to maintain public order".

¹²⁰⁶ See Kurtz J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, The Jean Monnet Working Paper Series, Jean Monnet Working Paper 06/08, 2012, p. 43.

¹²⁰⁷ See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, No. WT/DS285/R, WTO, Report of the Panel, November 10, 2004, para. 6.461.

¹²⁰⁸ See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 6.467.

¹²⁰⁹ See Kurtz J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, p. 44.

¹²¹⁰ See *Camuzzi International S.A. v. Argentine Republic*, Witness statement of Slaughter A.-M. And Burke-White W., para. 25.

¹²¹¹ See Kurtz J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, p. 45.

¹²¹² See, for instance, Article 16(1) of the Kenya-Japan BIT signed on August 28, 2016, and not entered into force yet.

parties to adopt the measures for the protection of their respective security interests¹²¹³. This formulation generically refers to either the ensemble of other treaty provisions or to specific ones, stating they should not obstacle the adoption of non-precluded measures. For instance, in the Ethiopia-UK BIT, the parties specified that the adoption of these measures cannot be prevented by the application of the provisions "relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State"¹²¹⁴.

The expression "national security interest" has been interpreted as meaning "the security interest of [independent] states"¹²¹⁵. A further elaboration of this assumption reasonably leads to the conclusion that states' discretionary power in determining what constitutes a national security interest will "change with the popular perception of threats"¹²¹⁶. Additionally, it can be expected that the popular perception of a threat can be influenced by the level of development of the host state, among other factors. Thus, arbitral tribunals should in-depth analyse what constitutes a security interest for IIAs contracting parties. States have attempted to include in the category of security interests several circumstances, going from military threats to economic risks. It has been argued that the inclusion of these categories among fundamental security interests depends on the relationship between the level of development of a state and its inclination towards including protection either from military threats or from economic risks among fundamental security interests¹²¹⁷.

The attention of developed countries appears more frequently oriented towards the protection from different forms of military threats: either physical military threats or the possibility that foreign investors will try to penetrate sensitive national sectors, like the production of armaments or technologies for military use. Scholars interpreting industrialised states' practice of including non-precluded measures clauses in BITs have identified also the practice (especially that of the US) of including these clauses specifically referring to the protection of military-related security interests, as a reaction to the 9/11 terroristic attacks¹²¹⁸. This new interpretation of security interests has originated from an entirely new set of "non-state security threats", which have been characterising the last decade¹²¹⁹.

The textual analysis of BITs has proven the preference of developed countries for equating security interests with security from military threats. The most part of the agreements concluded between African states and developed countries refer to military-related issues. Referring to military issues has contributed to further limit non-precluded measures clauses and to exclude economic threats from the applicability of these provisions. But, at the same time, these provisions refer to "other emergenc[ies] in international relations"

¹²¹³ See, for instance, Article 10 of the Egypt-Switzerland BIT signed on June 7, 2006, and entered into force on May 15, 2012.

¹²¹⁴ See Article 7(1) of the Ethiopia-UK BIT signed on November 19, 2009, but not entered into force yet.

¹²¹⁵ See Mac Donald A., Brollowski H., *Security*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, point 2.

¹²¹⁶ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, Emory International Law Review, Vol. 23, 2009, p. 187.

¹²¹⁷ See Sornarajah M., *The International Law on Foreign Investment*, p. 458.

¹²¹⁸ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, Emory International Law Review, Vol. 23, 2009, p. 179 and ff.

¹²¹⁹ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, p. 179 and ff.

and it would be interesting to determine whether arbitral tribunals would interpret such formulation as allowing or not a broader application of these provisions also to other areas¹²²⁰.

The BITs concluded by Finland show that the non-precluded measures the parties could adopt have to aim at protecting their "essential security interests" in the very specific circumstances of "war or armed conflict, or other emergency in international relations"¹²²¹. The more detailed non-precluded measures clauses have been included in the BITs concluded by Canada¹²²² and Turkey¹²²³. Canada has mentioned the provision also in the national Model BIT¹²²⁴, while the Turkish Model BIT does not include this clause¹²²⁵. Both the Canadian and the Turkish formulation of the clause affirm that non-precluded measures can be adopted in relation to three categories of military-related issues. Firstly, they should prevent the traffic in all "goods, materials, services and technology" of arms and related components with the direct or indirect objective of "supplying a military or other security establishment". Secondly, security interests should be preserved by states' measures "in time of war or other emergency in international relations". Thirdly, states shall not be prevented from implementing "national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices".

Developing countries tend to define economic and political stability as fundamental security interests. A large part of scholars and arbitral tribunals have been sceptic in accepting that economic and political interests can be protected by non-precluded measures clauses. Frequently, they recognise that BITs do not explicitly mention economic and political stability among the interests protected by these provisions. Some scholars doubt that, in the absence of a clarification by contracting parties, both economic and political interests can be included among a country's security interests. Others exclude the possibility that such provisions can be applied to circumstances of economic crisis with the only exception "extraordinary and so

¹²²⁰ See Lévesque C. and Newcombe A. commenting Canada's Model BIT within Brown C. ed., *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford, 2013, p. 90.

¹²²¹ See Article 15(1) of the Tanzania-Finland BIT signed on June 19, 2001, and entered into force on October 30, 2002. See also Article 14(1) of the Mauritius-Finland BIT. See also Article 14(1) of the Ethiopia-Finland BIT. See also Article 14(1) of the Nigeria-Finland BIT. See also Article 14(1) of the Mozambique-Finland BIT signed on September 3, 2004, and entered into force on September 21, 2005. See also Article 14(1) of the Zambia-Finland BIT signed on September 7, 2005, but not entered into force yet. Similarly, see Article 12(1) of the Kenya-France BIT. See also Article 14(1) of the Kenya-Slovakia BIT.

¹²²² See Article 20(4) of the Benin-Canada BIT signed on January 9, 2013, and entered into force on May 12, 2014. See also Article 17(4) of the Cameroon-Canada BIT signed on March 3, 2014, but not entered into force yet. See also Article 17(4) of the Ivory Coast-Canada BIT signed on November 30, 2014, but not entered into force yet. See also Article 17(4) of the Mali-Canada BIT signed on November 28, 2014, but not entered into force yet. See also Article 18(4) of the Nigeria-Canada BIT signed on May 6, 2014, but not entered into force yet. See also Article 18(4) of the Senegal-Canada BIT signed on November 27, 2014, but not entered into force yet. See also Article 17(4) of the Tanzania-Canada BIT signed on May 17, 2013, and entered into force on December 9, 2013.

¹²²³ See Article 6(2) of the Nigeria-Turkey BIT. See also Article 5(2) of the Cameroon-Turkey BIT. See also Article 5(2) of the Gabon-Turkey BIT signed on July 18, 2012. See also Article 5(2) of the Tanzania-Turkey.

¹²²⁴ See Article 10(4) of the 2004 Canadian Model BIT. The document can be found at the following link: <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>. The provision states that "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; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

¹²²⁵ See Article of the 2000 Turkish Model BIT. See Douglas Z., *The International Law of Investment Claims*, Appendix 9.

far unprecedented [economic] circumstances" will take place¹²²⁶. However, most BITs do not list the areas constituting a security interest and only a relatively small part of them expressly refer to military security interests. Thus, the possibility of defining economic issues as a fundamental sector of interest should not be *a priori* excluded. It would be excessively limiting to accept the hypothesis that non-precluded measures are applicable only with respect to circumstances posing military threats to a state's interests¹²²⁷. The correct approach would be to include both "economic security and political stability" among "national security exceptions"¹²²⁸.

The Kenya-Slovakia BIT is the only treaty I could find in which contracting parties have dissipated any doubt on the inclusion of economic and political stability among security interests. Article 14 explicitly states that, besides the protection of their interests in time of war or conflict, contracting states will not be prevented in adopting "any action [they] consider necessary for the protection of [their]... financial, economic, social crisis or other emergency in international relations"¹²²⁹.

The theories just presented can represent a guideline to recognise the typical priorities of industrialised and developing countries, but cannot represent absolute points of view. For instance, the Morocco-US Free Trade Agreement shows that even the US have accepted to include other areas, besides military-related interests, in the definition of security interests. The FTA recognises that treaties usually do not clarify the expression "essential security interests". For this reason, contracting parties clarified that, for greater certainty, the measures they can adopt shall relate to "the production of or traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services, and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment"¹²³⁰. The two states also highlighted that these fields of action would have not been the only ones. In fact, the treaty left open the possibility that the provision could be applied to other circumstances, stating that the measures states can adopt should have included *inter alia* the above-mentioned categories. Once again, the question on whether economic interests should be included in the interpretation of these provisions has arisen.

¹²²⁶ See the Legal Opinion of José E. Alvarez of April 20, 2005, para. 8. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID, Case No. ARB/01/3, Award, May 22, 2007, paras.328 and ff.

¹²²⁷ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006, paras. 237-238.

¹²²⁸ See the Legal Opinion of Anne-Marie Slaughter and William Burke-White of March 2, 2005. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, paras. 324 and ff. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 332.

¹²²⁹ See Article 14(1) of the Kenya-Slovakia BIT.

¹²³⁰ See Article 21.2 of the Morocco-USA Free Trade Agreement signed on June 15, 2004, and entered into force on January 1, 2006. The document can be found at the following link: <http://wits.worldbank.org/GPTAD/PDF/archive/US-Morocco.pdf>. the provision states that "nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests. For greater certainty, measures that a Party considers necessary for the protection of its own essential security interests may include, inter alia, measures relating to the production of or traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services, and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment".

The interchangeable use of the expressions "national security interests" or "essential security interests" has been analysed by the UNCTAD which has pointed out that the addition of "essential" to the concept of "security interests" could allow a narrower interpretation, with respect to the broader concept of "national security"¹²³¹. However, the UNCTAD's report also refer to the likely possibility that states, while concluding IIAs, do not make an aware distinction in the choice of the two concepts, suggesting that arbitral tribunals should step in to clarify the meaning of these concepts¹²³².

4. Non-precluded measures clauses included in African regional investment treaties.

Treaties establishing African regional organisations do not mention the possibility for contracting states to adopt the measures believed necessary for the preservation of public order or security interests. Investment protocols have filled in the gap of general treaties, adopting an approach similar to that of BITs. The ECOWAS Community Investment Code stresses out that states should not encourage "investment by relaxing domestic health and safety measures"¹²³³. African states recognise that there is not any treaty provision which will obstacle the "right of every state"¹²³⁴ to adopt the "appropriate" measures to assure that the "health, safety or environmental" fields¹²³⁵, as well as "national security and public morals"¹²³⁶, will be properly protected. According to regional organisations' member states, FDI's flows have to be subordinated to the preservation of the above-mentioned sensitive areas. Furthermore, similarly to BITs, even regional investment protocols underline that the measures adopted with the aim of protecting national security or public order should not be "considered as a less favourable treatment, in the meanings of the national and of the most-favoured nation provisions"¹²³⁷.

The additional protocol adopted by COMESA has explicitly stated the self-judging nature of non-precluded measures clauses and has focused on the hypothesis that the purpose to damage or restrict investment would prevail in states' actions¹²³⁸. The solutions regional organisations have proposed to mitigate this wide discretionary states' power consist in the reasonable, non-discriminatory, non-arbitrary or unjustifiable application of these clauses¹²³⁹.

¹²³¹ See the UNCTAD's Report on *The Protection of National Security in IIAs*, UNCTAD Series on International Investment Policies for Development, Doc. No. UNCTAD/DIAE/IA/2008/5, Geneva, 2009, p. 73. The report can be found at the following link: http://unctad.org/en/docs/diaeia20085_en.pdf.

¹²³² See *The Protection of National Security in IIAs*, p. 73.

¹²³³ See Paragraph 29 of Chapter IV, dedicated to the most favoured nation treatment, of the ECOWAS Community Investment Code.

¹²³⁴ See Article 14 of the Annex I to the SADC Protocol on Finance and Investment, dedicated to Cooperation on Investment. See also Article 39 of the Unified Agreement for the Investment of Arab Capital in the Arab States.

¹²³⁵ See Article 14 of the Annex I to the SADC Protocol on Finance and Investment. See also Paragraphs from 23 to 35 of Chapter IV, dedicated to the most favoured nation treatment, of the ECOWAS Community Investment Code.

¹²³⁶ See Article 22 of the Investment Agreement for the COMESA Common Investment Area.

¹²³⁷ See Paragraph 26 of Chapter IV, dedicated to the most favoured nation treatment, of the ECOWAS Community Investment Code.

¹²³⁸ See Article 22 of the Investment Agreement for the COMESA Common Investment Area.

¹²³⁹ See Paragraphs 26 and 30 of Chapter IV, dedicated to the most favoured nation treatment, of the ECOWAS Community Investment Code. See also Article 22 of the Investment Agreement for the COMESA Common Investment Area.

Investment protocols adopted by the EAC and the OIC are the exceptions to African regional organisations' practice of including non-precluded measures clauses. The EAC Protocol on Common Market has introduced the so called "security exceptions", but only in relation to the trade of services and movement of capital, neglecting the field of investment¹²⁴⁰. On the other hand, the OIC Investment Agreement does not rely on the typical formulation that the provisions of the treaty will not affect the possibility of a state to adopt measures for the protection of security interests or public order. This protocol has switched the point of view: the provision does not mention states' right, but it calls upon investors, bounding them not to "disturb public order or morals or [to act in a way] that may be prejudicial to the public interest"¹²⁴¹.

5. Including economic stability among security interests.

Economic, political and social interests are fundamental elements for the well-functioning of a state. Circumstances of grave instability in these fields can have devastating effects on the population and state's structure¹²⁴². Socio-economic instability has been at the core of several arbitral awards and, particularly, of the series of awards involving Argentina. In this group of disputes, the claimants affirmed that non-precluded measures clauses, like Article 11 of the Argentina-US BIT, did not "exempt the respondent from liability" and that they concerned only events like war, excluding the possibility these clauses would include also economic threats within the concept of "essential security interests"¹²⁴³. Argentina grounded its defence on an extensive interpretation of "security interests" which included also economic stability¹²⁴⁴. Circumstances of economic crisis have been included among the events more likely inducing states to adopt controversial measures¹²⁴⁵. The protection against economic difficulties is one of the objects and purposes of BITs and, consequently, it should characterise also those provisions establishing the right to adopt non-precluded measures for the safeguard of security interests¹²⁴⁶.

Several scholars have criticised this interpretation, since either Article 11 of the Argentina-US BIT or customary international law would unlikely allow such "open-ended" interpretation of security interests¹²⁴⁷. Essential security interests cannot be compared to "emergencies" and the inclusion of the term "security"

¹²⁴⁰ See Article 22 of the Protocol on the Establishment of the EAC Common Market.

¹²⁴¹ See Article 9 of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference. The provision states that "the investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means".

¹²⁴² See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 238.

¹²⁴³ See *CMS Gas Transmission Company v. Argentine Republic*, paras. 340-341. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, paras. 330. See also *Sempra Energy International v. Argentine Republic*, para. 372. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 203.

¹²⁴⁴ See *CMS Gas Transmission Company v. Argentine Republic*, paras. 344 and ff. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, paras. 324 and ff. See also *Sempra Energy International v. Argentine Republic*, paras. 366 and ff.

¹²⁴⁵ See *CMS Gas Transmission Company v. Argentine Republic*, para. 354.

¹²⁴⁶ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 331. See also *Sempra Energy International v. Argentine Republic*, para. 373. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 238.

¹²⁴⁷ See Alvarez J. E., Khamsi K., *The Argentine Crisis and Foreign Investors*, in Sauvank K. P. ed, *Yearbook on International Investment Law and Policy 2008-2009*, Oxford University Press, Oxford, 2009, Chapter X, p. 452. See also *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005, para. 46.

demonstrates that the meaning of such provisions should be drastically narrowed. According to this point of view, the usual interpretation of "essential" and "security" can only relate to the military or defensive fields¹²⁴⁸. The three categories of non-precluded measures included in Article 11 of the Argentina-US BIT are measures useful to "maintain public order", to fulfil obligations relating to the "maintenance or restoration of international peace and security" and to "essential security interests"¹²⁴⁹. Thus, an interpretation of the entire Article 11, according to Article 31 of the VCLT would unequivocally prove that the parts of Article 11 referring to physical and military-related matters and, consequently, also the expression "essential security interests" have to be interpreted as not including economic issues¹²⁵⁰.

The same ILC has pointed out that, among essential interests, it is possible to include references to "safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population"¹²⁵¹. Moreover, the ILC has stated that it is not possible to define the meaning of "essential", but it has to be the result of a case-by-case analysis which has to specifically consider both states' interests and their citizens' needs as well as to take into account the objective existence of a proximate grave peril¹²⁵². In this light, it seems reasonable to conclude that even economic crisis, which for their nature and sometimes overwhelming gravity could potentially harm the state's existence and its population's safety, should be included in the events ruled by non-precluded measures clauses. In the very specific case of the Argentinean economic crisis, the events had negative effects on both the economic and physical levels because of the riots which originated after the exacerbation of the crisis¹²⁵³. However, the fact that the crisis had been characterised also by episodes of physical violence would have allowed to define the events as national emergency permitting Argentina to adopt non-precluded measures to protect its security interests, even in the case the inclusion of economic crisis in the definition of security interests was rejected.

Even the ICJ in the *Nicaragua* case has accepted the broader interpretation of "security interest". The Court affirmed that the measures adopted to protect the state from military attacks could undoubtedly be defined as protecting national security interests. At the same time, the interpretation of "security interest" should not be limited so to refer only to the hypothesis of an armed attack, but it should be broadened¹²⁵⁴. According to the ICJ, in the past, a broader range of events has been interpreted as essential security interests, but that trend should be reversed so that the concept will be relied on only in relation to

¹²⁴⁸ See *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005, para. 50. See also Alvarez J. E., Khamisi K., *The Argentine Crisis and Foreign Investors*, p. 452.

¹²⁴⁹ See *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005, paras. 48-50.

¹²⁵⁰ See *Sempra Energy International v. Argentine Republic*, Opinion of Alvarez J. E., para. 50.

¹²⁵¹ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, adopted in 2001 by the ILC, at Article 25, para. 14.

¹²⁵² See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, para. 15.

¹²⁵³ See *Camuzzi International S.A. v. Argentine Republic*, para. 25.

¹²⁵⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Reports 1986, Merits, Judgment, June 27, 1986, para. 224. The Court's conclusions were subsequently recalled in the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ, Reports 2003, Judgment, November 6, 2003, paras. 73 and ff.

circumstances where an interest is "reasonable [and] necessary"¹²⁵⁵. The ICJ's jurisprudence seems to allow the inclusion of economic interests in the interpretation of security interest¹²⁵⁶.

6. The alleged self-judging nature of non-precluded measures clauses for the protection of security interests.

The formulation of non-precluded measures clauses leaves open the fundamental question on their alleged self-judging nature. Self-judging provisions allow states to maintain the right to unilaterally decide whether to comply with or derogate international obligations. These provisions do not tend to characterise international economic law and the analysis of African BITs confirms the general trend that they are not usually included in investment treaties either¹²⁵⁷.

Only a small part of African BITs include expressions like "that [the state] considers necessary"¹²⁵⁸ which reveal the intention of contracting parties to autonomously decide whether or not to adopt measures to protect their security interests¹²⁵⁹. This formulation focuses on states' discretionary margin of interpretation and does not seem to allow the possibility of questioning their choices. In even fewer BITs, the self-judging nature of these provisions has explicitly been mentioned. For instance, the practice of the United States of America has evolved in the sense of formally recognising the self-judging character of non-precluded measures clauses. Usually, the letters exchanged between the US President and the Senate or the Department of State, attached to the BITs pending approval, included an interpretation of these provisions which states that "measures to protect a Party's essential security interests are self-judging in nature"¹²⁶⁰. The most part of the non-precluded measures clauses included in African BITs relies on expressions like "to take any other actions"¹²⁶¹ and "to take any measure necessary"¹²⁶². The general formulation of these provisions does not

¹²⁵⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 224.

¹²⁵⁶ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 351.

¹²⁵⁷ See Reinisch A., *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, Transnational Dispute Management, Vol. 5, 2006, p. 142-143. See also Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, Duke Journal of Comparative and International Law, Vol. 23, 2012, p. 184.

¹²⁵⁸ See Article 6(2)(b) of the Nigeria-Turkey BIT. See also Article 5(2)(b) of the Cameroon-Turkey BIT. See also Article 5(2)(b) of the Gabon-Turkey BIT. See also Article 14 of the Mozambique-US BIT. See also Article 18(2) of the Rwanda-US BIT. See also Article 14(1) of the Kenya-Slovakia BIT signed on December 14, 2011, but not entered into force yet.

¹²⁵⁹ See Sornarajah M., *The International Law on Foreign Investment*, p. 459-460. See also Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 344-345.

¹²⁶⁰ The Letters of Submittal have been attached to the texts of each BIT and can be found at the following link: www.state.gov/e/eb/ifa/bit/117402.htm.

¹²⁶¹ See Article 7(1) of the Ethiopia-Israel BIT. See also Article 12 of the Egypt-Botswana BIT. See also Article 12(2) of the Mozambique-India BIT. See also Article 12(2) of the Libya-India BIT. See also Article 12 of the Mauritius-Zimbabwe BIT. See also Article 12 of the Mauritius-Swaziland BIT. See also Article 12 of the Mauritius-Botswana BIT. See also Article 12 of the Mauritius-Rwanda BIT. See also Article 12 of the Mauritius-Egypt BIT. See also Article 14 of the Mauritius-Belgium BIT. See also Article 11 of the Mauritius-China BIT. See also Article 12 of the Mauritius-Mozambique BIT. See also Article 11 of the Mauritius-Singapore BIT. See also Article 2(1) of the Mauritius-Romania BIT. See also Article 11(3) of the Mauritius-India BIT. See also Article 12 of the Mauritius-Pakistan BIT.

¹²⁶² See Article 13 of the Senegal-India BIT. See also Article 7(1) of the Ethiopia-UK BIT. See also Article 12(3) of the Morocco-Gabon BIT. See also Article 11 of the Mauritius-Cameroon BIT. See also Article 12 of the Mauritius-Comoros BIT. See also Article 11 of the Mauritius-Chad BIT. See also Article 14(1) of the Mauritius-Finland BIT. See also Article 11 of the Mauritius-Mauritania

seem to imply the degree of states' judging autonomy which is required by a self-judging provision and derives from the explicit mention of states' discretionary decision power. These provisions leave open the possibility of an external evaluation of states' actions by arbitral or international tribunals and the existence of objective elements justifying the adoption of such measures by a judicial institution.

States' intention to attribute these clauses a self-judging nature needs to be unambiguously expressed: a provision cannot be considered self-judging if it does not further define the nature of this right. According to the general rules of treaty interpretation codified in Article 31(4) VCLT, the "special meaning" attributed to the self-judging nature of non-precluded measures clauses necessarily has to represent parties' will beyond any doubt. The VCLT uses the word "established" which allows the assumption that, in order to determine states' will, there has to be concrete and irrefutable proof of the decision of states to attribute such meaning to an expression. In accordance with Article 31(1) VCLT, treaties "shall be interpreted in good faith" meaning that member states have to interact "honestly and fairly" in the fulfilment of their treaty obligations¹²⁶³.

Furthermore, a host state recognising self-judging nature to a non-precluded measures clause lacking that characteristic would commit an abuse of rights, preventing the other country and its investors' from enjoying the rights deriving from the BIT. In a similar circumstance the host state could be held liable for its wrongful conduct¹²⁶⁴. The state would be responsible also in the circumstance it did not intentionally injure its counterpart, since it is sufficient the existence of an "injurious or arbitrary use of rights, competences or discretions" to arise state responsibility¹²⁶⁵.

Even in the hypothesis a provision is expressly self-judging, states' discretionary power is neither unlimited nor non-judiciable before arbitral tribunals. Arbitral panels can still exercise their jurisdiction over these clauses in the attempt of verifying states' compliance with the good faith principle, as codified in Article 26 VCLT¹²⁶⁶. A similar analysis would only contribute to determine whether non-precluded measures have been adopted in good faith, and not whether they were "necessary to further the state's essential security interests"¹²⁶⁷. Good faith is a general principle of international law and states cannot derogate from it through the adoption of an international agreement, since it also characterises the *pacta sunt servanda* principle¹²⁶⁸. In any case, non-precluded measures clauses should be subordinated to the exercise of general principles of international law such as good faith, proportionality, non-discrimination, reasonableness; otherwise the non-fulfilment of respective obligations would constitute a breach of the treaty.

BIT. See also Article 12 of the Mauritius-Senegal BIT. See also Article 11 of the Mauritius-Benin BIT. See also Article 12(1) of the Kenya-France BIT signed on December 4, 2007, but not entered into force yet.

¹²⁶³ See Kotzur M., *Good Faith (Bona Fides)*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, point 20.

¹²⁶⁴ See Kiss A., *Abuse of Rights*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, point 32.

¹²⁶⁵ See Kiss A., *Abuse of Rights*, point 32.

¹²⁶⁶ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 377.

¹²⁶⁷ See Vandevelde K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, p. 181.

¹²⁶⁸ See Vandevelde K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, p. 180.

Excluding *a priori* the jurisdiction of an arbitral tribunal would also be in conflict with other fundamental BITs obligations. For instance, the right to access dispute solution mechanisms is a fundamental principle of international investment law which cannot be derogated without violating the object and the scope of a BIT. Investment agreements have been developed in order to protect foreign investors and to promote investment flows, and dispute solution is a fundamental element on which investors' protection is grounded. Thus, preventing investors from resorting to such a fundamental right would deprive a BIT of its object and purpose. The main consequence would be the inevitable reduction of guarantees for foreign investors, thus prejudicing the entire system of treaty-based guarantees¹²⁶⁹.

What can be argued is the extension of arbitral tribunals' jurisdiction. Possibly, self-judging provisions could limit tribunals' jurisdiction to a good faith review. The principle of good faith, besides characterising states' actions, can be considered as a requirement while testing states' conduct since it goes beyond the mere attribution to states' actions, encompassing also the activities of judicial bodies¹²⁷⁰. In this scenario, the role of arbitral tribunals will not be to find a compromise between a state and foreign investor's interests, but rather to verify whether the measures adopted by a state are the result of a fair evaluation, not aimed at affecting foreign investors.

7. Arbitral tribunals on the self-judging nature of non-precluded measures.

Several arbitral tribunals have restrictively interpreted states' discretionary power to determine whether the non-precluded measures they adopt effectively protect national security interests or are adopted to affect the correct execution of investment projects. The tribunals judging the disputes arising out of the 2001 Argentinean economic crisis have set a general trend followed also by other arbitral tribunals.

The parties of these disputes mainly argued on whether Article 11 of the Argentina-US BIT, concerning non-precluded measures, was self-judging¹²⁷¹. Considering Argentina's argumentations could help in predicting future lines of reasoning of other countries experiencing similar circumstances. Argentina

¹²⁶⁹ See Vandevelde K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, p. 176. See also Alvarez J. E., Khamisi K., *The Argentine Crisis and Foreign Investors*, p. 420. The authors referred to the US BIT Programme, but the reasoning can be extended to a more general level.

¹²⁷⁰ See Burke-White W. W., Von Staden A., *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, *Yale Journal of International Law*, Vol. 35, 2010, p. 312. See also Alvarez J. E., Khamisi K., *The Argentine Crisis and Foreign Investors*, p. 425.

¹²⁷¹ See Article 11 of the Argentina-US BIT. The provision states that "this Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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". Foreign investors frequently referred to the formulation of Article XXI of the GATT and the conclusions of the ICJ in the *Nicaragua* and *Oil Platforms* cases. In the *Nicaragua* case, the ICJ affirmed that Article XXI of the 1956 FCN Treaty between the US and Nicaragua was not self-judging, since the provision did not use any specific language which could lead to an opposite conclusion. In their opinion, a comparison between the FCN Treaty and Article XXI of the GATT led the Court to the conclusion that the different language used in the former confirmed the jurisdiction of the ICJ in the legal review of the measures adopted by the contracting states. The ICJ had a certain margin of interpretation in evaluating whether the measures adopted by one of the parties could be included in that exception. In *Oil Platform*, the ICJ shared the above-mentioned interpretation of Article XX of the GATT and agreed that the evaluation of the necessity of the measures adopted by a state cannot be solely put in the hands of that state. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Reports 1986, Merits, Judgment, June 27, 1986, paras. 222-282. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ, Reports 2003, Judgment, November 6, 2003, para. 43.

focused on both the self-judging nature of Article 11 and the ICJ's jurisprudence on non-precluded measures. One of the outcomes of the *Nicaragua case* concerned the lack of self-judging nature of Article XXI of the Nicaragua-USA FCN Treaty regarding the adoption of non-precluded measures. According to Argentina's expert, this conclusion motivated the following US practice of including self-judging non-precluded measures clauses in BITs, confirming such interpretation also in several "statements before the Congress"¹²⁷².

The Argentina-US BIT was grounded on the 1987 US Model BIT which had not been influenced by the new US' approach towards self-judging non-precluded measures clauses. Argentina agreed that Article 11 had not been drafted as a self-judging provision, but that nature could have been derived from the practice of its counterpart¹²⁷³. The reference was to the US's practice of either mentioning in official statements that provisions like Article 11 should be interpreted as being self-judging or of including specific terminology explicating that interpretation in the texts of BITs¹²⁷⁴. Argentina attempted to justify its interpretation of Article 11 of the BIT, as being self-judging, on the grounds of the principle of reciprocity: the US's interpretation of the clause should have been extended also to the investment disputes where it was involved¹²⁷⁵. The country affirmed the US had explicitly informed it of their position on the self-judging nature of Article 11 and that it shared that interpretation¹²⁷⁶. The US had made their practice clear with the contemporary conclusion of BITs with other countries which included a non-precluded measures clause identical to Article 11 and in the letters submitting the BIT's text to the US Senate those other provisions were interpreted as self-judging¹²⁷⁷. In the light of this interpretation, according to Argentina, the arbitral tribunals considering Article 11 should have only determined whether Argentina's measures had been adopted in good faith, which would have been the only limit for states' possibility of adopting such measures¹²⁷⁸.

Arbitral panels agreed that Article 11 of the BIT was not self-judging. Recognising that non-precluded measures clauses were self-judging would have constituted a deprivation of the BIT's "substantive meaning"¹²⁷⁹ and would have been inconsistent with its object and purpose¹²⁸⁰. Argentina's argumentation

¹²⁷² See *CMS Gas Transmission Company v. Argentine Republic*, para. 350. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 326. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, Decision on Liability, para. 217. See also *Sempra Energy International v. Argentine Republic*, para. 368. See also *El Paso Energy International Company v. Argentine Republic*, para. 564.

¹²⁷³ See *El Paso Energy International Company v. Argentine Republic*, ICSID, Case No. ARB/03/15, Award, October 31, 2011, para. 564.

¹²⁷⁴ See *CMS Gas Transmission Company v. Argentine Republic*, para. 350. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 326. See also *Sempra Energy International v. Argentine Republic*, para. 368. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 217.

¹²⁷⁵ See *CMS Gas Transmission Company v. Argentine Republic*, para. 351. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 326. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 209. See also *El Paso Energy International Company v. Argentine Republic*, para. 564.

¹²⁷⁶ See *Continental Casualty Company v. Argentine Republic*, paras. 183-186.

¹²⁷⁷ See *El Paso Energy International Company v. Argentine Republic*, para. 568.

¹²⁷⁸ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 208. See also *El Paso Energy International Company v. Argentine Republic*, paras. 563 and 573.

¹²⁷⁹ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 333. See also *Sempra Energy International v. Argentine Republic*, para. 374.

¹²⁸⁰ See *Sempra Energy International v. Argentine Republic*, para. 374.

that Article 11 should have been interpreted in the same way as other BITs concluded in the same period was rejected. Other contemporary international agreements, more in detail those concluded after 1991, were "irrelevant for establishing the meaning" of the Argentina-US BIT¹²⁸¹. A similar conclusion could also be applied to the drafting of a new Model BIT. In 1992, the US' authorities had been debating over the adoption of the new Model BIT, but it could not have been referred to in the attempt of interpreting the non-precluded measures clause of the Argentina-US BIT¹²⁸².

The short time separating the *Nicaragua case* judgment from the period in which the Argentina-US BIT had been concluded influenced the conclusion that self-judging provisions should be clearly formulated and negotiating parties should expressly give their consent to the inclusion of similar clauses in the treaties they ratify¹²⁸³. The US, after the *Nicaragua case* decision, had been evolving their practice supporting the introduction of "self-judging clauses... as security interests [were] affected"¹²⁸⁴. Nevertheless, arbitral panels disagreed with Argentina that the discussions within the US Congress and some of the official documents mentioned by the respondent should have been interpreted as attributing to the non-precluded measures clause a self-judging nature¹²⁸⁵. Moreover, there was no evidence that either the debate within Argentinean institutions contemplated the "self-judging interpretation of Article XI"¹²⁸⁶ or Argentina explicitly accepted the US communication on the self-judging nature of the provision¹²⁸⁷. The deriving conclusion was that states wishing to include such a broad limit to the applicability of BITs provisions should do so by expressly mentioning this possibility, as it was confirmed by ICJ's jurisprudence in *Nicaragua*¹²⁸⁸ or in other BITs concluded by the US¹²⁸⁹.

The nature of non-precluded measures clauses seems to allow states a rather substantial "margin of appreciation", but the recognition of such autonomy cannot imply states' freedom of eluding treaty obligations, since the measures they can adopt could contrast with that treaty's object and purpose¹²⁹⁰.

In the end, the tribunals analysed the issue from the point of view of the role of arbitral tribunals in the hypothesis a non-precluded measures clause was recognised as self-judging. In this context, states' decision power would have considerably limited the interpretative activities of arbitral tribunals to the point that the latter could interfere with states' decisions only to verify their compliance with the principle of good faith¹²⁹¹. Arbitral panels further agreed on the impossibility they are "the sole judge of whether" states'

¹²⁸¹ See *El Paso Energy International Company v. Argentine Republic*, para. 591.

¹²⁸² See *El Paso Energy International Company v. Argentine Republic*, para. 591.

¹²⁸³ See *El Paso Energy International Company v. Argentine Republic*, para. 594.

¹²⁸⁴ See *CMS Gas Transmission Company v. Argentine Republic*, para. 368.

¹²⁸⁵ See *CMS Gas Transmission Company v. Argentine Republic*, para. 369. See also *Sempra Energy International v. Argentine Republic*, para. 379.

¹²⁸⁶ See *Sempra Energy International v. Argentine Republic*, para. 381.

¹²⁸⁷ See *Continental Casualty Company v. Argentine Republic*, para. 187.

¹²⁸⁸ The arbitral panels also referred to the *Oil Platforms case* judged by the ICJ. See *CMS Gas Transmission Company v. Argentine Republic*, para. 370. See *Sempra Energy International v. Argentine Republic*, para. 383.

¹²⁸⁹ See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 213.

¹²⁹⁰ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 331. See also *Sempra Energy International v. Argentine Republic*, para. 373. See also *Continental Casualty Company v. Argentine Republic*, para. 187.

¹²⁹¹ See the Legal Opinion of Anne-Marie Slaughter and William Burke-White of March 2, 2005. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 325.

conduct has complied with the requirements of the necessity customary rule¹²⁹². Any judicial review should be "substantial" and not simply concern the examination of the compliance with good faith¹²⁹³, especially in the light of investors' fundamental right to resort to an arbitral tribunal. The role of arbitral tribunals cannot consist in the mere verification of the compliance of the measures adopted by a state with the principle of good faith, but should rather concern the analysis of both the events and the "requirements of state of necessity"¹²⁹⁴. Preventing foreign investors from demanding a legal review of the host state's actions "would conflict in principle" with the commitment undertaken by BITs contracting parties of submitting a dispute to arbitration¹²⁹⁵. A provision could be attributed self-judging nature only in exceptional circumstances and with an explicit declaration of intent¹²⁹⁶.

8. Limits established by African countries to states' decision power in the adoption of non-precluded measures.

Both self-judging and non-self-judging non-precluded measures clauses can differently affect the possibility for foreign investors to obtain the protection guaranteed by BITs in "normal" conditions. Their wide formulations present intrinsic risks for foreign investors. The most effective approach would be balancing states' attempts to extend their control over sensitive areas and the need of foreign investors to have their investment properly protected. In several cases, contracting parties of African BITs have been introducing limitations to their possibility of adopting such measures, while still protecting national security interests. As highlighted in the Ethiopia-Israel BIT, the objective of every state should be to "minimise the deviation[s] from the provisions" included in BITs¹²⁹⁷.

The decision of limiting states' discretionary decision power in BITs has not characterised the practice of every African country. Mauritius has concluded the highest number of BITs, with both African states¹²⁹⁸ and other countries¹²⁹⁹, including provisions which do not exclude the possibility for contracting states to adopt those measures believed necessary for the protection of national security interests in any case. According to these BITs, the other provisions "shall not in any way limit the right of either Contracting Party

¹²⁹² See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, paras. 51-52.

¹²⁹³ See *CMS Gas Transmission Company v. Argentine Republic*, paras. 372-374. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para. 339. See *Sempra Energy International v. Argentine Republic*, para. 388.

¹²⁹⁴ See the Legal Opinion of José E. Alvarez of April 20, 2005. See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para.327.

¹²⁹⁵ See *Continental Casualty Company v. Argentine Republic*, para. 187.

¹²⁹⁶ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, para.327.

¹²⁹⁷ See Article 7(1) of the Ethiopia-Israel BIT.

¹²⁹⁸ See Article 12 of the Mauritius-Comoros BIT signed on May 18, 2001, but not entered into force yet. See also Article 12 of the Mauritius-Mozambique BIT. See also Article 11 of the Mauritius-Mauritania BIT signed on May 18, 2001, but not entered into force yet. See also Article 12 of the Mauritius-Senegal BIT. See also Article 11 of the Mauritius-Cameroon BIT. See also Article 12 of the Mauritius-Zimbabwe BIT. See also Article 12 of the Mauritius-Botswana BIT. See also Article 12 of the Mauritius-Swaziland BIT. See also Article 12 of the Mauritius-Rwanda BIT. See also Article 12 of the Mauritius-Egypt BIT. See also Article 11 of the Mauritius-Chad BIT signed on May 18, 2001. See also Article 11 of the Mauritius-Benin BIT.

¹²⁹⁹ See Article 11 of the Mauritius-China BIT. See also Article 12 of the Mauritius-Czech Republic BIT signed on April 5, 1999, and entered into force on May 6, 2000. See also Article 14(1) of the Mauritius-Finland BIT signed on September 12, 2007, and entered into force on October 17, 2008. See also Article 11 of the Mauritius-Singapore BIT. See also Article 11(3) of the Mauritius-India BIT signed on September 4, 1998, and entered into force on June 20, 2000. See also Article 12 of the Mauritius-Pakistan BIT. See also Article 11 of the Mauritius-Belgium BIT. See Article 2(1) of the Mauritius-Romania BIT.

to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection or its essential security interests, or to the protection of public health... or the protection of its environment". This formulation shows that contracting parties are not willing to limit their discretionary power.

The most part of African BITs dealing with states' right to adopt measures for the protection of security interests has partially restrained the broad applicability of this right by introducing some limits. The requirements more frequently mentioned in African BITs concern the nature of the national interests at stake and the specific circumstances which can rise states' right to adopt non-precluded measures. Security interests should be "essential"¹³⁰⁰, the measures adopted by the host state should be "necessary"¹³⁰¹ or "strictly necessary"¹³⁰², and, in some cases, the circumstances requiring state's intervention should be of "extreme emergency"¹³⁰³. The Mauritius-Czech Republic BIT includes a further time-related limit specifying that contracting parties should adopt such measures "only to the extent and duration necessary for the protection of [either party's] essential security interests"¹³⁰⁴.

African BITs subordinate the possibility for contracting parties to adopt such measures to the general principles of reasonableness and non-discrimination¹³⁰⁵, as well as "good-faith"¹³⁰⁶, and the adoption of these measures should not be "arbitrary or unjustified"¹³⁰⁷. The references to these principles, in such subjective provisions, contribute to include a certain degree of objectivity¹³⁰⁸ which could serve the double purpose of limiting states' decision power and offering arbitral tribunals a further possibility to judge states' actions.

9. Arbitral tribunals' position on relating the customary rule on state of necessity and BITs non-precluded measures clauses.

The previous analysis of the concept of "national security interests"¹³⁰⁹ has shown that states' perception of what constitutes such interests tends to vary, depending on factors like "the popular perception

¹³⁰⁰ See Article 10(1) of the Cameroon-US BIT. See also Article 10(1) of the DRC-US BIT. See also Article 10(1) of the Republic of Congo-US BIT. See also Article 9(1) of the Morocco-US BIT. See also Article 14(1) of the Mozambique-US BIT. See also Article 18(1) of the Rwanda-US BIT. See also Article 10(1) of the Senegal-US BIT. See also Article 11(2) of the Egypt-India BIT signed on April 9, 1997, and entered into force on November 22, 2000. Also the BITs concluded by Mauritius include the word "essential" while referring to security interests.

¹³⁰¹ See Article 7(1) of the Ethiopia-Israel BIT signed on November 26, 2003, and entered into force on March 22, 2004. See also Article 7(1) of the Ethiopia-UK BIT. See also Article 18 of the Rwanda-USA BIT.

¹³⁰² See Article 7(1) of the Ethiopia-Israel BIT.

¹³⁰³ See Article 13 of the Senegal-India BIT signed on July 3, 2008, and entered into force on October 17, 2009. See also Article 12(2) of the Libya-India BIT signed on May 26, 2007, and entered into force on March 25, 2009. See also Article 12(2) of the Mozambique-India BIT signed on February 19, 2009, and entered into force on September 23, 2009. See also Article 11(2) of the Egypt-India BIT. See also Article 12 of the Sudan-India BIT.

¹³⁰⁴ See Article 12 of the Mauritius-Czech Republic BIT.

¹³⁰⁵ See Article 13 of the Senegal-India BIT. See also Article 12 of the Egypt-Botswana BIT. See also Article 7(1) of the Ethiopia-Israel BIT. See also Article 7(1) of the Ethiopia-UK BIT. See also Article 18 of the Rwanda-USA BIT. See also Article 12(2) of the Libya-India BIT. See also Article 12(2) of the Mozambique-India BIT. See also Article 11(2) of the Egypt-India BIT. See also Article 12 of the Sudan-India BIT.

¹³⁰⁶ See Article 7(1) of the Ethiopia-Israel BIT. See also Article 7(1) of the Ethiopia-UK BIT.

¹³⁰⁷ See Article 12 of the Morocco-Gabon BIT signed on June 21, 2004, and entered into force on July 24, 2009.

¹³⁰⁸ See Sornarajah M., *The International Law on Foreign Investment*, p. 460.

¹³⁰⁹ See Chapter 4, Section III, para. 3.

of threats¹³¹⁰ or states' level of development. Industrialised countries tend to interpret the protection of national security interests as requiring protection mainly from different forms of military threats. Instead, developing countries will more likely focus on economic and political stability, defining them as national security interests. It has also been possible to observe how states refer to either "national security interests" or "essential security interests" in the BITs they conclude.

Arbitral tribunals interpreting non-precluded measures clauses have rather frequently focused on the parts of these provisions referring to the necessity of protecting national security interests. The lack of definition of what constitutes a security interest or public order has urged arbitral tribunals to adopt supplementary interpretative means in the attempt of defining both expressions and has brought them to establish a link between the concept of "national or essential security interest" included in non-precluded measures clauses and that of "essential interest" included in the customary rule on necessity and restated in ILC Article 25. This practice has characterised several awards involving Argentina after the 2001 economic crisis, while it has been more limited in disputes involving African countries. *Mitchell v. DRC* has been the only dispute, involving an African state, where the arbitral panel focused on the alleged existence of a relationship between the two concepts¹³¹¹. Those arbitral tribunals concluded that non-precluded measures clauses represent a reflection of customary international law on state responsibility and for this reason customary rules can be applied in the disputes where non-precluded measures clauses are invoked by a state¹³¹². The customary rule on necessity was expected to be applicable also because BITs clauses do not mention the "requirements for [the] invocation" of customary rules, making necessary the application of the general rule¹³¹³. Thus, the arising question is whether the two concepts of "national security interest" and "essential interest" indeed can be related or they address different issues.

I believe arbitral panels' conclusion represented a threat for the correct interpretation of the two concepts, since they generally ended up relating BITs non-precluded measures clauses "to the causes for exemption from liability"¹³¹⁴. Perceiving these clauses as precluding the wrongfulness of states' actions in specific circumstances and not as delimiting the scope of application of the BIT would constitute a

¹³¹⁰ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, p. 187.

¹³¹¹ Mr. Mitchell, an American citizen owning a firm in the DRC, was on trial before a military court because his firm had allegedly been conducting illegal activities with one of its clients. The Court ordered Congolese military forces to seal the firm's premises, seize its documents and arrest two employees. Later that year, the same Military Court rejected all the charges, released the lawyers and allegedly returned the documents. The claimant contended that the restitution never took place and stated that the Republic of Zaire, later succeeded by the DRC, expropriated his investment without compensating him for the damages suffered during the seizure, which had caused the firm's closure and a sensitive loss of clients. The tribunal concluded that, on the grounds of Article 42 of the ICSID Convention, the applicable law would have been that "of the Contracting State party to the dispute and such rules of international law as may be applicable" which had been codified in the Zaire-US BIT, since the parties had not previously agree on applicable law. The DRC, before the annulment committee, argued that the tribunal exceeded its powers since its decision to grant compensation to the claimant because of a breach of the respondent's obligation not to adopt measures tantamount to expropriation did not take into consideration the exception included in Article 10 of the DRC-US BIT, ruling the adoption of non-precluded measures. See *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID, Case No. ARB/99/7, Excerpts of Award, February 9, 2004.

¹³¹² See *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005, paras. 51-55.

¹³¹³ See Alvarez-Jimenez A., *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After The Recent ICSID Annulment Decisions*, Yearbook on International Investment Law and Policy, 2011, p. CHECK!

¹³¹⁴ See *Mr. Patrick Mitchell v. Democratic Republic of Congo*, Annulment, para. 55.

misinterpretation involving the application of a very different set of international rules which applies to very different circumstances. In fact, the consequence has been that in the attempt of defining "security interests", tribunals used to complete the analysis of Article 11 of the Argentina-US BIT, concerning non-precluded measures, referring to the requirements of ILC Article 25. The common characteristic of these awards relates to arbitral panels' practice of not "strictly separating" BITs non-precluded measures clauses from the customary necessity rule¹³¹⁵. The result, according to the UNCTAD, has been the merging in a unique defence of the two provisions because of arbitral panels' trend of reading ILC Article 25's requirements into those of Article 11 of the BIT¹³¹⁶.

The common grounds which brought to this debatable conclusion has derived from tribunals' conviction that non-precluded measures clauses do not clarify either the meaning of security interests or the "conditions for the application" of non-precluded measures, highlighting the need of looking at other provisions dealing with similar concepts. Since they agreed Article 11 of the BIT and ILC Article 25 had the "same or similar" meaning and effects¹³¹⁷, it was of fundamental importance integrating the interpretation of the BIT with the customary rule on state of necessity and its requirements¹³¹⁸. Moreover, the analysis was not limited to the verification of the compliance of the measures adopted by Argentina with the principle of good faith, but went further verifying whether those measures respected the conditions to preclude wrongfulness established in ILC Article 25¹³¹⁹. The BITs and customary international law were considered so "inseparable" (because of the lack of clarity of treaties' provisions) that the customary rule was considered complementarily, and not supplementary according to the principle of *lex specialis*¹³²⁰.

Furthermore, arbitral panels referred to the fact that BITs "create a *lex specialis* regime"¹³²¹ and the provisions they include frequently refer to the importance of complying also with customary international law. This practice has developed, for instance, in relation with the full protection and security standard, as several African BITs have been including references to the importance of complying with customary international rules in the provisions concerning full protection and security. Arbitral tribunals linking non-precluded measures clauses and the rules on responsibility have failed to maintain the separation between treaty provisions and secondary obligations. The *Sempra* arbitral tribunal highlighted that the treaty regime would prevail over customary international law, but the real problem was that none of BIT's clauses referred

¹³¹⁵ See *The Protection of National Security in IIAs*, p. 47.

¹³¹⁶ See *The Protection of National Security in IIAs*, p. 47.

¹³¹⁷ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 403.

¹³¹⁸ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, paras. 333-357. See also *Sempra Energy International v. Argentine Republic*, Award, para. 375. The CMS Annulment Committee underlined that the tribunal, as well as the parties to the dispute, had assimilated "the conditions necessary for the implementation of Article 11 of the BIT to those concerning the existence of state of necessity under customary international law". See *CMS Gas Transmission Company v. Argentine Republic*, ICSID, Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the application for annulment of the Argentine Republic, September 25, 2007, para. 128.

¹³¹⁹ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, ICSID, Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, para. 351.

¹³²⁰ See *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, Annulment, para. 334.

¹³²¹ See *Sempra Energy International v. Argentine Republic*, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005, para. 52.

either to the customary necessity rule or to its requirements¹³²². Thus, the tribunal concluded that the following step would have been relying on customary international rules. The tribunal did not even consider the possibility that the fact treaty clauses did not refer to international custom could derive from the different legal areas covered by the customary and treaty provisions which make impossible to find the relevant legal elements to carry out the test on necessity simply because the BIT's provision is not aimed at ruling that issue.

I believe those arbitral tribunals misinterpreted non-precluded measures clauses. The point of view which should be embraced is that of more recent awards and annulment committees which intervened subsequently the adoption of those awards. It is noteworthy to remind that the most part of arbitral awards and annulment decisions dealing with the issue has concerned Argentina and the 2001 economic crisis. However, in my opinion, the conclusions of those panels should be extended to other similar disputes because of the general nature of the argumentations which does not limit the contents of the analysis only to the facts characterising those specific disputes.

Annulment decisions showed that annulment committees carried out a more in-depth analysis of non-precluded measures clauses and ILC Article 25. Those committees focused on both Article 11 of the BIT and ILC Article 25 in order to highlight the similarities which had led the arbitral panels to relate them, but ultimately they separated the customary rule on necessity from the BIT's non-precluded measures clauses. The committees had different opinions on whether the two provisions used¹³²³ or not a similar language¹³²⁴. A point of contact between the two provisions is represented by the use of the word "necessity": Article 11 of the BIT stated that the measures adopted by states have to be "necessary"¹³²⁵. The use of the word "necessary" can be interpreted so that the decision of implementing non-precluded measures must not originate from states' contribution to the creation of "the situation which it [relied] on when claiming the lawfulness of its measures"¹³²⁶. A similar interpretation and the link between the two provisions can be derived from the obligation of interpreting international agreements in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, as stated in Article 31(1) of the VCLT¹³²⁷. A further contact point between the two provisions lies on their application which is aimed at making the respective fields of action more flexible.

¹³²² See *Sempra Energy International v. Argentine Republic*, Award, para. 378.

¹³²³ See *CMS Gas Transmission Company v. Argentine Republic*, Annulment, para. 129.

¹³²⁴ See *Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic*, Annulment, para. 383. The committee annulled the part of the award dealing with the impossibility for Argentina to invoke state of necessity and, since the arbitral tribunal linked so closely the ILC Articles and the BIT, the committee consequently annulled also the part relating to the inapplicability of the BIT's provision. Among the reasons for annulling the part of the award concerning Article 25, the committee recognised the tribunal's lack of motivations for introducing the parallelism between the BIT's provision and the state of necessity customary rule and not properly completing its analysis.

¹³²⁵ See *El Paso Energy International Company v. Argentine Republic*, para. 613.

¹³²⁶ See *El Paso Energy International Company v. Argentine Republic*, para. 613.

¹³²⁷ See *El Paso Energy International Company v. Argentine Republic*, para. 613.

A deeper analysis of the two provisions shows their intrinsic difference¹³²⁸, demonstrating that "Article 25 [does] not offer a guide to the interpretation of the terms used in Article 11"¹³²⁹. Article 25 could have been separately considered, as a further defensive ground, by those arbitral panels¹³³⁰. Article 25 is formulated in a negative way, while Article 11 "specifies the conditions" for the application of the BIT¹³³¹. Article 11 states that other BIT's provisions shall not preclude a state to adopt measures in specific circumstances, while Article 25 is relevant only in the case a state has breached an international obligation¹³³². Article 11 relates to the adoption of measures aimed at protecting public order or security interests, while Article 25 lists the conditions for a state to invoke necessity in order to "excuse" a wrongful conduct¹³³³. Concerning the concept of "interest", the BIT mentions the right of a state to safeguard its security interests by adopting necessary measures, while the Draft Articles refer to the actions of the state invoking the state of necessity which could impair an essential interest. Furthermore, even though Article 11 does not define who should evaluate what constitutes a necessary security interest, but, once the measures are "properly judged to be necessary", the judicial control grounded on the state of necessity customary rule would be superfluous¹³³⁴. The two provisions differ not only in their contents, but also in their conditions for application: the first can be applied only in an investment framework with the purpose of limiting the applicability of treaty obligations dealing with protection, while the latter can concern "any context against any international obligation"¹³³⁵.

¹³²⁸ See *CMS Gas Transmission Company v. Argentine Republic*, Annulment, paras. 129-130. According to the annulment committee, the tribunal made a "manifest error of law" because the two provisions clearly had different contents and applied to different circumstances. The other tribunal's mistake was considering customary international law as having a mere subsidiary and not complementary role. See also *Sempra Energy International v. Argentine Republic*, Annulment, para. 199. Even the *Sempra* committee concluded that the tribunal had failed to apply Article 11 of the BIT (the applicable law), applying instead ILC Article 25, manifestly exceeding its power. The committee disagreed that the tribunal had failed to state the reasons which guided its reasoning on whether Article 11 was self-judging because its argumentations were coherently and fully expressed. The tribunal's reasons were clear also in the part where the requirements of Article 11 and Article 25 were compared: the BIT's content was so different from that of the state of necessity rule, that it would have been impossible to invoke the latter provision. It is a legitimate practice to look at customary international law for guidance, but, at the same time, the committee remembered that states can contract obligations different from customary law. The committee concluded that the error in law constituted an excess of powers of the tribunal which further failed to "identify or apply Article 11 of the BIT as the applicable law" and decided the award had to be annulled in its entirety.

¹³²⁹ See *Sempra Energy International v. Argentine Republic*, Annulment, para. 199.

¹³³⁰ See *The Protection of National Security in IIAs*, p. 48.

¹³³¹ See *CMS Gas Transmission Company v. Argentine Republic*, Annulment, para. 129.

¹³³² See *CMS Gas Transmission Company v. Argentine Republic*, Annulment, para. 129.

¹³³³ See *CMS Gas Transmission Company v. Argentine Republic*, Annulment, para. 129. See also *Continental Casualty Company v. Argentine Republic*, para. 166.

¹³³⁴ See *Sempra Energy International v. Argentine Republic*, Annulment, para. 205. See also *Continental Casualty Company v. Argentine Republic*, para. 162. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 245. However, the latter arbitral panel ended up linking the two provisions by stating that Article 11 "exempts Argentina of responsibility for measures enacted during the state of necessity" and that Article 25 should have been considered as an additional means to integrate Argentina's defence in interpreting the meaning of Article 11, failing to clarify "whether the two defences were different". See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 257-258. See also Alvarez J. E., *The Public International Law Regime Governing International Investment*, p. 384.

¹³³⁵ See *Continental Casualty Company v. Argentine Republic*, para. 167.

10. Doubts on the establishment of a direct connection between the customary rule on state of necessity and non-precluded measures clauses.

The objective of the present paragraph will be to present further argumentations for separately considering non-precluded measures clauses and the customary rule on necessity. The debate on this relationship has interested the literal formulation of these provisions, the relationship between different areas of international law and, finally, the importance of states' declarations.

Commentators to the ILC Articles on State Responsibility have posed the question of whether specific treaty provisions are "to coexist with or to exclude the general rule that would otherwise apply". Applying the affirmation to BITs and non-precluded measures clauses, the result would be that BITs clarify the "extent to which the more general rules on State responsibility... are displaced by" those specific clauses¹³³⁶. Thus, if the theory that the customary rule on necessity and these BITs clauses are related is accepted, in the case BITs provisions are clearly formulated, they will be considered as the applicable law. Nevertheless, the vagueness of non-precluded measures clauses has caused a significant part of jurisprudence and doctrine to decide to look for clarifications in the customary rule on necessity. Those supporting this point of view also state that the absence of an express declaration in the text of a BIT is proof that states will not derogate the customary rule on necessity, since differences in the text of a treaty do not mean that a provision derogates from the customary rule¹³³⁷. This reasoning would be acceptable in the case treaty and customary rules rule the same matter, but I think this is not the case.

One of the main objectives of BITs is to protect foreign investors in different circumstances, but they also assure great consideration to states' interests¹³³⁸. BITs are not legal instruments exclusively aimed at providing guarantees to investors: states would not conclude them in the case there is not anything in exchange. At the same time, non-precluded measures clauses cannot be interpreted as having the consequence of entirely excluding the applicability of the guarantees normally assured to foreign investors¹³³⁹. Thus, it is possible that states' general practice is to prefer the creation of *lex specialis* clauses rather than constantly referring to customary international rules. The limited reference to customary rules, like in the cases of the international minimum standard or rules on expropriation or compensation, demonstrate that states prefer a "pick and choose strategy"¹³⁴⁰. The advantages of establishing a flexible judicial framework able to respond to states' necessities, especially in the light of an increasing number of arbitral awards favouring foreign investors, seems to have prevailed in states' practice. However, states have to explicitly state whether BITs obligations relate to customary international rules. It is an element which

¹³³⁶ See Point 3 of the Commentary.

¹³³⁷ See Alvarez J. E., Khamsi K., *The Argentine Crisis and Foreign Investors*, in Sauvant K. P. ed, *Yearbook on International Investment Law and Policy 2008-2009*, Oxford University Press, Oxford, 2009, Chapter X, p. 432. See, debating the previous theory, Alvarez-Jimenez A., *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After The Recent ICSID Annulment Decisions*, Yearbook on International Investment Law and Policy, 2011.

¹³³⁸ See Alvarez-Jimenez A., *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After The Recent ICSID Annulment Decisions*.

¹³³⁹ See Alvarez-Jimenez A., *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After The Recent ICSID Annulment Decisions*.

¹³⁴⁰ See Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, p. 204-205.

cannot be assumed through the simple reading of a BIT's text and through a reference to apparently similar expressions. Even in the case a customary rule is applicable, it is of fundamental importance that arbitral tribunals will not apply the customary rule in an aseptic way without considering the particular framework established by an investment treaty, as well as neglecting to apply primary obligations.

Non-precluded measures clauses could be defined as *lex specialis* only in the circumstance they and the customary rule on necessity would have disciplined identical issues. The same Preamble of the VCLT reminds the principle that customary rules shall be applicable also in the circumstance some issues are not ruled by an international agreement¹³⁴¹. Indeed, non-precluded measures clauses are *lex specialis*, but not in relation with clauses precluding wrongfulness such as necessity or force majeure and, for this reason, arbitral tribunals should consider them in separate instances¹³⁴². In any case, ILC Article 55 on *lex specialis* reminds the importance of *lex specialis* in relation with customary rules on state responsibility and that *lex specialis* shall be applied as the primary obligation, despite the existence of a customary rule dealing with the same matter. In the hypothesis the existence of a relationship between the two provisions is accepted, it is necessary that the BIT's breach is considered as the primary obligation and, only in a second time, the customary test can be carried out.

As it has been ascertained in the previous paragraph, arbitral tribunals' approach of focusing on the apparent similarity of the wording of ILC Article on state of necessity with non-precluded measures clauses presents several debatable points. The analysis has shown that there is not any such relationship between non-precluded measures clauses and the customary rules. On the one hand, arbitral tribunals have tried to complete the awards by relating to legal standards "external" from investment law. On the other hand, they have carried out a limited "substantive analysis of the conditions" which should exist for a correct adaptation of rules normally relied on in different subsystems of international law¹³⁴³. Arbitral panels ultimately failed to properly analyse the articles on state responsibility and their practical implications in relation to the contents and effects of non-precluded measures clauses.

ILC Article 25 presents a negative formulation, stating that generally the state of necessity cannot be invoked as a preclusion of wrongfulness, which has been preferred to highlight the "exceptionality of [the] defence"¹³⁴⁴. BITs provisions are more oriented at underlining the absence of obstacles in the possibility of adopting certain measures for protecting either security interests or public order, instead of forbidding states

¹³⁴¹ The relevant part of the Preamble of the Vienna Convention on the Law of Treaties states that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

¹³⁴² See Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 895.

¹³⁴³ See Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, *Foreign Investment Law Journal*, Vol. 25, Issue 1, 2010, p. 200-201. See also Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 832. See also Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, *Duke Journal of Comparative and International Law*, Vol. 23, 2012, p. 186.

¹³⁴⁴ See Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*, within Weiler T. ed., *Investment treaty Arbitration and International Law*, Huntington, New York, 2008, Chapter 8. The author referred to *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Reports 1997, Judgment, September 25, 1997, para. 51.

from adopting such measures¹³⁴⁵. The two provisions clearly concern different legal issues¹³⁴⁶. Article 25's only purpose is to preclude the wrongfulness of a state's conduct, while non-precluded measures clauses allow states to protect their security interests or public order¹³⁴⁷.

Article 25 establishes a very high and narrower threshold for the invocation of the state of necessity, while BITs refer to limits that states should respect such as good faith or non-discrimination. Article 25(1)(a) requires that the acts implemented by a state are the "only way" for the protection of a state's interests in specific situations of "grave and imminent peril". Article 25(1)(b) requires that the state's conduct will not threaten the interests of other states or the international community. African BITs provisions do not refer in any circumstance to these strict requirements. Moreover, Article 25 technically refers only to those acts which can harm another state's essential interests. Thus, the violation of an investor's right does not arise *per se* state's responsibility because the investor's right could not mirror his mother-country's essential interest. For this reason, a wide range of circumstances could not be protected by the customary rule.

Finally, I agree with those scholars pointing out that intertwining non-precluded measures clauses with the customary rule on necessity is methodologically incorrect because these tribunals have not been interpreting non-precluded measures clauses according to the rules of interpretation codified in Articles 31 and 32 VCLT¹³⁴⁸. The incorrect conclusion that such BIT clauses would exempt a state from international responsibility could have emerged from an interpretive leap deriving from the debatable reference to ILC Article 25 and the inclination to refer to legal instruments other than the relevant BIT¹³⁴⁹. Furthermore, it seems that a similar approach goes against the necessity customary rule's purpose of representing an exceptional excuse which can be invoked by states.

It is fundamental that BITs include an explicit declaration of states' intentions of establishing a connection between the two provisions, since states' intentions cannot be presumed¹³⁵⁰. According to Articles 31 and 32 VCLT, it seems more reasonable to conclude that non-precluded measures clauses establish a regime which is separate from customary rule on necessity because the two sources coexist but are at the same time independent, unless the *travaux préparatoires* or the text of a BIT or other official statements of contracting parties state otherwise¹³⁵¹. Thus, it would be preferable that states willing to establish such connection among the provisions explicitly mention their intention in the texts of the BITs, as well as in the commentaries attached to those treaties.

¹³⁴⁵ See Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 917.

¹³⁴⁶ See Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, p. 212. See also Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 902.

¹³⁴⁷ There have been arbitral tribunals explicitly affirming that the state's conduct during the economic crisis had not arisen its responsibility because the emergency measures complied with the BIT's obligations. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, paras. 229 and 257.

¹³⁴⁸ See Sloane R. D., *On the Use and Abuse of Necessity in the Law of State Responsibility*, p. 61.

¹³⁴⁹ See Sloane R. D., *On the Use and Abuse of Necessity in the Law of State Responsibility*, p. 61.

¹³⁵⁰ See *Camuzzi International S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/2, Witness statement of Slaughter A.-M. And Burke-White W., December 2, 2005, para. 38.

¹³⁵¹ See *Camuzzi International S.A. v. Argentine Republic*, ICSID, Case No. ARB/03/2, Witness statement of Slaughter A.-M. And Burke-White W., December 2, 2005, para. 35.

The analysis of BITs non-precluded measures clauses in accordance with the rules on treaty interpretation shows that there is not any BITs text referring to the customary rule on necessity and, thus, the invocation of Article 31 VCLT seems precluded. I agree that the absence of external elements suggesting the existence of a link between non-precluded measures clauses and ILC Article 25 is proof of the lack of the existence of such a link¹³⁵². In fact, not even the conditions mentioned in Article 31(3) VCLT seem to have been fulfilled by any country. Discarded the possibility to invoke the general rule of interpretation in the attempt of linking non-precluded measures clauses and the customary rule on necessity, the supplementary means of interpretation would be the other alternatively applicable rule. The chances that Article 25 can operate as a subsidiary means of interpretation are scarce. The differences between BITs and the customary necessity rule are so great that the possibility to interpret non-precluded measures clauses according to Article 31 will automatically eliminate the possibility to resort also to Article 32.

In my opinion, relating the two provisions would inevitably lead to the interpretation of non-precluded measures as wrongful acts which will be subject to the test established in Article 25, in order to prove that the measures are not internationally wrongful. Nevertheless, it cannot be *a priori* proved that a non-precluded measure constitutes a wrongful act and such assumption does not seem to mirror the "spirit" of the provision. It is possible that the adoption of these measures does not automatically constitute a violation of BITs provisions, as some of them can be defined as "legitimate regulatory actions"¹³⁵³. Indeed, such measures can be wrongful acts, but, in this case, the analysis of their wrongfulness has to be carried out separately from the analysis on the breach of non-precluded measures clauses.

11. Strategies to avoid the negative effects of non-precluded measures on foreign investors' security.

Non-precluded measures clauses undoubtedly have the effect of weakening investors' guarantees in favour of a larger protection of states' security interests or the maintenance of public order. Further arguable effects of these clauses relate to their heterogeneous interpretation by arbitral tribunals. Fair and equitable treatment standard and the rules on indirect expropriation are the standards mostly affected by non-precluded measures clauses¹³⁵⁴. However, also the application of the full protection and security standard can be threatened by the adoption of non-precluded measures. It is not infrequent for host states facing threats to their security interests or public order to adopt such measures and relax on the protection usually granted to foreign investors. This scenario is more likely to verify in developing countries, like African states, since the protection and security they can guarantee to foreign investors are already undermined by precarious national stability. Threats to investment protection and security are even more plausible if an extensive interpretation of security interests is accepted, so to cover the necessity of protecting states' interests from economic

¹³⁵² See Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 910.

¹³⁵³ See Sacerdoti G., *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, p. 6.

¹³⁵⁴ See Sacerdoti G., *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, p. 6-9.

threats. In the African continent, economic difficulties can originate from both market instability or from states of war or civil unrest.

The adoption of non-precluded measures clauses can also operate as deterrent for foreign investors wishing to invest in a new country. This could be the case of an unstable country having concluded a BIT including these clauses which is not either wishing or effectively able to control the quite large discretionary decision power deriving from the possibility of adopting non-precluded measures. Investors' expectations deserve to be considered as a fundamental component of the process of investing abroad, as it happens to the right of every state to pursue its national security and stability¹³⁵⁵. But, the uncertain content of these clauses will increase investors' uncertainty, at least until a consolidated interpretation of security interests and of the extent of applicability of non-precluded measures clauses will take place¹³⁵⁶. Especially politically-oriented motivations are difficult to foresee because, most of the time they are not guided by objective considerations and can unexpectedly arise, depending on the political vicissitudes experienced by a country. They can derive from the origin of the foreign investor or from a "retaliation" of the host country in response to specific political choices of the investor's mother country¹³⁵⁷.

For the above-mentioned reasons, the most important result would be balancing states' rights and the fundamental obligation of protecting foreign investors¹³⁵⁸. Such delicate balance needs to be found in the "allocation of risks and costs between states and investors"¹³⁵⁹. The solution to this uncertainty over the interpretation of non-precluded measures clauses should come from both states and arbitral tribunals, especially since these provisions are becoming more common in treaty practice and their interpretation has been concerning several arbitral disputes.

As it is happening in relation to the full protection and security standard that states are starting to clarify which level of protection (legal or physical) they are eager to assure foreign investors, states should clarify whether they believe certain customary rules, like state of necessity, should be applied in the interpretation of IIAs. States should either modify BITs or present official statements citing their point of view on the matter. For their part, arbitral tribunals should effectively distinguish between general and particular rules, and should be more precise in analysing these sources of law, effectively applying the

¹³⁵⁵ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, p. 406.

¹³⁵⁶ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, p. 187.

¹³⁵⁷ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, p. 189.

¹³⁵⁸ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008, p. 314. See also Alvarez J. E., Khamsi K., *The Argentine Crisis and Foreign Investors*, in Sauvant K. P. ed., *Yearbook on International Investment Law and Policy 2008-2009*, Oxford University Press, Oxford, 2009, Chapter X, p. 448. See also Aguirre Luzi R., *BITs & Economic Crises: Do States Have Carte Blanche?*, within Weiler T. ed., *Investment treaty Arbitration and International Law*, Huntington, New York, 2008, Chapter 8. See also Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, Duke Journal of Comparative and International Law, Vol. 23, 2012, p. 186.

¹³⁵⁹ See Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, p. 348-401.

interpretative rules of the VCLT¹³⁶⁰. About the theory of the absence of any link between custom and BITs provisions, arbitral tribunals should rely on new principles and standards to interpret such provisions, since they could not refer to customary rules on state responsibility¹³⁶¹. Anyways, the interpretation incorporating the customary rule on necessity in non-precluded measures clauses should only take place when it has been clearly foreseen by states, beyond any doubt, that the BIT's text and the contracting parties intended to include this possibility¹³⁶².

The most beneficial result for both foreign investors and host states shall be the progressive narrowing of the interpretation of security interests. Foreign investors will be able to fully enjoy the guarantees assured in the BITs and host countries will benefit in terms of better responding to the challenges of the 21st century, like terrorism¹³⁶³, war or economic threats. The various levels of state development can influence the proliferation of different perceptions of what constitute a threat to either security interests or public order and I believe it is an element which will allow narrower definitions of "security interests".

SECTION IV. Cultural property's protection, the detention and deportation of foreign investors and the suspension of bilateral relations.

1. The protection of cultural property.

The protection of the cultural and historical heritage of a country is a rather uncommon defence. In few cases states have claimed foreign investment carried out in their territories jeopardised national cultural property. The importance of such argumentation is twofold. On the one hand, it remarks the necessity of protecting a state's historical heritage from purely market-oriented speculations. On the other hand, it highlights the attempt of introducing in investment arbitration principles typically used in different contexts.

SPP v. Egypt is probably the most relevant award focusing on the protection of cultural heritage and has also been referred to as a precedent by other arbitral tribunals¹³⁶⁴. The dispute concerned the non-performance of contractual obligations and Egypt's invocation of the necessity of protecting the country's cultural heritage for having breached its international obligations towards the claimants¹³⁶⁵.

¹³⁶⁰ See Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, Foreign Investment Law Journal, Vol. 25, Issue 1, 2010, p. 216-217. See also Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 832, 915 and 919.

¹³⁶¹ See Bjorklund A. K., *Emergency Exceptions: State of Necessity and Force Majeure*, p. 498.

¹³⁶² See Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, p. 916.

¹³⁶³ See Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, p. 200.

¹³⁶⁴ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICSID, Case No. ARB/84/3, Award on the Merits, March 20, 1992.

¹³⁶⁵ The claimants and EGOH (a public sector enterprise operating in the development of tourism sector) established a joint venture for the building of a touristic complex within the Pyramids area. Egyptian authorities approved the establishment of the joint venture, the development of the tourist project on the Pyramids area and authorised the assignment of usufruct rights. Immediately, an increasing political opposition arose against the construction works and led the project's opponents to declare the realisation of the touristic project "posed a threat to undiscovered antiquities". In the end, a Presidential decree cancelled the precedent authorisations

The fact Egyptian domestic legislation did not provide any remedy for the claimants¹³⁶⁶ motivated the tribunal to consider other sources of international law. The tribunal affirmed Article 42(1) of the Washington Convention, binding arbitral tribunals to apply international rules whenever there is a lack of agreement on applicable law, is also applicable in the hypothesis the sole application of state law violates a rule of international law or state law presents lacunae¹³⁶⁷. In any case, Article 42(1) does not involve any evaluation on the validity of states' domestic legislation, even though it is possible that the ending result will consist in the non application of domestic legislation (whenever the application of state law causes a breach of international law)¹³⁶⁸. Then, the consideration of the events in the light of the UNESCO Convention motivated the tribunal's conclusion that not even the Convention could have justified "the measures taken by the Respondent to cancel the project, nor [it excluded] the Claimants' right to compensation"¹³⁶⁹.

Indeed, Egypt had a sovereign right to terminate the execution of the project in order to preserve the antiquities present in the area and the cancellation of the project was entirely lawful¹³⁷⁰. The claimants did not even challenge the public purpose of the decision. They only complained about Egypt's failure to compensate them after having cancelled the investment project and for the capitals already invested in the project's drafting and the missed opportunity of profiting from the touristic site¹³⁷¹. The payment of compensation was a right granted by Egyptian law (by both the Constitution and ordinary law) and international law¹³⁷². Egyptian law guaranteed compensation, not only in the general hypothesis of expropriation, but also in the specific circumstance of expropriation when the discovery of antiquities was involved. On the contrary, Egypt asserted that its laws did not cover the right to compensation for the specific interests which had been allegedly unlawfully expropriated; that there had not been a transfer of property to the state qualifying a nationalisation; and that the claimants had not been entirely deprived of their rights. The tribunal concluded that contractual rights arising out of the conclusion of the joint venture contract and that for the building of the touristic site were "entitled to the protection of international law" and, consequently, the foreign investors had to be compensated¹³⁷³.

I believe the tribunal in *SPP* did not exhaustively consider the relation between the protection of foreign investment and cultural property. One of the reasons can be linked to the nature of the tribunal, a contract-based tribunal whose only purpose was to determine whether a breach of the contract had occurred¹³⁷⁴. The arbitral panel dismissed the issue whether the tourist complex could have endangered the historical area right after it determined that the listing of the Pyramids Plateau in the World Heritage List had

for the exploitation of the area for touristic purposes, declaring it had "public utility" and, eventually, Egypt revoked the permits for the building of the touristic complex. See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, paras. 62-65.

¹³⁶⁶ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 84.

¹³⁶⁷ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 84.

¹³⁶⁸ See Broches A., *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours, Vol. 136, 1972, p. 342. See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 84.

¹³⁶⁹ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 154.

¹³⁷⁰ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 158.

¹³⁷¹ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 180 point 7.

¹³⁷² See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 159.

¹³⁷³ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 164.

¹³⁷⁴ See Sornarajah M., *The International Law on Foreign Investment*, p. 471.

been made after the conclusion of the contract between SPP and EGOH. Similarly, in a more recent contract-based dispute, *Malaysian Salvors v. Malaysia*¹³⁷⁵, neither the tribunal nor the parties seemed concerned about the historical and cultural relevance of the ship's cargo and the effects its mere consideration as common goods, involved in an economic transaction, could have had on those relics¹³⁷⁶. The risk about contract-based tribunals only focusing on contractual obligations is that they can end up avoiding considering the implications of a dispute in terms of preserving and protecting antiquities with a fundamental historical value for the mankind.

Other considerations derive from the reading of the dissenting opinion of the Egyptian arbitrator to the *SPP* award. A point considered by the dissenting arbitrator regarded Egypt's "concern for the antiquities at the project site and the legitimacy of its registration under the UNESCO Convention"¹³⁷⁷. The state even issued a decree classifying the area as public property and authorising expropriations for the protection of the antiquities located there, after the conclusion of the joint venture agreement between EGOH and the claimants. Nevertheless, Egypt ratified the Convention in 1974 and it submitted its request to consider the Pyramids Plateau a protected area only in 1979. According to the Convention, it was up to the state submitting to the World Heritage Committee a request for the specific areas intended for protection, it could not be a choice "imposed externally". Consequently, it was only after 1979 that the construction project could have been evaluated as unlawful according to international law¹³⁷⁸.

The dissenting arbitrator offered an interesting cause for reflection suggesting that the principles codified in the UNESCO Convention had already internationally consolidated long before the decision of negotiating the Convention¹³⁷⁹. He also added that the protection of antiquities belonging to the World Heritage was already an *ius cogens* rule¹³⁸⁰. The example he presented about the existence of such international obligation concerned the effort of the international community in moving the Abu Simbel temple during the construction works of the Aswan Dam. That decision had been taken in the 60s and the arbitrator interpreted that event as a symbol of the existence of "*un état d'esprit* of the International Community behind its strive to preserve its own Cultural Heritage"¹³⁸¹. It is undisputed that the replacement of the Abu Simbel and Philae temples represented a cornerstone. From that moment, the international community started a productive cooperation process for the protection of the world cultural heritage. It is plausible that the moving of the Egyptian temples started the formation of a customary rule, which by the time of the dispute had fully formed. But, if Egypt believed that the protection of cultural heritage had been a customary rule since the 60s, it should not have authorised the execution of the project in the first place since

¹³⁷⁵ The claimant and the respondent had entered a contract for the recovery of a British ship, containing Chinese porcelain, sunk near the Malaccan coastline in the XIX century. The claimant declared Malaysia had allegedly not paid the contracted percentage for the claimant's services, after the recovery of the ship and the auctioning of the cargo. See *Malaysian Historical Salvors v. Government of Malaysia*, ICSID, Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007.

¹³⁷⁶ See Sornarajah M., *The International Law on Foreign Investment*, p. 471.

¹³⁷⁷ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, para. 156.

¹³⁷⁸ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, paras. 154 and 190.

¹³⁷⁹ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, Dissenting Opinion, p. 410.

¹³⁸⁰ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, Dissenting Opinion, p. 410.

¹³⁸¹ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, Dissenting Opinion, p. 410.

its behaviour would have been contrary to an international obligation it believed already existent. Furthermore, it could have invoked that customary rule in its defence, but there were neither records of a similar argumentation nor evidence presented to meet the threshold of the burden of proof.

The dissenting arbitrator further underlined that the contract was a "*contrat à grand risque*" since the parties had to know the great risks deriving from operating on the Pyramids Plateau and had chosen to continue the execution of the project on that area, instead of the alternative site proposed by the respondent¹³⁸². He affirmed the claimants had been aware of the historical relevance of the area and of the antiquities present there (either discovered or potentially discoverable¹³⁸³) and that it would have endangered the monuments protected by the UNESCO Convention. The claimants' cooperation with the Egyptian Antiquities Authority was further proof of their interest in the preservation of the historical sites present in the Pyramids Plateau. According to the arbitrator, this spirit of cooperation and the acknowledgement of the historical value of the area confirmed the "*notion du risque*" characterising the investment project¹³⁸⁴. He also highlighted that the approved project would have trespassed upon the monuments' zone which would have been endangered.

In my opinion, risk is an intrinsic component of investment which has to be taken into account, but the disputed events have clearly shown that the claimants considered the project-related risks. The claimants' desire of cooperating with Egyptian institutions for the protection of antiquities proved their intention of assuring the correct execution of the investment and of attempting to avoid future procedural issues to arise. However, the acceptance of risks by the investors should have been balanced by Egypt's guarantee for a stable investment framework. A host state cannot abruptly change or eliminate the guarantees fundamental for the execution of an investment initially provided to an investor, without substituting them with new ones or compensating the investor who relied on initial circumstances.

The dissenting arbitrator also referred to a sort of "sense of responsibility" of the investors, which should have prevented them from deciding to realise a tourist complex so close to the Pyramids Plateau in the first place. Investors' main purpose is profiting from an investment, thus they will reasonably do everything in their power to favour their interests. I believe that, in *SPP's* specific circumstances, the investors' profits would have definitively been higher building the complex in that zone and their offer to cooperate with national authorities was aimed at showing their consideration for the building area. It could be expected more from investors in terms of ethic involvement in the realisation of an investment. But, if international investment law does not evolve in the way of requiring foreign investors a more "conscious" approach, there will only be cautious expectations that they will give more consideration to issues like the necessity of protecting host countries' cultural heritage.

¹³⁸² See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICSID, Case No. ARB/84/3, Dissenting Opinion, March 20, 1992, p. 408.

¹³⁸³ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, Dissenting Opinion, p. 410.

¹³⁸⁴ See *Southern Pacific Properties Limited v. Arab Republic of Egypt*, Dissenting Opinion, p. 409.

Possible solutions that, in my opinion, can favour the development of foreign investors' "sense of responsibility" towards host countries could consist in the inclusion of references to the necessity of respecting and protecting host states' cultural heritage in the codes of conduct investors, especially multinational companies, nowadays tend to adopt. References to the protection of cultural heritage could also be included in IIAs, following the increasing present trend of integrating IIAs with other international principles, such as the protection of human rights, labour rights or the environment. On the other hand, there could have been more focus on Egypt's role in those events. The relevance of the archaeological area had been very well known also at the time EGOH and the claimants concluded the joint venture agreement and, accordingly, clear limits were established to the project's development. Nevertheless, Egyptian authorities granted the necessary permits for the realisation of the project on the Pyramids Plateau, instead of on the other site proposed at the early negotiation stages.

Contract-based tribunals will likely consider the protection of a country's cultural heritage only in the circumstance an actual damage to historical remains has occurred, fostering the opinion that it is rather unlikely "a contract-based tribunal [will] adequately consider such issues"¹³⁸⁵. The previous analysis of *SPP* and *Malaysian Salvors* has shown that both tribunals carried out a purely contractual analysis of the disputes, having to judge the alleged spoliation of the claimants' contractual rights. They ended up marginally considering the historical and cultural relevance of the areas and the relics. The only circumstance which could have motivated the tribunals' consideration of international rules concerning the protection of cultural heritage would have related to the damaging of "material of archaeological significance listed under the World Heritage Convention"¹³⁸⁶.

The emerging question is whether treaty-based arbitral tribunals, instead of contract-based arbitral panels, could be expected to extend their analysis so to consider principles of international law normally applied in different circumstances (such as the protection of cultural property, human rights or international trades). It is uncommon that contract-based tribunals would focus on such areas as well. For instance, in the *Malaysian Salvors* case, the cargo of the sunken ship was considered only as a commodity. It was found intact and was at the core of a commercial transaction, thus the arbitral panel did not deem necessary extending their analysis to other international rules. An exception could be represented by the case of a relic damaged by the investor after the conclusion of a contract for the development of an investment, where the relic would have had a primary relevance. An example could be the possibility SPP had damaged the Pyramids Plateau after having concluded the contract for the building of the touristic facility. In this circumstance, since the relic was a fundamental element for the deployment of the investment, the arbitral panel would have had to consider also the rules on cultural heritage's protection.

Anyway, the chances a contract-based tribunal will be able to carry out such analysis are rather scant¹³⁸⁷. I believe this depends on the composition and the resources at these tribunals' disposal. From the

¹³⁸⁵ See Sornarajah M., *The International Law on Foreign Investment*, p. 471.

¹³⁸⁶ See Sornarajah M., *The International Law on Foreign Investment*, p. 471.

¹³⁸⁷ See Sornarajah M., *The International Law on Foreign Investment*, p. 471.

economic point of view, arbitral tribunals can prove costly for disputes' parties and this is the reason they tend to settle disputes more rapidly than other international tribunals focusing only on the more essential issues. From the perspective of the composition of arbitral panels in disputes having a commercial nature, parties will tend to appoint arbitrators mainly competent in investment or commercial law who could not have a sufficient degree of expertise to judge in-depth a dispute also from the point of view of the protection of cultural heritage. Thus, there is the concrete risk that, in any case, a similar commercial tribunal will not be able to effectively consider and integrate the international rules on the protection of cultural property in its reasoning. However, it should be kept in mind that tribunals can consider such issues only if their mandate expressly allow them to do so.

2. Unlawful detention and deportation of foreign investors.

IAs normally establish a general right of admission of foreign investors and investment. Investment treaties subordinate admission rights to the obligation to enter a market according to the host state's laws, while further obligations and rights are established in the following treaties' provisions. The expulsion of foreign investors is an issue which has been left uncovered, leading to the conclusion that its ruling is an exclusive prerogative of host states¹³⁸⁸. The expulsion of foreign investors has been frequently practiced in Africa, characterising several disputes since the early 90s. Among the most relevant cases it is possible to include *LAFICO v. Burundi*¹³⁸⁹, *Biloune v. Ghana*¹³⁹⁰ and *Biwater Gauff v. Tanzania*¹³⁹¹. Foreign investors involved in those disputes operated in different sectors¹³⁹².

The only contact point among those disputes has been host states' decisions of expelling the investors, since even the reasons for their expulsion differed¹³⁹³. It is worth considering how host states have justified those expulsions and whether it is possible to identify similarities between their argumentations. States tend to motivate the expulsion of foreign investors referring to their legitimate right to expel

¹³⁸⁸ See Brownlie I., *Principles of Public International Law*, Oxford University Press, Oxford, 2008, p. 520-521.

¹³⁸⁹ See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, *ad hoc* Arbitral Tribunal, Arbitral Sentence, March 4, 1991. The award was published within the *Revue Belge de Droit International*, Issue 2, 1990.

¹³⁹⁰ See *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana*, UNCITRAL, *Ad hoc* Tribunal, Award on Jurisdiction and Liability, October 27, 1989. The award was published in *International Law Reports*, Vol. 95.

¹³⁹¹ See *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID, Case No. ARB/05/22, Award, July 24, 2008.

¹³⁹² In *LAFICO*, the Libyan Arab Foreign Investment Company (LAFICO) and Burundi were both partners in the Holding Arabe Libyen Burundais (HALB) which would have operated in several areas of the primary sector like agriculture, breeding, fishing, research and mining. In *Biloune*, the claimant had concluded a 10 years lease agreement with the Ghana Tourist Development Company (GTDC) for the building of tourist facilities in an area next to the Ghanaian Government's seat. In *Biwater Gauff*, the claimant operated in the water sector and had been awarded a contract for the improvement of the water system in the area of Dar-Es-Salaam.

¹³⁹³ In *LAFICO*, Burundi decided to break off diplomatic relations with Libya and, within 48 hours, to expel all Libyan diplomats and investors. In *Biloune*, Ghanaian local authorities suspended the works and partially demolished the touristic facilities, and when Mr. Biloune contacted the GTDC to obtain some explanation, he was arrested, held in custody for 13 days and eventually deported from Ghana to Togo (not his mother-country, since he was a Syrian citizen). In *Biwater Gauff*, the claimant's difficulties in correctly performing the lease agreement (in the improvement of the water system and in paying the monthly rental) had motivated national authorities' decision to terminate the contract. This decision had soon been followed by "the occupation of [claimant's company (CW)] facilities, the usurpation of management and seizure of City Water's operations, and the final deportation of City Water's management".

foreigners in accordance with their national legislations, particularly in cases where their presence has been perceived as a threat for the country.

In the above-mentioned arbitral disputes, host states have generally justified their decision of expelling foreign investors referring to their fundamental right to protect national security or public order¹³⁹⁴. Arbitral panels have never argued states' right of expelling foreigners and protecting national security and public order. However, in several occasions, they have expressed concern about the execution of those expulsions and have also focused on the rights of foreigners. There are some guarantees for individuals targeted by expulsion measures which should constantly be assured (like the principle of good faith, proportionality and the existence of a reasonable cause for expulsion). In *LAFICO*, the tribunal did not question either the state's right or its margin of appreciation, but rather Burundi's attempt of recalling that margin of appreciation in order to escape from the obligation of providing concrete and irrefutable evidence of the existence of a reasonable cause for expulsion. In *Biwater Gauff*, the tribunal stated that among the events which had caused the conduct amounting to expropriation there were the occupation of CW's facilities, the usurpation of management control and the deportation of CW's senior managers. The assistance of police forces had had a primary role in the development of the first two events and was an arbitrary, unreasonable and unjustified exercise of *puissance publique* that went "well beyond the ambit of normal contractual behaviour"¹³⁹⁵.

The expulsion of foreign investors arises concerns in relation to the real reasons behind host states' decision of expelling foreign investors, not only in terms of the guarantees which should be accorded to foreign investors in similar circumstances (such as a non-discriminatory or arbitrary treatment, the respect of their fundamental human rights). Arbitral tribunals have highlighted that these expulsions might be driven by host states' desire of obstructing FDI flows. In *LAFICO*, the fact that Burundi had not asked LAFICO to substitute the two managers who allegedly had been posing threats to national security was a proof of the state's true intention of obstructing any activity carried out by LAFICO on the territory. It led to the conclusion that the state's objective was actually to terminate HALB's activities¹³⁹⁶. The expulsion of the two managers and the subsequent obstruction to LAFICO's attempts of restoring its participation in the HALB led to the conclusion that Burundi had "violated international law in a way engaging its international

¹³⁹⁴ Burundi, in *LAFICO*, grounded the decision on the alleged destabilising activities carried out by Libyan investors consisting in the endangering of the state's internal and external peace and security. Burundi affirmed it was its fundamental right to break off diplomatic relations with Libya and that it would have been impossible to label that measure as internationally wrongful. Burundi also argued that even the expulsion was within its rights, a "discretionary competence not limited but by its function and objective" useful to protect the state's public order, and thus very wide. In *Biloune*, Ghana declared that the deportation had not in any way been linked to the objective of ending the activities of the claimant's company (MDCL), but it had been rather grounded on the alleged failure of the claimant in presenting his assets declaration on time and the participation of Mr. Biloune in illegal financial dealings. In *Biwater Gauff*, according to Tanzania, the substitution of the management of CW was a direct consequence of the termination of the contract: doubts on the legitimacy of this removal could have arisen only if the termination of the contract had not taken place. The deportation of the managers was motivated by the need to protect the water and sewerage system from physical harm. See *LAFICO v. Republic of Burundi*, paras. 27, 35 and 46. See *Biloune v. Ghana*, p. 209.

¹³⁹⁵ The deportation of the senior managers of CW was an unjustified display of Tanzania's *puissance publique* which had violated the claimant's rights. See *Biwater Gauff Ltd. v. United Republic of Tanzania*, para. 503.

¹³⁹⁶ See *LAFICO v. Republic of Burundi*, para. 52.

responsibility"¹³⁹⁷. In *Biloune*, the claimant undoubtedly had a central role in the realisation of the investment project and his deportation, added to the suspension of the works and the demolition of the premises, "effectively prevented MDCL from further pursuing the project"¹³⁹⁸. Those events were closely connected with the purpose of terminating the touristic project and, eventually, culminated in the expropriation of the claimant's rights¹³⁹⁹. The tribunal declared that the way Tanzania had intervened was not justified by "necessity or impending public purpose" and that the only effect had been the nullification of the claimant's rights¹⁴⁰⁰.

The negative effects of either unlawful expulsions or too strict rules on expulsion can amount to a violation of fundamental human rights (like the obligation of non-discriminating individuals on the grounds of their race, religion, nationality, etc.)¹⁴⁰¹. However, in investment-related disputes, arbitral tribunals tend to exclusively focus on international investment law, not considering for instance human rights or the protection of cultural heritage (as it respectively happened in *Diallo v. Congo*¹⁴⁰² and *SPP*).

In *LAFICO*, the tribunal verified that Burundian legislation was in compliance with international law, and more specifically with the International Covenant on Civil and Political Rights, since it considered expulsion on an individual basis: the state had the right to expel an individual who posed a threat to public order or national security¹⁴⁰³. The state's conduct did not comply with its international obligations: Burundi objectively failed to follow legal procedures and to guarantee the foreigners' basic rights. The state did not provide the reasons, the charges and the possibility of appealing before a national judge and, in the end, expelled the individuals in their quality of Libyan citizens¹⁴⁰⁴.

¹³⁹⁷ See *LAFICO v. Republic of Burundi*, para. 59.

¹³⁹⁸ See the Case Summary of *Biloune v. Ghana* released by the British Institute of International and Comparative Law, which can be found at the following link: www.biicl.org/files/2568_1990_biloune_v_ghana_-_summary.doc+&cd=1&hl=it&ct=clnk&gl=it.

¹³⁹⁹ See *Biloune v. Ghana*, p. 209.

¹⁴⁰⁰ There the tribunal referred to both *Biloune* and *Benvenuti & Bonfant* because of their similarities with the former. Concerning *Benvenuti & Bonfant*, the criminal investigation of the claimant, his flee from Congo and the forcibly occupation of the premises of the claimant's company constituted an expropriation of the investment. See *Biwater Gauff Ltd. v. United Republic of Tanzania*, paras. 515-516. See *Benvenuti & Bonfant v. People's Republic of Congo*, ICSID, Case No. ARB/77/2, Award, August 8, 1980

¹⁴⁰¹ The "Expulsion of Aliens" has been included among the areas of competence of the ILC, in the attempt of codified a shared set of rules. See the Chapter VI of the ILC's Report, Document No. A/62/10, released in the summer of 2007.

¹⁴⁰² The ICJ has followed a different path in the more recent *Diallo case*, concerning the diplomatic protection of an investor. The difference with the arbitral awards presented in this paragraph relates to the Court's decision of verifying whether the arrest, detention and expulsion of Mr. Diallo, in the 90s, had violated international law. The Court concluded the state had breached several obligations of both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter). Then, the Court also focused on the alleged violation of Mr. Diallo's rights as manager of both Africom-Zaire and Africontainers-Zaire. The Court reaffirmed its support to the principle that a company's legal personality has to be distinguished from that of its shareholders: the property of the two companies could not be merged with Mr. Diallo's properties. The only "direct right" of Mr. Diallo related to the companies' dividends, but, since they were not affected by the DRC's actions, there was not any ground to affirm that the respondent breached any property right.

¹⁴⁰³ See Articles 26 and 29 of the Decree No. 1/007 of March 20, 1989, which state that "peut notamment être déclaré indésirable et expulsé par ordonnance du ministre de l'intérieur, l'étranger, l° qui porte atteinte à l'ordre public ou à la sécurité nationale" and that "en cas d'extrême urgence ou lorsque les circonstances graves l'exigent, le ministre de l'intérieur peut, par dérogation à l'article 3 du présent décret-loi, prendre une ordonnance d'expulsion sans en référer à la commission qui devra néanmoins en être informée". See *LAFICO v. Republic of Burundi*, para. 47.

¹⁴⁰⁴ See *LAFICO v. Republic of Burundi*, para. 47.

The *Biloune* tribunal was also asked by the claimant to decide whether the arbitrary detention and deportation of Mr. Biloune constituted a violation of human rights¹⁴⁰⁵. The *ad hoc* tribunal applied both fundamental human rights and the principle that states are bound to accord a standard of treatment not inferior to the level established by international law¹⁴⁰⁶. The tribunal could have taken advantage of the situation integrating its reasoning with provisions or principles normally not applied to investment law and concerning the protection of human rights. Nevertheless, it explicitly refused to follow that path because it affirmed its jurisdiction was limited to commercial disputes and could not be extended to other external fields¹⁴⁰⁷. The tribunal's jurisdiction could not be extended to the point of covering every circumstance where the minimum standard of treatment had been breached, and human rights did not fall within that circle.

One last aspect which should be considered in the deportation *iter* relates to investors' conditions while in custody. In *Ahmonseto v. Egypt*, the tribunal's considerations on the possibility the host state had breached human rights are similar to those of the previous awards and help in defining the trend followed by arbitral tribunals. The arbitral panel stated that a grave violation of the rights of the imprisoned investor is the only circumstance in which "a violation of the BIT can be accepted"¹⁴⁰⁸. However, the tribunal specified that it should have analysed the facts as "an international tribunal that has to adjudicate upon excessive impairment of investments"¹⁴⁰⁹. It could not have judged the dispute in the disguise of a human rights tribunal or "of a state authority charged with the application of criminal law"¹⁴¹⁰.

The awards presented in this paragraph have shown that foreign investors' expulsions can be used to interrupt or obstruct the correct execution of an investment, in parallel with the risk of negative effects also in terms of granting the respect of fundamental human rights. The arbitrary expulsion of foreign investors also represents a violation of the obligation of assuring protection and security, but the issue has been discussed only in one dispute (*Biwater Gauff*)¹⁴¹¹. The physical protection of foreign investors and investment also implies the assurance that investors will not be expelled from host countries for reasons not grounded on legal basis. Especially in those cases where foreign investors have a central role in the

¹⁴⁰⁵ See *Biloune v. Ghana*, p. 203. The claimant's company, after having concluded the contract with the GTDC, received the approval of the Ghana Investment Centre (GIC) which also guaranteed some investment concessions by concluding the "GIC Agreement". The claimant believed that the GIC Agreement allowed him to ask for compensation for both the unlawful expropriation and the violation of human rights.

¹⁴⁰⁶ See *Biloune v. Ghana*, p. 203.

¹⁴⁰⁷ See *Biloune v. Ghana*, p. 203.

¹⁴⁰⁸ See *Ahmonseto Inc. And Others v. Arab Republic of Egypt*, ICSID, Case No. ARB/02/15, Award, June 18, 2007, para. 262. Excerpts of the award have been published within the *Foreign Investment Law Journal*, Vol. 23, Issue 2, Fall, 2008.

¹⁴⁰⁹ See *Ahmonseto Inc. And Others v. Arab Republic of Egypt*, para. 262.

¹⁴¹⁰ See *Ahmonseto Inc. And Others v. Arab Republic of Egypt*, para. 262.

¹⁴¹¹ *Biwater Gauff* is the only case where an arbitral tribunal analysed the events also from the point of view of the full protection and security standard and, not only, the hypothesis that the host state's behaviour had failed to protect the investment through its expropriation. Tanzania, for its part, adopted a more conservative approach. It admitted full protection and security does not impose a strict liability and applies only to cases of physical threats, like civil war, riots, or natural disasters, and that the obligation of due diligence has "to do with anticipating or responding to harm to the investment caused by outside agencies". The state argued that the assumption of control of CW and the deportation of its managers could not be intended as a use of physical force. In the first case, the investment's physical integrity had not been threatened; in the second, the deportations had been executed with the proper amount of force required by Tanzanian laws. The tribunal agreed with the claimant that the full protection and security standard imposes an obligation upon states of guaranteeing a certain degree of stability at the physical, commercial and legal levels. The consequence was that the seizure of CW's premises and the removal of the managers, even if there was not any use of force, were judged "unnecessary and abusive", thus amounting to a breach of the standard. See *Biwater Gauff Ltd. v. United Republic of Tanzania*, paras. 728-730.

implementation of an investment, their expulsion can negatively affect the execution of the investment project. It is true that an investor could control the investment also from a third country. But, especially in unstable countries, it is more likely that with the investor's absence the host state will relax in its duty to assure protection and security to the investment, with the possibility that it will end up expropriating the investment.

Risks are an intrinsic component of investment and when investors decide to enter a foreign market they must assume certain risks. At the same time, they will develop legitimate expectations on the degree of protection they will be granted in the host country. However, states' legitimate right to protect public order and national security cannot be interpreted as a possibility of jeopardising investors' rights. It is necessary that both states and arbitral tribunals will intervene in order to define limits to states' otherwise too broad discretionary decision powers. Attempting to find a shared definition for the concepts of public order and national security could eventually help in this purpose. States' right to autonomously rule expulsion procedures should be balanced with investors' right not to be affected from those expulsions in the name of political considerations.

3. The suspension of consular and diplomatic relations.

The precarious relation between host states and investors' mother-countries can represent another risk for the security of foreign investors and investment. In several occasions, arbitral panels have focused on host states' attempts to use the suspension of consular and diplomatic relations to ignore treaty obligations.

The *LAFICO* award concerned the expulsion of Libyan diplomats and investors operating in Burundi, after national authorities' statement that Libyan investors had allegedly been endangering Burundi's internal and external peace and security¹⁴¹². The respondent stated that that measure could not have been considered an internationally wrongful act, since the breaking off of consular or diplomatic relation is a fundamental right of every state. Burundian shareholders then demanded the liquidation of HALB in order to obviate the problems originating from the absence of the Libyan counterpart.

Burundi's reference to the customary rule on the severance of diplomatic or consular relations embodied in Article 63 VCLT constituted the main focus. According to the provision, international treaties can be suspended in certain circumstances (like the termination of bilateral relations) when the existence of such relations is a fundamental requirement for the applicability of the treaty. The tribunal then recalled the rule codified in Article 74 VCLT, concerning the absence of obstacles to the conclusion of international agreements even in the absence of diplomatic or consular relations. The tribunal attempted to determine the effect of that break off on the treaty concluded between the parties. It stressed out that states can discretionarily decide whether or not to continue diplomatic relations with third countries, but it also restated

¹⁴¹² See *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi, ad hoc* Arbitral Tribunal, Arbitral Sentence, March 4, 1991, para. 27.

the principle supported by both the ILC and the Vienna Conference that the "severance of diplomatic relations [cannot] be used as a pretext for evading treaty obligations"¹⁴¹³. The tribunal concluded that the nature of the joint agreement between Libya and Burundi could not allow its termination as a consequence of a unilateral and discretionary decision of one of the contracting parties to suspend diplomatic relations, "under the pretext that the existence of diplomatic or consular relations was indispensable for the application of a treaty"¹⁴¹⁴. Moreover, Article 63 VCLT cannot be interpreted as a means to destabilise "international relations as a consequence of an extensive interpretation of the unavoidable consequences of diplomatic rupture"¹⁴¹⁵.

I believe the risk related to states' attempts of suspending the application of international agreements on the grounds of the lack of diplomatic or consular relations could be at the origin of states' practice of including BITs provisions explicitly dealing with the hypothesis of a breaking off of diplomatic or consular relations and the effects on the applicability of investment treaties. Since the 90s, several states have been including specific provisions in BITs assuring that foreign investments are protected even if a breaking off of diplomatic or consular relations occurs. The Germany-Angola BIT is the only BIT explicitly referring to the general rule expressed in Article 63 VCLT¹⁴¹⁶. Other BITs provisions are identically formulated and state that the BITs "shall apply irrespective of the existence of diplomatic or consular relations"¹⁴¹⁷. Only Italy¹⁴¹⁸ and Germany¹⁴¹⁹ have established a consolidated practice, including these provisions also in their Models BITs. Both the 2003 Italian Model BIT¹⁴²⁰ and the 2008 German Model BIT¹⁴²¹ state that BITs "shall be applied irrespective of whether or not the Contracting Parties have diplomatic or consular relations". Among regional investment treaties and protocols, the Agreement on Promotion, Protection and Guarantee of Investments concluded by the OIC is the only treaty addressing the issue. It is the only case where a regional organisation has mentioned the obligation that the agreement will apply also in the case of absence of

¹⁴¹³ See the Yearbook of the ILC, Document No. A/CN.4/SER.A/1966/Add.1, Vol. II, 1966. See also *LAFICO v. Republic of Burundi*, para. 36.

¹⁴¹⁴ See *LAFICO v. Republic of Burundi*, para. 40.

¹⁴¹⁵ See *LAFICO v. Republic of Burundi*, para. 40.

¹⁴¹⁶ See also Article 12(4) of the Angola-Germany BIT. The provision states that "this Agreement shall apply regardless of whether the two Parties diplomatic or consular relations exist in accordance with Article 63 of the Vienna Convention on the Law of Treaties of 23 May 1969th".

¹⁴¹⁷ See Article 12 of the Botswana-China BIT signed on December 6, 2000, but not entered into force yet. See also Article 11 of the Ethiopia-Kuwait BIT signed on September 14, 1996, and entered into force on November 12, 1998. See also Article 10 of the Uganda-Eritrea BIT.

¹⁴¹⁸ See Article 9 of the Eritrea-Italy BIT signed on February 6, 1996, and entered into force on July 14, 2003. See also Article 11 of the Gabon-Italy BIT. See Article 11 of the Republic of Congo-Italy BIT. See also Article 11 of the DRC-Italy BIT. See also Article 11 of the Angola-Italy BIT. See also Article 11 of the Mozambique-Italy BIT. See also Article 11 of the Cape Verde-Italy BIT. See also Article 10 of the South Africa-Italy BIT. See also Article 10 of the Morocco-Italy BIT signed on July 18, 1990, and entered into force on April 7, 2000.

¹⁴¹⁹ See Article 12 of the Madagascar-Germany BIT signed on August 1, 2006, but not entered into force yet. See also Article 12 of the Mozambique-Germany BIT signed on March 6, 2002, and entered into force on September 15, 2007. See also Article 12 of the Botswana-Germany BIT signed on May 23, 2000, and entered into force on August 6, 2007. See also Article 12 of the Morocco-Germany BIT.

¹⁴²⁰ See Article 11 of the 2003 Italian Model BIT which can be found at the following link: www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf.

¹⁴²¹ See Article 11 of the 2008 German Model BIT which can be found at the following link: www.italaw.com/sites/default/files/archive/ita1025.pdf.

relations among states¹⁴²². Differently from BITs, Article 19 of the Agreement refers to circumstances where diplomatic relations are lacking or a dispute has arisen.

Returning to *LAFICO*, being absent a BIT concluded between Libya and Burundi and any provision referring to the absence of consular or diplomatic relations, Burundi affirmed the existence of bilateral relations with Libya was an essential condition for the treaty's application. According to the state, HALB was an inter-state company and the cooperation between states could have been implemented only with stable diplomatic relations¹⁴²³. The tribunal agreed that the existence of diplomatic relations can be related to the existence of other forms of bilateral relations, like economic ones, but it did not agree that the interruption of one automatically causes the interruption of the other. The threats deriving from Burundi's interpretation are that, every time a country questions its diplomatic ties with third countries, the consequence will be the automatic questioning of every cooperation project. *LAFICO* is a clear example of the risks related to a similar theory. The worst effects could be experienced by foreign citizens and investors who, in normal conditions, should not be affected by the way states relate to each other¹⁴²⁴.

The *LAFICO* tribunal remarked that the interruption of diplomatic relations could only have effects for the Libyan diplomatic and consular personnel, but the fact that Burundi exploited the situation to expel also private citizens (HALB's managers) was not acceptable¹⁴²⁵. Burundi failed to convince the tribunal that the two managers were Libyan "public agents" who either "had to be assimilated to «coopérants» or acted as «organes politiques»"¹⁴²⁶. In that perspective, the expulsion was directly connected with the interruption of bilateral relations because the cooperation agreement concluded by the two states brought to the appointment of those managers. Economic relations can be suspended anytime by states and the presence of functionaries operating for the implementation of these relations is directly intertwined with the perpetuation of economic relations. Nevertheless, the tribunal acknowledged the managers were simple employees with no link to the structure of the Libyan state and for this reason their activities in Burundi could not be linked with the maintenance of bilateral relations.

The expulsion of the Libyan managers, the subsequent obstruction to *LAFICO*'s attempts of appointing new managers, in the attempt of continuing the cooperation plan, and the attempt to liquidate HALB showed that Burundi could be held responsible for having breached international law¹⁴²⁷. Burundi's conduct objectively prevented *LAFICO* from continuing to operate in its territory, making it impossible for the claimant to participate in the daily management of HALB¹⁴²⁸. Moreover, the defence that it was a necessary consequence of the suspension of bilateral relation which allegedly made it impossible the

¹⁴²² See Article 19 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (OIC). The provision states that "the Agreement shall continue to be in force in the event that disputes of any kind arise between the contracting parties and notwithstanding the existence or otherwise of diplomatic relations or any other type of representation between the states concerned".

¹⁴²³ See *LAFICO v. Republic of Burundi*, para. 39.

¹⁴²⁴ See *LAFICO v. Republic of Burundi*, para. 39.

¹⁴²⁵ See *LAFICO v. Republic of Burundi*, para. 38.

¹⁴²⁶ See *LAFICO v. Republic of Burundi*, paras. 38-43.

¹⁴²⁷ See *LAFICO v. Republic of Burundi*, para. 59.

¹⁴²⁸ See *LAFICO v. Republic of Burundi*, para. 53.

application of the agreement concluded between the parties since bilateral relations were a fundamental precondition, could not be accepted.

In the entire proceeding, Burundi never invoked international rules precluding the wrongfulness of its decision to expel LAFICO's managers, like force majeure or state of necessity. But, even if the tribunal had accepted to evaluate the existence of a force majeure or state of necessity, I believe the only possible conclusion would have been that the state did not meet the conditions of the two rules because it had had an active role in the happening of those circumstances. Burundi could not even have invoked Article 61 VCLT on supervening impossibility of performance. According to the first paragraph of the provision, the termination or suspension of an international agreement is admissible if there is the disappearance or destruction of an object indispensable for the execution of the treaty, as it could have been the termination of bilateral relations. However, by virtue of the second paragraph of the provision, Burundi's violation of the cooperation agreement was the event causing the impossibility of performing the treaty, thus making it impossible for Burundi to rely on the supervening impossibility of performance clause¹⁴²⁹.

The previous analysis of IIAs has shown that the practice of including provisions dealing with the interruption of diplomatic or consular relations has always been limited at both the bilateral and regional level. At least until now, a continental practice has not raised in this field. Nevertheless, I am convinced that a proper regulation of this issue would contribute to prevent states from arbitrarily invoking the absence of diplomatic and consular relations to justify the termination of IIAs and cooperation agreements, as it happened in *LAFICO*. Similar provisions perpetuating the applicability of IIAs independently from the existence of bilateral relations provide foreign investors a further level of protection, unequivocally establishing that their rights will be guaranteed independently from how mother-countries and host states conduct their bilateral relations.

¹⁴²⁹ See *LAFICO v. Republic of Burundi*, para. 54.

CONCLUSION

1. Full protection and security in Africa. Between consolidated interpretations and new perspectives.

The main purpose of this thesis has been to study the full protection and security standard in the context of the African continent. In the last years, the standard has been disregarded in favour of other standards and any focus on Africa has mostly been neglected as well. It is necessary to fill in this gap, in order to clarify the existing legal framework in the continent.

The analysis of African bilateral and regional investment agreements has unequivocally shown that references to full protection and security have been included in almost every investment agreement. African countries have aligned with the general practice of including clauses on full protection and security in investment treaties, confirming its primary importance in international investment law. Furthermore, the formulations of the standard generally included in IIAs show that African states have conformed to the general practice and that no regional custom has formed. Full protection and security is not an absolute obligation imposing strict liability upon host states whenever they fail to assure that no damage at all would occur. On the contrary, the standard requires states to act in accordance with the due diligence principle and, thus, to exercise a certain level of vigilance as well as to adopt all reasonable measures for the protection of the investment.

The present debate on the standard's different formulations in BITs, either "simple" or "qualified", has not brought to the formation of a shared opinion on the matter yet. The fragmentation between arbitral awards allowing and other excluding such approach has contributed to make more uncertain a rapid clarification of the issue. However, the more convincing conclusion is that to different formulations of the standard should not correspond different interpretations, mainly because of the interchangeable use states make of these different formulations.

Attempts of expanding the meaning of full protection and security have gone also in the direction of distinguishing between "physical" and "legal" protection. The former requires that the physical integrity of foreign investment is granted against episodes of physical violence, damages and other circumstances which can materially affect the investment. The latter would expand the meaning of the standard so to include the hypothesis of protection against circumstances like the negative effects of economic regulatory powers, amendment of laws or actions of administrative bodies, lack of available judicial systems, loan losses or security of intangible assets.

The problem of expanding the standard's interpretation to such extent is that there will be either a conflict or overlap with other standards, particularly fair and equitable treatment. The full protection and security and fair and equitable treatment standards are undoubtedly interrelated, but not in a subordinated way. They are autonomous, since they discipline different, but complementary, areas. The first is more related to the protection of foreign investment from the omissive conduct of host states deriving from their

failure to guarantee protection, while the second deals with the active conduct of host countries. Leading one standard back to the other is a useless exercise. The only possible result is the confusion of the few clear features of the two standards, rather than the definitive clarification of the definition of the standards of protection.

Full protection and security presents similarities also with the international minimum standard of treatment. The latter deals with various aspects of the treatment owed to foreign investors, such as the protection of aliens, the protection from expropriation and fair and equitable treatment. The points of contact with full protection and security concern physical protection and the due diligence principle. But, the minimum standard is formulated and usually interpreted as being vaguer and less demanding than full protection and security. The minimum standard should rather operate as a floor for the development of other standards. Any reference to this specific standard of treatment should be explicitly made in IIAs texts by contracting parties.

The "classic" interpretation of full protection and security, grounded on the idea of physical protection, has to prevail in order to favour the development of a clearer normative framework and to avoid the overlapping of different standards of protection. States seem to prefer this approach as well, and the analysis of states' argumentations attached to investment awards contributes to confirm this affirmation. Arbitral tribunals represent the only uncertain variable. Jurisprudence is rather fragmented between awards interpreting legal protection as a further element qualifying the standard and those excluding such interpretation.

However, the debate on whether the standard's interpretation should also encompass legal protection has marginal influence on African countries. More recent IIAs sometimes address the issue, but until now it has represented only a minor practice. It seems impossible to affirm a new practice is developing in Africa and it does not seem either that this trend will change in the immediate future. Even past and pending investment disputes involving African states reflect this trend. The events more frequently urging foreign investors to resort before arbitral panels for alleged breaches of full protection and security clauses deal with the inability or unwillingness of African states of protecting foreign investment against physical damages caused by the violent conduct of police forces, armed forces, commercial state entities entitled with the exercise of governmental authority or private individuals. Of the about fifteen disputes where arbitral panels have judged whether full protection and security was violated, half of them have dealt with the conduct of the army, police forces (which was either the primary or a collateral object of the disputes) and that of private individuals; while the remaining with the activities of state-related entities.

2. *African states and the attribution of responsibility.*

The establishment of the normative framework of full protection and security necessarily has to include also the issue of attribution of responsibility to states for actions threatening or affecting the security of foreign investment.

The first threat to foreign investors operating in Africa is represented by the conduct of host states' organs. The use of force by armed or police forces, and more in general their conduct, cause African countries to fail to guarantee full protection and security to foreign investors. African countries agree with the general definition of state organs as entities with legislative, executive and judicial powers. They do not question the attribution test, but they rather frequently attempt to deny the possibility for certain organs to be a part before arbitral tribunals, invoking their national legislations. But national legislations cannot represent an obstacle for arbitral panels to include state organs among disputes' parties, when it has been proved their conduct influenced the rising of the dispute. African countries also happen to attempt to hide the true nature of state organs by formally changing their status. This latter practice is also adopted in relation to entities exercising governmental authority. Host states establish entities having an autonomous legal personality with the double purpose of exercising governmental authority and performing specific commercial activities, instead of assigning the same competences to state agencies. States' further attempt to avoid the attribution of responsibility consists in qualifying any conduct as an articulation of entities' ability of acting in private capacity as commercial entities.

The "structural and functional test" is the only means allowing to clearly qualify the status of organs or entities which cannot be framed in a specific category. The evaluation of the mere structure of state-related entities, in some circumstances, can prove inconclusive for the purpose of attributing a conduct to a state. Thus, a further level of analysis focusing on uncovering the true competences and purposes of these entities represents the more reasonable step to unequivocally determine in which capacity a conduct is carried out and whether we are in the presence of either a *de facto* state organ or an entity exercising governmental authority. This is a test which is generally accepted and whose application is not questioned by both arbitral tribunals and African states, proving that it is a consolidated test which will be likely relied on in future arbitral practice.

A similar trend has been registered also in relation to the "effective control test" applied to determine whether the conduct of an entity has been under the instructions, direction or control of host states. In this case, a test normally relied on in the ICJ's jurisprudence has been adapted to investment disputes. The practice of relying on the effective control test is the one which has consolidated and has not been questioned by African states either. This test has prevailed over the "overall control test". The consequence of the application of the latter test would be that host states would be too easily held responsible in relation to the conduct of entities over which they generally exercise control even in the circumstance the state was not exercising any form of control in a specific circumstance relevant in an investment dispute.

The conduct of private individuals represents another frequent challenge to the ability of African states to guarantee the full protection and security of foreign investment. The most relevant examples registered in Africa relate to damages occurred to land owners or to touristic premises, which represent two of the areas more frequently chosen by foreign investors to operate in the continent. The state has necessarily to acknowledge and adopt the conduct of private individuals or groups. This could verify through an explicit act of acknowledgment and adoption or through the progressive adoption of pieces of legislation having the ultimate effect of legalising the initially wrongful conduct and protecting the perpetrators, instead of the investment.

Recently, new challenges to the security of foreign investment in Africa are represented by the activities of revolutionary movements, terrorist groups or Private Security Companies (PSCs). The conduct of revolutionary movements cannot be attributed to the state if the movement has not been able to establish a new government or state. This general rule has been constantly referred to by arbitral panels since the beginning of the 20th century, in disputes where foreign investments were physically damaged. In similar circumstances, the only means available to foreign investors to see their investment protected can consist in proving the host state failed to fully protect and secure the investment and to exercise due diligence during the period of the insurrection. But, in similar circumstances, the exercise of due diligence should not be interpreted as encompassing also the host state's negligence in the suppression of the revolt.

The serious threats posed by the activities of terrorist groups in African countries which affect foreign investment raise increasing concern among foreign investors, especially since host states generally do not seem able to effectively counteract those groups' damages and to protect the investment located in their territories. Despite the frequent episodes of physical damage occurred to foreign investment, there have been only a scant number of investment disputes originating from the operations of terrorist groups in host states, where arbitral tribunals have referred to the issue only in an incidental way. The peculiarity of these awards is that arbitral panels focus on whether host states fail to accord the protection and security owed to foreign investment. State responsibility is not considered in relation to the actions of terrorist groups. Issues like whether terrorist groups are *de facto* state organs, whether host states direct and control or acknowledge and adopt these groups' conduct are not generally considered. The direct consequence of the proliferation of terrorist attacks has been states' decision of including treaty provisions granting a certain treatment to foreign investors when losses occurred to foreign investment are a consequence of acts of terrorism. Nevertheless, the limited number of IIAs including such clauses indicates that, at least, an African regional practice has not raised yet. However, it leaves open the possibility that an increasing number of states will follow this trend taking inspiration from existing treaty clauses.

The figure of PSCs is difficult to analyse since they cannot be categorised in specific groups. They are aimed at offering security protection, their internal statutes can sensitively vary, they can provide an ample spectrum of services going from logistic to operative support. They can be hired by either private investors or host states and states' legislations on the matter are rather nebulous, since they can either be

strictly ruled or there can be no regulation at all. The uncertainty surrounding the status and the normative framework where these companies operate, coupled with their exponential proliferation in the African continent and the consequent problems in determining the attribution of their conduct have made necessary a separate consideration of these entities. The employment of these companies presents several critical points. They may endanger states' monopoly of the use of force because of the progressive entrusting of these private companies with the exercise of public powers to the detriment of a correct development of national armed and police forces. Host states also tend to avoid any possible form of accountability for their failure to protect foreign investment through the employment of private companies either disengaging from any form of control or trying to deny any responsibility for the conduct of these entities. Last but not least, hiring these companies can pose a threat to national stability. Their services can prove incredibly costly for host states, particularly for African developing or least-developed countries, and host countries having relied for too long on their services could not be able to return to an autonomous management of military or police services because of a lack of competences.

The phenomenon of PSCs' hiring necessarily involves a case-by-case analysis because of the existence of so many differently structured private companies appointed with various tasks. Consequently, attribution rules to be applied in each circumstance cannot be *a priori* determined: it is necessary to consider the competences attributed to them by hiring contracts as well as the concrete activities they carry out, a test which presents points in common with the "structural and functional test" applied to state organs and entities exercising governmental authority. It is difficult to include private companies among "state organs", because states tend to confer PSCs a status allowing to avoid the attribution of responsibility.

On the contrary, the conduct of these private operators is more likely to be attributed to hiring states in the circumstance they act as entities exercising governmental authority. In this circumstance, it will be of fundamental importance considering, not only hiring contracts, but also verifying whether the company has acted in private capacity or exercising elements of governmental authority by considering the purpose of the actions at the core of the analysis. Attributing the conduct of these companies to a host state as a consequence of the latter's exercise of a form of control or direction is another likely scenario. In this case, the prevailing test to be applied to PSC's conduct is the "overall control test", because if the hiring state is also the territorial state in which the private company will operate, the "effective control test" would be unnecessarily stricter. Nowadays, neither national legislations nor international law have evolved in accordance with the need of unequivocally identifying these entities and defining their characteristics and competences. There have been some attempts of identifying the implications of the use of private companies and the possible solutions to hold them accountable for the breaches of international law. Nevertheless, recent states' reforms on the topic prove rather ineffective showing the necessity of a more incisive approach.

Ultimately, state failure is an issue underlying the entire debate on the possibility of attributing a conduct to host states. The issue is of particular relevance for the present research, given the increased number of African states experiencing different degrees of failure or collapse and the inevitable

repercussions on their ability of assuring protection and security to foreign investment. The fact that state failure has not been considered by the ILC in its debate on state responsibility has contributed to reduce the possibility of the development of an ample debate on state failure, despite the increasing relevance of the issue in the last years. Extending the application of other ILC Articles proves difficult, also because of the lack of a shared definition of state failure which would help to determine whether these provisions are actually applicable and to which specific circumstances. In a circumstance of state collapse, where the country's governmental and organic apparatus is not functioning, it would not be possible to apply the rules on attribution. On the contrary, in a circumstance of state failure there can be certain national institutions able to carry out their activities and to whom responsibility could still be attributed.

3. Considerations on the circumstances precluding wrongfulness relied on by African states.

The last part of this study to determine the normative framework of the full protection and security standard had to include the study of the defences more frequently invoked by African countries to avoid the attribution of responsibility. African states have relied on defences such as force majeure or state of necessity against the accusation of having failed to protect foreign investment in circumstances of physical damages occurred to foreign investment. They have also invoked defences such as the right of protecting cultural property or expelling foreigners, and the suspension of diplomatic and consular relations.

Force majeure has been invoked mainly in contract-based disputes. Besides national legislations, disputes' parties invoke contractual clauses specifically dealing with force majeure more frequently than customary law. Force majeure tends to be invoked by both states unable to protect foreign investment and by foreign investors affected by the adverse socio-political conditions of host states. Force majeure is also invoked when a sudden change of the initial investment framework occurs as a consequence of new legislative measures adopted by host states. Such practice radically changes the initial normative framework and is substantially contrary to the spirit of foreign investment's protection. In similar circumstances, foreign investors' defences grounded on force majeure against changes in host states' legislations should be allowed. Such abrupt changes in national legislations would appear to foreign investors as unforeseeable events beyond their control, whose irresistibility would derive from the impossibility of influencing states' decision to implement such measures.

State of necessity is an exceptional rule to be invoked only in specific circumstances, but states tend to abuse its invocation, particularly because of the abstract nature of the customary rule allowing states a discrete margin of appreciation. African countries have usually invoked necessity in relation to material damages occurred to foreign investors, while non-African countries have been invoking necessity also in relation to economic crisis, as Argentina did after the 2001 economic crisis.

The intrinsic instability of economic fluctuations should not allow a relaxation over the customary rule's high thresholds, otherwise there could be an abuse by states invoking it. Indeed economic interests can

be qualified as a state's essential interest, but an economic crisis should be of such grave magnitude and uniqueness to allow the invocation of a state of necessity. Another difficult point to prove would be the fact that the host state did not have any part or influenced in any way, with its actions, the emergence of the economic crisis. It seems rather difficult that economic crisis generate only from exogenous factors, since there is always the concurrence of endogenous factors. The "conservative" approach of jurisprudence, excluding the possibility of extending the rule to circumstances of economic crisis, has allowed the state of necessity rule to maintain its high thresholds. A different outcome could derive from the hypothesis the gravity of an economic crisis generates so grave socio-political disorders that the invocation of the necessity rule will be the only way for a state to safeguard its interests.

The state of necessity rule cannot be confused with treaty provisions concerning compensation for losses or states' right to adopt non-precluded measures, despite the attempts of either states or arbitral panels to identify them with the customary rule.

Compensation for losses clauses require host state to guarantee a specific no less favourable treatment to foreign investors, and even compensation for the losses experienced, in a series of circumstances which are included in non-exhaustive lists. These clauses do not deal with international responsibility and cannot be interpreted as excluding the wrongfulness of a state's conduct. They are drafted to protect the investor and the investment. Compensation for losses clauses characterise states' conduct towards foreign investors after a specific event (like a revolution or civil disturbance) takes place and affects the foreign investment. Thus, they could apply also after events forcing a country to invoke the state of necessity rule. The concrete effect of the part of these clauses dealing with compensation may be similar to the application of ILC Article 27(b), dealing with the compensation for the losses caused by a wrongful action, to a state of necessity. These clauses' further requirement that compensation is no less favourable than that accorded to national investors or investors of third countries can also open up to the possibility host countries decide not to compensate at all or not to pay full compensation in the hypothesis an event of enormous gravity has occurred.

Non-precluded measures clauses refer to states' right to adopt the measures they deem necessary to protect public order and morals or their own essential security interests, or even the fulfilment of obligations to maintain or restore international peace or security. The definition of "interests" is significantly influenced by the common perception, thus also economic interests and stability should be included in the range of circumstances safeguarded by non-precluded measures clauses. It is not possible to affirm that an African practice has emerged about non-precluded measures clauses, since the number of treaties including them does not allow such conclusion yet.

It is fundamental that specific limits are introduced to prevent states from intervening in a broader range of circumstances with increased discretionary powers. States should not abuse their right to adopt such measures with the concrete risk of constituting a threat to the guaranteeing of a certain level of protection to foreign investment. Furthermore, the alleged self-judging nature of these clauses can apparently jeopardise

the security of foreign investment as well. This represents a very limited practice among African countries. Unless expressly recognised, these clauses cannot be interpreted as being self-judging. Until explicit limits to states' discretionary power will be included in these clauses, states are still bound to respect fundamental principles, such as good faith (fundamental for the application and execution of international agreements), proportionality, non-discrimination or reasonableness, since their power is not unlimited. Indeed, recognising these clauses a non-judiciable nature by arbitral tribunals would constitute a violation of BITs obligations because the jurisdiction of arbitral panels would be excluded and a series of guarantees would be precluded to foreign investors. This would jeopardise the entire system of treaty-based guarantees.

The direct effect of non-precluded measures clauses is to expand host states' rights and limit those of foreign investors, mainly the applicability of protection standards, in specific circumstances. Non-precluded measures clauses allow the adoption of provisions which might be contrary to the obligations included in BITs. Thus, they possibly have the same practical effect of applying the necessity customary rule, condoning a wrongful conduct and eliminating a country's responsibility. However, non-precluded measures clauses rule circumstances different from a state of necessity and do not affect or influence in any way the possibility of applying the necessity customary rule. The former establish a threshold which, if it is met, allows the state not to apply other BITs obligations. By contrast, state of necessity excludes the wrongfulness of a conduct, it is an excuse, and becomes relevant only if a breach of a treaty obligation has been ascertained. Non-precluded measures clauses contemplate a broader margin of action for states, even though they still have to act in accordance with the principles of reasonableness, non-discrimination, good-faith, non-arbitrariness or proportionality, as well as the obligation not to act in a way contrary to treaties' object and purpose. The necessity rule presents a very narrow threshold, requiring that a state's conduct is the only way to safeguard an essential interest against a grave and imminent peril and that it does not affect the interests of other states or the international community.

Concerning the last group of defences invoked by African states, the underlying question is whether states might rely on them to hide their true purpose of obstructing the correct execution of foreign investment. The exacerbation of bilateral relations between mother and host countries can be a significant source of concern for foreign investors and their intention to operate abroad. Including treaty provisions dealing with the suspension of consular and diplomatic relations is a consequence of the uncertainty a similar circumstance can create and a preventive move to avoid that host countries will rely on similar circumstances to ignore treaty obligations. The worsening of bilateral relations cannot represent a pretext for not complying with international obligations and, on the other hand, international treaties can be suspended only when the existence of bilateral relations is a fundamental requirement for the applicability of the treaty. However, the interruption of diplomatic or consular relations does not automatically imply the interruption of commercial relations. The inclusion of treaty clauses ruling the possibility of applying IIAs, irrespective of the existence of diplomatic or consular relations, is not a consolidated practice in Africa. Nevertheless, this trend, coupled with arbitral jurisprudence rejecting states' defences for not protecting investment grounded on the worsening or interruption of bilateral relations, allows the conclusion that treaty obligations would not be affected by

the severance or interruption of consular or diplomatic relations and host states would still be bound to assure full protection and security to foreign investors.

The practice of unlawfully detaining and deporting foreigners is rather frequent in Africa and can negatively affect FDI flows. States generally refer to their legitimate right to expel foreigners in accordance with their national legislations, particularly in those cases where their presence is considered as a threat for the national security or public order of the country. But, states' right has to be counterbalanced by investors' right to protection, fundamental human rights, or the principles of good faith, proportionality, non-discrimination or non arbitrariness and the existence of a reasonable cause for expulsion. Behind the imprisonment and subsequent deportation of foreign investors, there is often host states' purpose of jeopardising the investment. Most of the times, they do not even provide any justification for their actions against foreign investors. Foreign investors could still control the investment from a third country. But, it is more likely that with the investor's absence the host state would be less meticulous in the compliance with the international duty to assure protection and security to the investment, with the possibility that it will end up expropriating the investment.

Pursuing the protection of national cultural property is a right of every state. However, states cannot invoke the need of protecting their cultural heritage to concretely jeopardise foreign investment. Moreover, state legislations and arbitral tribunals recognise that every time a state adopts measures to protect its cultural property, the payment of an indemnity has to be corresponded to the foreign investor.

An issue underlying the debate on the defences against the attribution of responsibility (observed in relation to state of necessity, foreign investors' expulsion and the protection of cultural property), relates also to the necessity host states will balance the rights of different categories of individuals. Both states' citizens and foreign investors can be affected by the consequences of national instability or economic crisis and states have a duty to protect both. For this reason, host states should determine, on a case-by-case basis, the rights of which group should be primarily considered. Since they are not mutually exclusive set of rights, it is up to host states deciding which category of individuals should be protected in a first instance. It is undeniable that, especially in grave circumstances, states would want to prioritise the protection of their nationals and their human rights, but at the same time, they are equally bound to respect international obligations towards foreign investors and investment deriving from IIAs. This does not imply that a state should be excused for the possible wrongfulness of its conduct towards foreign investors. It is about recognising a parallel set of rights for another part of the population which could be more important to protect in the immediate future.

Considering different categories of subjects to be protected arises the question of the applicability of principles and rules normally characterising human rights law or the protection of cultural property to investment disputes. Only a small part of arbitral panels has attempted to integrate in their reasoning human rights (such as the provisions of the ICCPR, the fundamental right to access to water or the UNESCO Convention) even though, however, they have not carry out an extensive analysis of those provisions.

Problems arise since arbitral panels tend to focus only on international investment law and avoid or refuse to apply provisions or principles extraneous to that sector.

Arbitral tribunals, in the most part of cases, have affirmed their purpose is to address investment-related disputes and that they cannot act as international tribunals appointed with the application of, for instance, human rights or international criminal law. The risk deriving from arbitral panels' refusal of considering rules and principles usually not characterising investment law is that there could be a fragmentation of international law. In disputes where tribunals have determined that their jurisdiction and the applicable law extend only to investment-related issues, it would not be possible to operate such a distinction. However, in disputes where arbitral panels can generically apply international law or principles, they should consider also the implications of certain conducts and actions in other ambits different from the investment if they are relevant for the judgement of the dispute.

4. Concrete application of full protection and security in Africa.

Africa is probably one of the very few regions still presenting substantial opportunities for foreign investors thanks to its richness in raw materials and the presence of almost unexploited markets. Nevertheless, the choice of investing there should be the object of cautious risk assessment studies operated by foreign investors because of the threats foreign investors could face. The most part of African countries present considerable social, political or economic forms of instability. Continuous wars, insurrections or institutional instability are mainly registered in Sub Saharan Africa, as well as the most severe episodes of economic underdevelopment. The years following the Arab Spring have negatively influenced the stability also of North African states. Episodes of state failure or collapse are spreading in the continent and interesting countries rich in raw materials in an increasing number of cases. The intrinsic instability of these countries also allows the proliferation of terroristic groups which either exploit these countries as training bases before sending their members abroad or operate within those countries. However, potential threats to foreign investment do not derive only from factors external to host countries. The tendency of police or armed forces to use the force on a daily basis represents a source of concern. Presently, foreign investors deciding to operate in Africa would be mainly interested by episodes of physical threats.

The more pressing question arising among foreign investors would probably be what level of protection they should realistically expect from host states presenting similar characteristics and whether it would be similar to that normally assured by developed or more stable countries. The features characterising the standard unequivocally show that investors would be in the presence of a guarantee not involving strict liability of host states, but requiring the exercise of due diligence. It is a clause allowing a rather ample margin of discretion in the evaluation of what constitutes a diligent behaviour. Indeed, this characteristic might worry private investors, since they could likely experience lower levels of protection in the most part of African countries.

States cannot be compared because their different levels of development or socio-political stability do not allow to put them on the same level even though they are formally defined as equal. The articulation of the full protection and security standard should ease the process of recognising the existence of differences among countries and among the level of protection they are effectively able to guarantee foreign investors. Operating a similar adaptation represents a sound compromise between the necessity of recognising a primary relevance of states' socio-political and economic conditions and investors' necessity of being protected. Foreign investors' right to protection would be slightly eroded, but it should not be forgotten that other treaty clauses and principles (such as reasonableness, non-discrimination, good-faith, non-arbitrariness or proportionality) should always inform host states' conduct and would still be applicable in the interpretation of the standard.

States are more than willing to attract FDI flows, particularly those with weaker economies, but the fact that they would experience difficulties in granting the same level of protection and security as that offered by stronger states could induce the former to question a similar approach. A possible consequence could even be the denunciation of investment treaties and the decision of either negotiating new ones, more onerous for foreign investors, or not to negotiate new ones at all. Even the exit from the ICSID system could be a possible effect, as some states have been doing in the past years. This would influence not only the possibility for investors to receive a degree of protection higher than that these countries tend to assure to nationals, but also their possibility of resorting before international tribunals that would apply international law along with national legislations.

To avoid these negative consequences, a compromise should be found between investors' right to be protected and the right of weaker states to be recognised that their obligation to protect foreign investment is adapted to their effective ability of offering protection. When deciding to invest abroad, particularly in states with precarious social, political or economic conditions, foreign investors should plan to reserve a part of their economic resources for the implementation of additional means of protection. This autonomous counterbalancing of the inadequate level of protection assured by these states could consist in either the hiring of PMSCs or the conclusion of so called insurances against political risks. These solutions could reveal costly particularly for small investors who should evaluate whether it is more worth accepting the risks of investing in a country guaranteeing an inferior level of protection or facing increasing costs deriving from the adoption of private means of protection.

BIBLIOGRAPHY

Table of Cases

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID, Case No. ARB/03/16, Award of the Tribunal, September 27, 2006.

ADF Group Inc. v. United States of America, ICSID (NAFTA), Case No. ARB(AF)/00/1, Award, January 9, 2003.

AES Summit Generation Limited and AES-Tisza Eromii Kft. v. Republic of Hungary, ICSID, Case No. ARB/07/22, Award, September 23, 2010.

Agua del Tunari S.A. v. Republic of Bolivia, ICSID, Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005.

Ahmadou S. Diallo (Republic of Guinea v. Democratic Republic of Congo), ICJ, Reports 2010, Judgment, November 30, 2010.

Ahmonseto Inc. And Others v. Arab Republic of Egypt, ICSID, Case No. ARB/02/15, Award, June 18, 2007.

Alabama Claims (United States of America v. Great Britain), UNRIAA, Vol. 29, Award, September 14, 1872.

American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire, ICSID, Case No. ARB/93/1, Award, February 21, 1997.

American Manufacturing & Trading Inc. (AMT) v. Republic of Zaire, ICSID, Case No. ARB/93/1, Statement of the Individual Opinion, February 10, 1997.

Antoine A. Lahoud and Liela B-A Lahoud v. Democratic Republic of Congo, ICISD, Case No. ARB/10/4, Award, February 7, 2014.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, Judgement, February 26, 2007.

Armed Activities on the Territory of the Congo Case (Republic of the Congo v. Uganda), ICJ Reports 2005, Judgment, December 19, 2005.

Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka, ICSID, Case No. ARB/87/3, Final Award, June 27, 1990.

Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka, ICSID, Case No. ARB/87/3, Dissenting Opinion of S. K. B. Asante, June 15, 1990.

Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela, ICSID, Case No. ARB/00/5, Award, September 23, 2003.

Azurix Corporation v. Argentine Republic, ICSID, Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003.

Azurix Corporation v. Argentine Republic, ICSID, Case No. ARB/01/12, Award, July 14, 2006.

BG Group Plc. v. Republic of Argentina, UNCITRAL, Final Award, December 24, 2007.

Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970.

Barizaa Manson Tete Dooh v. Royal Dutch Shell Plc., Den Haag District Court, Case No. C/09/337058, Judgement, January 30, 2013.

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID, Case No. ARB/03/29, Award, August 27, 2009.

Benvenuti & Bonfant v. People's Republic of Congo, ICSID, Case No. ARB/77/2, Award, August 8, 1980.

Bernardus Enricus Funnekotter & others v. Republic of Zimbabwe, ICSID, Case No. ARB/05/6, Award, April 22, 2009.

Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana, UNCITRAL, Ad hoc Tribunal, Award on Jurisdiction and Liability, October 27, 1989.

Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID, Case No. ARB/05/22, Award, July 24, 2008.

CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award, March 14, 2003.

CMS Gas Transmission Company v. Argentine Republic, ICSID, Case No. ARB/01/8, Award, May 12, 2005.

CMS Gas Transmission Company v. Argentine Republic, ICSID, Case No. ARB/01/8, Decision of the Ad Hoc Committee on the application for annulment of the Argentine Republic, September 25, 2007.

Camuzzi International S.A. v. Argentine Republic, ICSID, Case No. ARB/03/2, Witness Statement of Slaughter A.-M. And Burke-White W., December 2, 2005.

Case Concerning Certain German Interests in Polish Upper Silesia, ICPIJ, Series A, Case No. 7, Merits, May 25, 1926.

Case Concerning the Factory at Chorzow (Germany v. Poland), ICPIJ, Series A, Case No. 17, Merits, September 13, 1928.

Case Concerning the Territorial Dispute (Libya v. Chad), ICJ, Reports 1994, Judgment, February 3, 1994.

Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia), ICJ Reports 2007, Preliminary Objections, Judgement, December 13, 2007.

Case Nos. 3099 and 3100, ICC, Award, May 30, 1979.

Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic, ICSID, Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999.

Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic, ICSID, Case No. ARB/97/4, Award, December 29, 2004.

Chapman W. E. (USA) v. United Mexican States, UNRIAA, Vol. 4, October 24, 1930.

Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID, Case No. ARB/97/3, Award, August 20, 2007.

Consortium Groupement L.E.S.I. - Dipenta v. Republic of Algeria, ICSID, Case No. ARB/03/08, Award, January 10, 2005.

Consortium R.F.C.C. v. Kingdom of Morocco, ICSID, Case No. ARB/00/6, Decision on Jurisdiction, July 16, 2001.

Consorts Hovelacque case, Conseil d'Etat, 2/6 SSR, Case No. 35028, Decision, January 13, 1984.

Continental Casualty Company v. Argentine Republic, ICSID, Case No. ARB/03/9, Award, September 5, 2008.

Corfu Channel Case (United Kingdom v. Albania), ICJ Reports, 1949, Judgement, April 9, 1949.

Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID, Case No. ARB/04/19, Award, August 18, 2008.

Eastern Sugar B.V. v. Czech Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 088/2004, Partial Award, March 27, 2007.

El Paso Energy International Company v. Argentine Republic, ICSID, Case No. ARB/03/15, Award, October 31, 2011.

Elettronica Sicala S.P.A. (ELSI) Case (USA v. Italy), ICJ, Reports 1989, Judgment, July 30, 1989.

Emilio A. Maffezini v. Kingdom of Spain, ICSID, Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000.

Emilio A. Maffezini v. Kingdom of Spain, ICSID, Case No. ARB/97/7, Award, November 13, 2000.

Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, ICSID, Case No. ARB/01/3, Award, May 22, 2007.

Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, ICSID, Case No. ARB/01/3, Decision on Jurisdiction, Ancillary Claim, August 2, 2004.

Enron Creditors Recovery Corp. and Ponderosa Assets L. P. V. Argentine Republic, ICSID, Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010.

Etablissements Henri Maschat case, Conseil d'Etat, Case No. 04878, Decision, May 10, 1978.

Fidelis Ayoro Oguru and Alali Efanga v. Royal Dutch Shell Plc., Den Haag District Court, Case No. C/09/330891, Judgement, January 30, 2013.

French Company of Venezuelan Railroads Case (France v. Venezuela), UNRIAA, Vol. 10, 1902.

Friday Alfred Akpan v. Royal Dutch Shell Plc., Den Haag District Court, Case No. C/09/337050, Judgement, January 30, 2013.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ, Reports 1997, Judgment, September 25, 1997.

Gami Investments Inc. v. United Mexican States, NAFTA and UNCITRAL, Final Award, November 15, 2004.

Gemplus S. A. & others v. United Mexican States, ICSID, Cases Nos. ARB (AF)/04/3 and ARB (AF)/04/4, Award, June 16, 2010.

Generation Ukraine Inc. v. Ukraine, ICSID, Case No. ARB/00/9, Award, September 16, 2003.

Genin A., Eastern Credit Limited INC. and A.S. Baltoil v. Republic of Estonia, ICSID, Case No. ARB/99/2, Award, June 25, 2001.

Government of the Republic of Namibia and the Minister of Finance v. Cultura 2000 and Brandt J. J., Supreme Court of Namibia, Case No. SA 2/92, Judgement, October 15, 1993.

Grillo case, Conseil d'Etat, 10 / 7 SSR, Case No. 178498, Decision, July 28, 1999.

Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana, ICSID, Case No. ARB/07/24, Award, June 18, 2010.

Harry Roberts (USA) v. United Mexican States, UNRIAA, Vol. 4, Decision, November 2, 1926.

Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID, Case No. ARB 05/19, Decision of the Tribunal on Objection to Jurisdiction, October 17, 2006.

Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID, Case No. ARB 05/19, Award, July 3, 2008.

Hespel case, Consorts d'X, Conseil d'Etat, 2/6 SSR, Case No. 11092, Decision, December 5, 1980.

Himpurna California Energy Ltd. (Bermuda) v. PT. Perusahaan Listrik Negara (Indonesia), UNCITRAL, Final Award, May 4, 1999.

Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain, UNRIAA, Vol. VI, 1920.

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID, Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006.

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID, Case No. ARB/04/13, Award, November 6, 2008.

Janes L. M. B. et al. (USA) v. United Mexican States, UNRIAA, Vol. 4, November 16, 1925.

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, US District Court for the Southern District of Texas, Civil Action No. H 01-0634, 190 F. Supp. 2d 936, November 30, 2001.

Kardassopoulos I. v. Republic of Georgia, ICSID, Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007.

Kardassopoulos I. and Fuchs R. v. Republic of Georgia, ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010.

Klockner v. Republic of Cameroon, ICSID, Case No. ARB/81/2, Decision on Annulment, December 21, 1983.

L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Republic of Algeria, ICSID, Case No. ARB/05/3, Award, November 12, 2008.

L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, UNRIAA, Vol. 4, Decision, October 15, 1926.

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006.

Lauder R. S. v. Czech Republic, UNCITRAL, Final Award, September 3, 2001.

Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia, ICSID, Case No. ARB/83/2, Award, March 31, 1986.

Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi, ad hoc Arbitral Tribunal, Arbitral Sentence, March 4, 1991.

Loewen Group Inc. and Raymond L. Loewen v. The United States of America, ICISD (NAFTA), Case No. ARB(AF)/98/3, Jurisdiction and Award, June 26, 2003.

MCI Power Group L.c. and New Turbine Inc. V. Republic of Ecuador, ICSID, Case No. ARB/03/6, Award, July 31, 2007.

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID, Case No. ARB/01/7, Award, May 25, 2004.

Malaysian Historical Salvors v. Government of Malaysia, ICSID, Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007.

Malicorp Limited v. Arab Republic of Egypt, ICSID, Case No. ARB/08/18, Award, February 7, 2011.

Meerapfel Söhne AG v. Central African Republic, ICSID, Case No. ARB/07/10, Award, May 12, 2011.

Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal, ICSID, Case No. ARB/08/20, Decision on Jurisdiction, July 16, 2010.

Minister of Defence v. Mwandighi I., Supreme Court of Namibia, Case No. SA 5/91, Judgment, October 25, 1991.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ, Reports 1984, Jurisdiction and Admissibility, November 26, 1984.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ, Reports 1986, Merits, Judgment, June 27, 1986.

Mohamed A. Al-Kharafi & Sons Co.v. State of Libya, Court of Arbitration of the Unified Agreement for the Investment of Arab Capital in the Arab States, Final Arbitral Award, March 22, 2013.

Mondev International LTD. v. United States of America, ICSID (NAFTA), Case No. ARB(AF)/99/2, Award, October 11, 2002.

Mr. Joseph Houben v. Republic of Burundi, ICSID, Case No. ARB/13/7, Award, January 12, 2016.

Mr. Patrick Mitchell v. Democratic Republic of Congo, ICSID, Case No. ARB/99/7, Excerpts of Award, February 9, 2004.

Mr. Patrick Mitchell v. Democratic Republic of Congo, ICSID, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1, 2006.

Mr. X (United Kingdom) v. The Republic (in Central Europe), Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 49/2002, Final Arbitral Award, September 9, 2003.

National Grid Plc. v. Argentine Republic, UNCITRAL, Case No. 1:09-cv-00248-RBW, Award, November 3, 2008.

National Oil Corp. v. Libyan Sun Oil Co., ICC, Case No. 4462, First Award on Force Majeure, May 31, 1985.

Noble Ventures Inc. v. Republic of Romania, ICSID, Case No. ARB/01/11, Award, October 12, 2005.

North Sea Continental Shelf Case (France, Germany v. Denmark), ICJ, Reports 1969, Judgment, February 20, 1969.

Norwegian Shipowners' Claims (Norway v. USA), UNRIAA, Vol.1, October 13, 1922.

Nykomb Synergetics Technology Holding AB v. Republic of Latvia, Stockholm Chamber of Commerce, Arbitral Award, December 16, 2003.

Occidental Exploration and Production Company v. Republic of Ecuador, UNCITRAL, London Court of International Arbitration, Case No. UN 3467, Award, July 1, 2004.

Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ, Reports 2003, Judgment, November 6, 2003.

PSEG Global Inc. and Konya Ilgin Elektirk Uretim ve Ticaret Ltd. Sirketi v. Republic of Turkey, ICSID, Case No. ARB/02/5, Award, January 19, 2007.

Pantehniki S.A. Contractors & Engineers v. Republic of Albania, ICSID, Case No. ARB/07/21, Award, July 30, 2009.

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

Patrick Mitchell v. Democratic Republic of the Congo, ICSID, Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, February 9, 2004.

Perriquet case, Mr. Hubert X, Conseil d'Etat, 3 SS, Case No. 119737, Decision, March 15, 1995.

Petrobart Limited v. Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 126/2003, Award, March 29, 2005.

Plama Consortium Limited v. Republic of Bulgaria, ICSID, Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005.

Pope & Talbot Inc. V. Canada, Ad Hoc Tribunal, UNCITRAL, Case No. IIC 195, Award on Damages, May 31, 2002.

Prosecutor v. Duško Tadić, ICTY, Case No. IT-94-1-A, Appeal Judgement, July 15, 1999.

RSM Production Corporation v. Central African Republic, ICSID, Case No. ARB/07/02, Decision on Jurisdiction and Responsibility, December 7, 2010.

Republic of Somalia v. Woodhouse Drake & Carey S.A. and Others, British High Court, Queen's Bench Division, Judgement, March 13, 1992.

Robert Azinian, K. Davitian and E. Baca v. United Mexican States, ICSID, Case No. ARB(AF)/97/2, Award, November 1, 1999.

Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID, Case No. ARB/05/16, Award, July 29, 2008.

S. D. Myers Inc. v. Government of Canada, UNCITRAL (NAFTA), Partial Award, November 13, 2000.

Saipem S. p. A. v. People's Republic of Bangladesh, ICSID, Case No. ARB/05/07, Decision on Jurisdiction and Recommendations on Provisional Measures, March 21, 2007.

Salem Case (Egypt v. USA), UNRIAA, Vol. 2, Decision, June 8, 1932.

Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID, Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001.

Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, May 17, 2006.

Sambiaggio Case (Italy v. Venezuela), Italy-Venezuela Mixed Claims Commission (1903), UNRIAA, Vol. X, 1960.

Sempra Energy International v. Argentine Republic, ICSID, Case No. ARB/02/16, Award, September 28, 2007.

Sempra Energy International v. Argentine Republic, ICSID, Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, September 28, 2007.

Sempra Energy International v. Argentine Republic, ICSID, Case No. ARB/02/16, Jurisdiction, September 28, 2007.

Sempra Energy International v. Argentine Republic, ICSID, Case No. ARB/02/16, Opinion of Alvarez J. E., August 12, 2005.

Siemens A.G. v. Argentine Republic, ICSID, Case No. ARB/02/8, Award, January 17, 2007.

Societe Generale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. Dominican Republic, UNCITRAL, Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 9, 2008.

Somalfruit and Camar v. Ministero delle Finanze and Ministero del Commercio con l'Estero, ECJ, Case No. C-369/95, Judgement, November 27, 1997.

Southern Pacific Properties Limited v. Arab Republic of Egypt, ICSID, Case No. ARB/84/3, Award on the Merits, March 20, 1992.

Southern Pacific Properties Limited v. Arab Republic of Egypt, ICSID, Case No. ARB/84/3, Dissenting Opinion, March 20, 1992.

Spanish Zone of Morocco Claims (Great Britain v. Spain) (1924), UNRIAA, Vol. 2, 1949.

Standard Chartered Bank v. Republic of Tanzania, ICSID, Case No. ARB/10/12, Award, November 2, 2012.

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID, Case No. ARB/03/19, Decision on Liability, July 30, 2010.

Tanmiah v. Tunisia, Arab Investment Court, Case No. 1/1 Q, Court Decision, October 12, 2004.

Tecnicas Medioambientales Tecmed v. United Mexican States, ICSID, Case No. ARB (AF)/00/2, Award, May 29, 2003.

The Mavrommatis Palestine Concessions, ICPIJ, Series A, Case No. 2, Judgement, August 30, 1924.

Tokios Tokelès v. Ukraine, ICSID, Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004.

Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID, Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009.

Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID, Case No. ARB/07/12, Award, June 7, 2012.

The Case of the S.S. "Lotus" (France v. Turkey), PCIJ, Reports, Series A, No. 10, Collection of Judgments, September 7, 1927.

The Home Insurance Co. Case (United States of America v. United Mexican States), UNRIAA, Vol. 4, March 31, 1926.

Trendtex Trading Corporation v. Central Bank of Nigeria, British Court of Appeal, Case No. Q.B. 529, Appeal, January 1, 1977.

United Parcel Service of America INC. v. Canada, UNCITRAL (NAFTA), Award on Jurisdiction and Award on the Merits, May 24, 2007.

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, No. WT/DS285/R, WTO, Report of the Panel, November 10, 2004.

United States v. Arjona, US Supreme Court, Case No. 120 U.S. 479 (7 S. Ct. 628, 30 L. Ed. 728), March 7, 1887.

United States Diplomatic and Consular Staff in Tehran (USA v. Iran), ICJ, Reports 1980, Judgment, May 24, 1980.

Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID, Case No. ARB/05/15, Award, June 1, 2009.

Waste Management Inc. v. United Mexican States, ICSID (NAFTA), Case No. ARB(AF)/00/3, Award, April 30, 2004.

Wena Hotels Ltd. v. Arab Republic of Egypt, ICISD, Case No. ARB/98/4, Award, December 8, 2000.

Wena Hotels Ltd. v. Arab Republic of Egypt, ICISD, Case No. ARB/98/4, Decision on Annulment, February 5, 2002.

Y.M.N. Establishment v. Central Bank of Nigeria, Commercial Court of Frankfurt, Decision, December 2, 1975.

Youmans T. H. Case (United States of America v. United Mexican States), UNRIAA, Vol. 4, November 23, 1926.

Manuals and Monographies

Akpinarli N., *The Fragility of the "Failed State" Paradigm*, Martinus Nijhoff Publishers, Leiden, 2010.

Alvarez J. E., *The Public International Law Regime Governing International Investment*, Hague Academy of International Law, The Hague, 2011.

Anderson D. M. ed., Cheeseman N. ed., Scheibler A. ed., *Routledge Handbook of African Politics*, Routledge, London, 2013.

Arsanjani M. H., Cogan J. K., Sloane R. D., Wiessner S. ed., *Looking to the Future: Essays on International Law in Honour of Michael Reisman*, Martinus Nijhoff Publishers, Leiden, 2010.

Baetens F. ed., *Investment Law within International Law. Integrationist Perspectives*, Cambridge University Press, Cambridge, 2013.

Becker T., *Terrorism and the State*, Hart Publishing, Portland, 2006.

Bernardini P., *L'arbitrato nel commercio e negli investimenti internazionali*, Giuffré Editore, Milano, 2008.

Binder C., Kriebaum U., Reinisch A., Wittich S., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009.

Bories C., *The Hague Conference of 1930*, within *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.

Brown C. ed., *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford, 2013.

Brown C. ed., Miles K. ed., *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge University, 2011.

- Brownlie I., *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford, 2008.
- Brunner C., *Force Majeure and Hardship under General Contract Principles*, Kluwer Law International, Netherlands, 2009.
- Buthe T., Milner H. V., *Bilateral Investment Treaties and Foreign Direct Investment: a Political Analysis*, within *The Effect of Treaties on Foreign Direct Investment*, Oxford University Press, Oxford, 2009.
- Cilliers J. ed., Mason P. ed., *Peace, Profit or Plunder? The Privatisation of Security In War-torn African Societies*, Institute for Security Studies, 1999.
- Clapham C. ed., Mills G. ed., Morner A. ed., Sidiropoulos E. ed., *Regional Integration in Southern Africa: Comparative International Perspectives*, South African Institute of International Affairs, 2001.
- Crawford J., *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012.
- Crawford J., *State Responsibility - General Part*, Cambridge University Press, Cambridge, 2013.
- Crawford J., *The Creation of States in International Law*, Clarendon Press, Oxford, 2006.
- Crawford J., *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002.
- Crawford J. ed., Pellet A. ed., Olleson S. ed., *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.
- De Mestral A. ed., Lévesque C. ed., *Improving International Investment Agreements*, Routledge, 2013, Abingdon, Oxon.
- Diehl A., *The Core Standard of International Investment Protection*, International Arbitration Law Library, Vol. 26, Kluwer Law International, 2012.
- Dolzer R., Schreuer C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012.
- Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague, 1995.
- Douglas Z., *The International Law of Investment Claims*, Cambridge University Press, Cambridge University, 2009.
- Dugan C. F., Wallace D., Rubins N., Sabahi B., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008.
- Egger P., Pfaffermayr M., *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, within *The Effect of Treaties on Foreign Direct Investment*, Oxford University Press, Oxford, 2009.
- Elias T. O., *Africa and the Development of International Law*, Kluwer Academic Publishers, Martinus Nijhoff Editor, Dordrecht, 1988.
- François G., Mariol H., *Législation Coloniale*, Librairie La Rose, Paris, 1929.

- Freeman A. V., *Responsibility of States for Unlawful Acts of Their Armed Forces*, Recueil des Cours, Vol. 88, 1956.
- Freeman A. V., *Responsibility of States for Unlawful Acts of Their Armed Forces*, A. W. Sijthoff, Leiden, 1957.
- Giorgetti C., *A Principled Approach to State Failure*, Koninklijke Brill NV, Leiden, 2010.
- Grant J. P., Barker J. C., *Parry and Grant Encyclopaedic Dictionary of International Law*, 3rd Edition, Oxford University Press, Oxford, 2009.
- Grotius Hugo, Whewell W. transl., *De iure belli ac pacis*, Cambridge University Press, Cambridge, 1853.
- Hofmann R., Tams C. J., *International Investment Law and General International Law*, Nomos, Baden-Baden, 2011.
- Jäger T. ed., Kümmel G. ed., *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, VS Verlag für Sozialwissenschaften, GWV Fachverlage GmbH, Wiesbaden, 2007.
- Klager R., *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, Cambridge, 2011.
- Leal-Arcas R., *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing, Cheltenham – Northampton, 2010.
- Lehnardt C., *State Responsibility and Private Military Companies*, within *State Responsibility and the Law of Treaties*, Eleven International Publishing, The Hague, 2010.
- Mancini F., *In Good Company? The Role of Business in Security Sector Reform*, Demos, International Peace Academy, London, 2005.
- McLachlan C., Shore L., Weiniger M., *International Investment Arbitration. Substantive Principles*, Oxford University Press, Oxford, 2007.
- Miles K., *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge, 2013.
- Muchlinski P. ed., Ortino F. ed., Schreuer C. ed., *International Investment Law*, Oxford University Press, Oxford, 2008.
- Newcombe A., Paradell L., *Law and Practice of Investment Treaties - Standards of Treatment*, Kluwer Law International, The Netherlands, 2009.
- Ortino F. ed., Liberti L. ed., Sheppard A. ed., Warner U. ed., *Investment Treaty Law, Current Issues II*, British Institute of International and Comparative Law, 2007.
- Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, Oxford, 2013.
- Pisillo Mazzeschi R., *"Due diligence" e responsabilità internazionale degli stati*, Giuffré Editore, Milano, 1989.

- Pollan T., *Legal Framework for the admission of Foreign Direct Investment*, Eleven International Publishing, 2006.
- Reinisch A. ed, *Standards of Investment Protection*, Oxford University Press, Oxford, 2008.
- Rotberg R. I. ed., *State Failure and State Weakness in a Time of Terror*, Bookings Institution Press, Washington D. C., 2003, p. 10
- Rubins N. D., Kinsella N. S., *International Investment, Political Risk and Dispute Resolution*, Oceana Publications, Dobbs Ferry, New York, 2005.
- Salacuse J.W., *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010.
- Sauvant K. P. ed, *Yearbook on International Investment Law and Policy 2008-2009*, Oxford University Press, Oxford, 2009.
- Schefer K. N., *International Investment Law. Texts, Cases and Materials*, Edward Elgar Publishing Limited, Cheltenham, 2013.
- Schicho L., *State Entities in International Investment Law*, Nomos, Baden-Baden, 2012.
- Schwarzenberger G., *Foreign Investments and International Law*, Stevens and Sons, London, 1969.
- Small Arms Survey, *Small Arms Survey 2011 States of Security*, Cambridge University Press, Cambridge, 2011.
- Sornarajah M., *Resistance and Change in the International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2015.
- Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010.
- Subedi S. P., *International Investment Law. Reconciling Policy and Principle*, Hart Publishing, Oregon, 2012.
- Tanzi A., *Introduzione al diritto internazionale contemporaneo*, Cedam, Padova, 2010.
- Tonkin H., *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, Cambridge, 2013.
- Trapp K. N., *State Responsibility for International Terrorism: problems and prospects*, Oxford University Press, Oxford, 2011.
- Tudor I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, Oxford, 2008.
- United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, United Nations Publication, New York, 1998.
- Van Harten G., *Investment Treaty Arbitration*, Oxford University Press, Oxford, 2007.

Vandevelde K., *Bilateral Investment Treaties. History, Policy and Interpretation*, Oxford University Press, Oxford, 2010.

Voss J. O., *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff Publishers, Leiden – Boston, 2011.

Weeramanrty J. R., *Treaty Interpretation in Investment Arbitration*, Oxford University Press, Oxford, 2012.

Weiler T. ed., *Investment Treaty Arbitration and International Law*, Huntington, New York, 2008.

Weiler T., *The Interpretation of International Investment Law. Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, Martinus Nijhoff Publishers, Leiden – Boston, 2013.

Wilson R. R., *The International Law Standard in Treaties of the United States*, Harvard University Press, Massachusetts, 1953.

Wilson R. R., *United States Commercial Treaties and International Law*, The Hauser Press, New Orleans, Louisiana, 1960.

Articles

Abadie A., Gardeazabal J., *Terrorism and the World Economy*, European Economic Review, Vol. 52, 2008.

Abrahamsen R., Williams M. C., *Security Beyond the State: Global Security Assemblages in International Politics*, International Political Sociology, Vol. 3, 2009.

Abrahamsen R., Williams M. C., *Security Sector Reform: Bringing the Private In*, Conflict, Security & Development, Vol. 6, Issue 1, April, 2006.

Abs H., Shawcross H., *Comment on the Draft Convention by its Authors*, Journal of Public Law, Vol. 9, 1960.

Al Faruque A., *Creating Customary International Law Through Bilateral Investment Treaties: a Critical Appraisal*, Indian Journal of International Law, Vol. 44, Issue 2, April-June, 2004.

Alvarez J. E., *A BIT on Custom*, New York University Journal of International Law & Policy, Vol. 42, 2009.

Alvarez J. E. and Brink T., *Revisiting the Necessity Defence: Continental Casualty v. Argentina*, Transnational Dispute Management, Vol. 9, Issue 3, April, 2012.

Alvarez-Jimenez A., *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After The Recent ICSID Annulment Decisions*, Yearbook on International Investment Law and Policy, 2011.

Augenblick M., Rousseau A. B., *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, Journal of World Investment & Trade, Vol. 13, 2012.

Ayad M. B., *International Commercial Arbitration Award Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden Pattern Towards Harmonisation*, The Journal of World Investment and Trade, vol. 10 n. 5, Werner Publishing Company, Switzerland, 2009.

Avant D., *The Privatization of Security and Change in the Control of Force*, International Studies Perspectives, Vol. 5, 2004.

Bandyopadhyay S., Sandler T., Younas J., *Foreign Direct Investment, Aid and Terrorism*, Oxford Economic Papers, Vol. 25, Oxford University Press, Oxford, 2014.

Ben Hamida W., *The First Arab Investment Court Decision*, Journal of World Investment and Trade, Vol. 7, Issue 5, 2006.

Bergman M. S., *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, New York University Journal of International Law and Politics, Vol. 16, Issue 1, Fall, 1983.

Bernardini P., *Investment Protection under Bilateral Investment Treaties and Investment Contracts*, Journal of World Investment, Vol. 2, 2001.

Bottini G., *Reflections on the Origins and Evolution of the International Minimum Standard of Treatment*, Transnational Dispute Management, Vol. 10, Issue 4, 2013.

Borchard E., *The "Minimum Standard" of the Treatment of Aliens*, Michigan Law Review, Vol. 38, Issue 4, February, 1940.

Broches A., *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours, Vol. 136, 1972.

Burke White W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, University of Pennsylvania Law School, Faculty Scholarship, Paper 193, 2008.

Burke-White W. W., Von Staden A., *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia Journal of International Law, Vol. 48, Issue 2, 2008.

Burke-White W. W., Von Staden A., *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, Yale Journal of International Law, Vol. 35, 2010.

Carroll J. F. F., *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, Emory International Law Review, Vol. 23, 2009.

Cassese A., *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law, Vol. 18, Issue 4, 2007.

Chapman K. J., *The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ*, Vanderbilt Law Review, Vol. 63, 2010.

Chubb K., *The "State of Necessity Defense": A Burden, not a Blessing to the International Investment Arbitration System*, Cardozo Journal of Conflict Resolution, Vol. 14, 2013.

Cockayne J., *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*, International Review of the Red Cross, Vol. 88, Issue 863, September, 2006.

Desai D. R., *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, University of San Francisco Law Review, Vol. 39, Summer, 2005.

Desierto D. E., *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, University of Pennsylvania Journal of International Law, Vol. 31, Issue 3, 2010.

Dickinson L. A., *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, William and Mary Law Review, Vol. 47, Issue 1, 2005.

Duffield M., *Post-modern Conflict: Warlords, Post-adjustment States and Private Protection*, Civil Wars, Vol. 1, Issue 1, 1998.

Dumberry P., *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, European Journal of International Law, Vol. 17, Issue 3, 2006.

Eckardt M. N., *The Fair and Equitable Treatment (FET) Standard in International Investment Law*, Transnational Dispute Management, Vol. 9, Issue 3, 2012.

Elkin Z., Guzman A. T., Simmons B. A., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, International Organisation, Vol. 60, Issue 4, Fall, 2006.

Faessler M., *Working with Local Security - A Case Study from the DRC*, Journal of International Peace Operations, Vol. 5, Issue 5, March-April, 2010.

Foster G. K., *Recovering "Protection and Security": the Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, Vanderbilt University, Nashville, Tennessee, 2012.

Frieden J. A., *International Investment and International Conflict*, CISA Working Paper n. 73, Princeton University Press, Princeton, 1991.

Frye E. L., *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the Dogs of War*", Fordham Law Review, Vol. 73, Issue 6.

Gallus N., *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, World investment and Trade, Vol. 6, 2005.

Gaston E.L., *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, Harvard International Law Journal, Vo. 49, Issue 1, Winter, 2008.

Gillard E-C., *Business goes to War: Private Military/Security Companies and International Humanitarian Law*, International Review of the Red Cross, Vol. 88, Issue 863, 2006.

Giorgetti C., *Why should international law be concerned about state failure?*, ILSA Journal of International & Comparative Law, Vol. 16, 2010.

- Gomez del Prado J. L., *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, Journal of Conflict and Security Law, Vol. 13, 2008.
- Greenaway J., Ludwig C., *"International" Arbitration in an Increasingly Regional World*, Transnational Dispute Management, Vol. 10, Issue 4, September, 2010.
- Gudgeon K. S., *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, Berkeley Journal of International Law, Vol. 4, Issue 1, Spring, 1986.
- Haynes J., *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, Journal of World Investment & Trade, Vol. 14, 2013.
- Hentrei S., Soley X., *Force Majeure*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law.
- Herdegen M., *Interpretation in International Law*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law.
- Hobér K., *State Responsibility and Investment Arbitration*, Journal of International Arbitration, Vol. 25, Issue 5, 2008.
- Hoppe C., *Passing the Buck: State Responsibility for Private Military Companies*, European Journal of International Law, Vol. 19, Issue 5, 2008.
- Hussein H., *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, Arbitration International, Kluwer Law International, Vol. 27, Issue 1, 2011.
- Jones O. R., *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, Connecticut Journal of International Law, Vol. 24, 2008-2009.
- Kees A., *Regulation of Private Military Companies*, Goettingen Journal of International Law, Vol. 3, Issue 1, 2011.
- Koskenmaki R., *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, Nordic Journal of International Law, Vol. 73, 2004.
- Kotzur M., *Good Faith (Bona Fides)*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law.
- Kriebaum U., *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, Law and Practice of International Courts and Tribunals, Vol. 10, 2011.
- Kurtz J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, The Jean Monnet Working Paper Series, Jean Monnet Working Paper 06/08, 2012.
- Kurtz J., *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, Foreign Investment Law Journal, Vol. 25, Issue 1, 2010.
- Leander A., *The Commodification of Violence, Private Military Companies, and African States*, Centre for Development Research Working Paper, Danish Institute for International Studies, 2003.

- Lehnardt C., *Private Military Companies and State Responsibility*, International Law and Justice Working Paper, Issue 2, 2007.
- Mac Donald A., Brollowski H., *Security*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law.
- Mahmood N., *Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States*, Journal of World Investment & Trade, Vol. 14, 2013.
- Mann F. A., *British Treaties for the Promotion and Protection of Investments*, British Yearbook of International Law, Vol. 52, Issue 1, 1981.
- Martinez E. A., *Understanding the Debate over Necessity: Unanswered Question and Future Implications of Annulment in the Argentine Gas Cases*, Duke Journal of Comparative and International Law, Vol. 23, 2012.
- Mwase N., *Coordination and Rationalisation of Sub-Regional Economic Integration Institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA*, The Journal of World Investment and Trade, vol. 9 n. 4, Werner Publishing Company, Switzerland, 2008.
- Newell V., Sheehy B., *Corporate Militaries and States: Actors, Interactions, and Reactions*, Texas International Law Journal, Vol. 41, 2006.
- Ngangjoh-Hodu Y., *Sino-African Relationship and its impacts on Africa's Regional Integration Process*, Journal of World Investment and Trade, Vol. 10, Issue 2, 2009.
- Ofodile U. E., *Africa-China Bilateral Investment Treaties: A Critique*, Michigan Journal of International Law, Vol. 35, Issue 1, 2013.
- Ogutçu M., *Foreign Direct Investment and Regional Development. How to Enhance the Competitiveness of Regions in Brazil, China, Russia and Turkey*, Journal of World Investment, Vol. 4, 2003.
- Oladimeji M. S., Oresanwo A. M., *Effects of Terrorism on the International Business in Nigeria*, International Journal of Humanities and Social Science, Vol. 4, Issue 7, May, 2014.
- Olleson S., *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, British Institute of International and Comparative Law, 2007.
- Ouedraogo A., *La neutralité et l'émergence du concept de due diligence en droit international. L'affaire de l'Alabama revisitée*, Journal of the History of International Law, Vol. 13, 2011.
- Picherack J. R., *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, Journal of World Investment and Trade, Vol. 9, Issue 4, 2008.
- Powers M., Seung-Whan C., *Does Transnational Terrorism Reduce Foreign Direct Investment? Business-Related Versus non-Business-Related Terrorism*, Journal of Peace Research, Vol. 49, Issue 3, 2012.
- Reinisch A., *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, Transnational Dispute Management, Vol. 5, 2006.

- Root E., *The Basis of Protection to Citizens Residing Abroad*, American Journal of International Law, Issue 4, 1910.
- Rubins N., *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, American University International Law Review, Vol. 2, Issue 20, 2005.
- Sacerdoti G., *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, Foreign Investment Law Journal, Vol. 28, Issue 2, Fall, 2013.
- Sacerdoti G., *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Collected Courses, Hague Academy of International Law, Vol. 269, Martinus Nijhoff Publishers, Leiden, 1997.
- Sacerdoti G., *The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties*, Journal of World Investment, Vol. 1, 2000.
- Salacuse J. W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, The International Lawyer, Vol. 24, 1990.
- Salacuse J. W., *The Emerging Global Regime for Investment*, Harvard International Law Journal, Vol. 51, Issue 2, Summer, 2010.
- Salacuse J. W., Sullivan N. P., *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46, 2005.
- Schill S., *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, New York University Public Law and Legal Theory Working Papers, Paper No. 146, 2009.
- Schreier F., Caparini M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper, No. 6, 2005.
- Schreuer C. H., *Fair and Equitable Treatment in Arbitral Practice*, Journal of World Investment and Trade, Vol. 6, Issue 3, June, 2005.
- Schreuer C. H., *Fair and Equitable Treatment: Interactions with Other Standards*, Transnational Dispute Management, Vol. 4, Issue 5, 2007.
- Schreuer C. H., *Full Protection and Security*, Journal of International Dispute Settlement, Vol. 1, Issue 2, August, 2010.
- Schreuer C., *Investments, International Protection*, Max Planck Encyclopedia of Public International Law, Oxford Public International Law.
- Schwarzenberger G., *The Most-Favoured-Nation Standard in British State Practice*, British Yearbook of International Law, Vol. 22, 1945.
- Schwebel S. M., *Investor-State Disputes and the Development of International Law, The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL Proc. 214 (2004), March-April, Washington DC, 2004.

Schwebel S. M., *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, *Transnational Dispute Management*, Vol. 3, Issue 2, April, 2006.

Selber J., Jobarteh K., *From Enemy to Peacemaker: The Role of Private Military Companies in Sub-Saharan Africa*, *Medicine & Global Survival*, Vol. 7, Issue 2, February, 2002.

Singer P. W., *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, *International Security*, Vol. 26, Issue 3, Winter, 2001-2002.

Singer P. W., *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, *Columbia Journal of Transnational Law*, Vol. 42, Issue 2, Spring, 2004.

Sloane R. D., *On the Use and Abuse of Necessity in the Law of State Responsibility*, Boston University School of Law Working Paper, No. 11-16, 2011.

Small M., *Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa*, Occasional Paper Series, Vol. 1, Issue 2, African Centre for the Constructive Resolution of Disputes, 2006.

Sornarajah M., *State Responsibility and Bilateral Investment Treaties*, *Journal of World Trade Law*, Vol. 20, Issue 1, 1986.

Stone Sweet A., *Investor-State Arbitration: Proportionality's New Frontier*, Yale Law School Faculty Scholarship Series, Paper 69, 2010.

Tanzi A., *State of Necessity*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law.

Thürer D., *Failing States*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law.

Vandevelde K. J., *A Brief History of International Investment Agreements*, *U.C. Davis Journal of International Law & Policy*, Vol. 12, No. 1, 2005.

Vandevelde K. J., *A Unified Theory of Fair and Equitable Treatment*, *New York University Journal of International Law and Politics*, Vol. 43, 2010-2011.

Vandevelde K. J., *Of Politics and Markets: The Shifting Ideology of the BITs*, *Berkeley Journal of International Law*, Vol. 11, Issue 2, 1993.

Vandevelde K. J., *The Bilateral Investment Treaty Program of the United States*, *Cornell International Law Journal*, Issue 21, 1988.

Vandevelde K. J., *The BIT Programme: A Fifteen-Year Appraisal*, *American Society of International Law Proceedings*, Vol. 86, 1992.

Vasciannie S., *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, *British Yearbook of International Law*, Vol. 70, Issue 1, 1999.

Vinuales J. E., *State of Necessity and Peremptory Norms in International Investment Law*, Law and Business Review of the Americas, Vol. 14, 2008.

Wälde T. W., *In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v. The Republic of Latvia - Legal Opinion*, Transnational Dispute Management, Vol. 2, Issue 5, November, 2005.

Weeramanrty J. R., *The Future Role of Past Awards in Investment Arbitration*, ICSID Review, FILJ, Vol. 25 Issue 1, Spring, 2010.

Westcott T., *Recent Practice on Fair and Equitable Treatment*, Journal of World Investment and Trade, Vol. 8, Issue 3, 2007.

Zeitler H. E., *The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors*, Stockholm International Arbitration Review, Vol. 3, 2005.

Web Sites

Affari Internazionali

www.affarinternazionali.it

African Development Bank Group

www.afdb.org

Agence Nationale de Développement de l'Investissement - Algeria

www.andi.dz

Al-Jazeera

www.aljazeera.com

American Economic Association - AEA

www.aeaweb.org

Arab Maghreb Union – AMU

www.maghrebarabe.org

BBC

www.bbc.com

Bases documentaires du ministère des Affaires étrangères et européennes - France

<http://basedoc.diplomatie.gouv.fr>

Board of Investment - Mauritius

www.investmauritius.com

British Institute of International and Comparative Law - BIICL

www.biicl.org

Caisse des Dépôts et de Développement - Mauritania

www.cdd.gov.mr

Columbia Center on Sustainable Investment

<http://ccsi.columbia.edu/>

Commission for the Implementation of the Constitution - Kenya

www.cickenya.org

Common Market for Eastern and Southern Africa – COMESA

www.comesa.int

Conseil d'Etat Français

www.conseil-etat.fr

Conseil Présidentiel pour l'Investissement - Burkina Faso

www.cp-investburkina.bf

Cornell University Law School

www.law.cornell.edu

Council on Foreign Relations

www.cfr.org

East African Community

www.eac.int

Economic Community of Central African States – ECCAS

www.ceeac-eccas.org

Economic Community of West African States - ECOWAS

www.ecowas.int

Federal Foreign Office - Germany

www.auswaertiges-amt.de

Federal Ministry of Science, Research and Economy - Austria

www.en.bmfwf.gv.at

Federal Reserve Bank of St. Louis

www.stlouisfed.org

FindLaw

<http://lp.findlaw.com>

Foreign Affairs, Trade and Development - Canada

www.international.gc.ca

Fund for Peace

<http://fsi.fundforpeace.org>

G4S

www.g4s.com

General Authority for Investment - Egypt

www.gafi.gov.eg

Geneva Academy

www.geneva-academy.ch

Ghana Legal

<http://laws.ghanalegal.com>

HeinOnline

<http://heinonline.org>

Intergovernmental Authority on Development - IGAD

<http://igad.int/>

International Chamber of Commerce - ICC

www.iccwbo.org

International Committee of the Red Cross - ICRC

www.icrc.org

International Institute for Sustainable Development - IISD

www.iisd.org

International Investment Database

www.arbitration.org

International Law Association

www.ila-hq.org

International Law Commission

<http://www.un.org/law/ilc>

Investir au Sénégal

www.investinsenegal.com

Investment Claims – Oxford University Press

<http://oxia.ouplaw.com>

Invest Barbados

www.investbarbados.org

Invest in Turkey - Investment Support and Promotion Agency

www.invest.gov.tr

Jordan Investment Board

www.jordaninvestment.com

Jurisite Tunisie

www.jurisitetunisie.com

Kluwer Arbitration

www.kluwarbitration.com

La Repubblica

www.repubblica.it

Limes

www.limesonline.com

Ministry of Economic Development - Italy

www.sviluppoeconomico.gov.it

Ministry of Finance – Government of India

<http://finmin.nic.in>

Multilateral Investment Guarantee Agency - MIGA

www.miga.org

New York Times

www.nytimes.com

Office of the United States Trade Representative

www.ustr.gov/trade-agreements/bilateral-investment-treaties

Organisation for Investment, Economic and Technical Assistance of Iran

www.oietai.ir

Overheid.nl – The Guide to Dutch Government Information and Services

<https://treatydatabase.overheid.nl>

Oxford Public International Law

<http://opil.ouplaw.com>

Press Information Bureau - Government of India

<http://pib.nic.in>

Reuters

www.reuters.com

Secretariado do Conselho de Ministros - Republic of Angola

www.scm.gov.ao

South African Government

www.gov.za

Southern African Development Community – SADC

www.sadc.int

Southern African Legal Information Institute - SAFLII

www.saflii.org

Swiss State Secretariat for Economic Affairs - SECO

www.seco.admin.ch

The Economist

www.economist.com

The Guardian

www.theguardian.com

TranslLex.org - Law Research

<http://trans-lex.org>

UK Parliament Website

www.parliament.uk

UK Treaties Online

<http://treaties.fco.gov.uk>

United Nations

www.un.org

United Nations Commission on International Trade Law - UNCITRAL

www.uncitral.org

United Nations Conference on Trade and Development - UNCTAD

www.unctad.org

Université de Genève

www.unige.ch

University of Edinburgh – Edinburgh Law School

www.law.ed.ac.uk

University of Warwick

www2.warwick.ac.uk

US Department of State

<http://fpc.state.gov>

World Bank Group

www.worldbank.org

Yale Global Online

<http://yaleglobal.yale.edu>

ABSTRACT

Foreign investment law has evolved rapidly and considerably in the last couple of decades, generating a large body of arbitral decisions and attracting the attention of many scholars. Several textbooks and studies have dealt with most of the legal issues related to the promotion and protection of foreign investment and investors. Host states' obligation to ensure full protection and security in the field of foreign investment, on the contrary, has not been properly considered yet. Thus, the dissertation's purpose is to fill in this gap with a specific focus on the African continent.

A first introductory part has included a historical presentation of the origins of the so called "African specificity". This concept tries to underline how historical events (above all colonisation and the issues related to decolonisation and the post-colonial phase) have influenced investment flows in Africa, the guarantees and protection allowed by host states to foreign investors, and the obligations of those countries.

The research has contributed to define and analyse the obligations regarding the full security and protection owed to foreign investments and investors under bilateral and regional treaties, customary international law, domestic legislation and international contract. The research has carefully considered not only the sources of these obligations, but also state practice and relevant international decisions. This part of the dissertation has followed a pragmatic approach, since it has been fundamental to observe how, in reality, investors and investments are protected and what level of protection they can reasonably expect from host states.

The research has dealt with the questions of attribution to host states of acts threatening or affecting the security of foreign investment or foreign investors. From this perspective, the rules on attribution codified by the International Law Commission have provided the normative framework for the determination of state responsibility for internationally wrongful acts and their consequences. A fundamental part of the analysis has concerned the examination of the settlement of claims related to alleged breaches of the obligations to ensure security and full protection from the perspective of both State-investor and State-State disputes.

The study of African states' obligation to grant protection and security to foreign investment would have been incomplete without the analysis of the circumstances precluding wrongfulness more frequently invoked by states in order to avoid responsibility for alleged violations of the full protection and security standard. The purpose has been to consider in which circumstances specific defences are more likely to be invoked by African countries and whether they tend to be accepted by arbitral tribunals. This is a particularly urgent task, since the recent increasing practice of countries of relying on certain defences is the result of their attempt of finding newer ways to obstacle the deployment and the execution of foreign investment in their territories.

ABSTRACT

Nel corso dell'ultimo ventennio, il diritto internazionale degli investimenti ha subito un'evoluzione rapida e considerevole, generando un ampio *corpus* di decisioni arbitrali e attirando l'attenzione della dottrina. Vi sono stati diversi studi dedicati alle questioni giuridiche riguardanti la promozione e protezione degli investitori e degli investimenti esteri. Al contrario, l'obbligo degli stati ospitanti di assicurare piena protezione e sicurezza a tali investimenti non è ancora stato propriamente considerato. L'obiettivo della presente tesi è stato quello di affrontare tale lacuna con particolare attenzione al continente africano.

Una prima parte introduttiva ha incluso una presentazione storica delle origini della cosiddetta "specificità africana". Questo concetto cerca di evidenziare come alcuni eventi storici (principalmente, la colonizzazione, la decolonizzazione e la fase postcoloniale) abbiano influenzato i flussi d'investimento in Africa, le garanzie e la protezione garantite dagli stati ospitanti agli investitori esteri, nonché gli obblighi di questi stati.

Questa ricerca ha contribuito a definire e analizzare gli obblighi relativi alla piena protezione e sicurezza garantita agli investitori esteri e ai loro investimenti dai trattati internazionale e regionali, dalla consuetudine internazionale, dalle legislazioni nazionali e dai contratti internazionali. La ricerca ha considerato, non solo le fonti di tali obblighi, ma anche la prassi degli stati e le decisioni internazionali rilevanti. In questa parte della tesi è stato seguito un approccio pragmatico, essendo fondamentale accertare come gli investimenti e investitori esteri vengano realmente protetti e quale livello di protezione possono ragionevolmente attendersi dagli stati ospitanti.

Il presente studio ha altresì affrontato la questione dell'attribuzione agli stati ospitanti degli atti che hanno minacciato e pregiudicato la sicurezza degli investimenti o degli investitori esteri. Da tale prospettiva, le regole sull'attribuzione codificate dalla Commissione per il diritto internazionale hanno costituito il quadro normativo di riferimento per determinare la responsabilità degli stati per atti internazionalmente illeciti e le loro conseguenze. Una parte fondamentale dello studio ha riguardato l'analisi della soluzione di controversie concernenti presunte violazioni degli obblighi di assicurare piena protezione e sicurezza, esaminandole dalla prospettiva delle controversie fra stati-investitori e fra stati.

L'analisi dell'obbligo degli stati africani di garantire protezione e sicurezza agli investimenti esteri sarebbe stata incompleta senza considerare le circostanze precludenti l'illiceità che sono più frequentemente invocate dagli stati per evitare l'attribuzione della responsabilità in merito alle presunte violazioni dello standard di piena protezione e sicurezza. L'obiettivo è stato quello di esaminare in quali circostanze è maggiormente prevedibile l'opposizione di specifiche difese da parte dei paesi africani e se i tribunali arbitrali siano orientati ad accettarle. Si tratta di una tematica di particolare rilievo, dal momento che l'accresciuta recente prassi degli stati di utilizzare tali difese corrisponde anche al tentativo di individuare nuovi mezzi che consentano di ostacolare l'allocazione e l'esecuzione degli investimenti esteri nei loro territori.